After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation

Tucker S. Player

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I. INTRODUCTION

Over the last forty-two years, the tobacco industry has enjoyed a practical immunity from legal responsibility for the devastating health consequences of its
product. At least 350,000 Americans die from smoking each year. For comparison, three DC-10 aircraft would have to crash every day for a year to approximate the same number of deaths. Yet the designers, manufacturers, and distributors of tobacco products have avoided liability with a consistency that can only be characterized as astounding. This immunity from liability has been the result of several factors—the tobacco industry’s unrelenting strategy of fighting every case to the very end; billions of dollars spent to hire the top litigators in the country to defend the industry; brilliant litigation strategies to destroy plaintiffs’ claims before they were ever allowed to go before a jury; the reluctance of judges and legislators to bankrupt the industry; and, as revealed in the recent discovery of industry documents, an adroit use of fraud, deceit, and conspiracy.

Recent legal developments and public revelations concerning the tobacco industry have completely changed the scope and viability of tort claims by smokers. The discovery and publication of the tobacco industry’s own internal documents have effectively nullified the industry’s most steadfast defenses and opened the door to new claims which could force the entire industry into bankruptcy. In the 1970s and 1980s, asbestos manufacturers saw the awesome power of the American tort system annihilate an entire industry in the span of a few short years. The ghosts of asbestos, coupled with the recent developments, have forced the tobacco industry into what it swore it would never do—settle. This note reflects on the monumental changes in tobacco litigation over the past five years, including the proposed global settlement, and explores possible future claims against the tobacco industry.

II. THE HISTORY OF TOBACCO LITIGATION

A. The First Wave

The first reports concerning the connection between smoking cigarettes and cancer were published in 1950. For years the adverse health consequences of smoking had been suspected, but these first reports offered the scientific proof needed to substantiate these fears. In 1953, the most widely read magazine of the day, Reader’s Digest, published a condensed, readable version of these health reports. For the first time, the average person could read and understand that smoking could kill. Not surprisingly, the first damage claims arose against the tobacco

2. Id.
5. Id.
industry about this same time. In 1954, what scholars term the “first wave” of tobacco litigation began with the filing of Lowe v. R.J. Reynolds Tobacco Co.\(^6\) Approximately 100 other cases followed quickly after Lowe, most of which were based on claims of negligence and breach of warranty,\(^7\) and like Lowe, most were subsequently dropped without formal disposition.\(^8\)

Tobacco companies saw a definite threat in these tort claims, not only to their profits but to their very existence.\(^9\) The industry committed to an absolute, no-compromise litigation strategy. They would offer to settle no case, and appeal every adverse decision to the fullest extent.\(^10\) The effectiveness of the tobacco industry’s no-compromise strategy was to strangle plaintiffs’ claims financially. Tobacco lawyers would barrage plaintiffs attorneys with mountains of pretrial motions, from interrogatories to depositions.\(^11\) The pretrial stages would drag on for years, requiring the expenditure of enormous amounts of money before a jury was even paneled.\(^12\) This stonewalling of the industry’s plan was critical. Because tobacco manufacturers could absorb litigation costs better than plaintiffs, the industry exploited this advantage. A single practitioner working on a contingency fee basis would soon see his costs spiral far higher than any anticipated gain from a favorable verdict. A substantial majority of the first wave cases were dropped or discontinued.\(^13\) Those cases that did reach trial eventually failed\(^14\) or had to contend with a number of appeals and retrials which also consumed funds.\(^15\)

The central defensive doctrine pled in the first wave by the tobacco industry was foreseeability.\(^16\) The courts generally accepted this theory as in Lartigue v. R.J.

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6. No. 9673(C) (E.D. Mo. filed Mar. 10, 1954); see Rabin, supra note 4, at 857. Professor Rabin defines the first wave as the cases filed between 1954 and the adoption of comment i of the Restatement (Second) of Torts. See id. at 857-64. The second wave is composed of those cases filed after the proliferation of mass toxic tort cases in the 1970s and early 1980s (asbestos, Agent Orange, and DES), up to the recent decision of Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). See Rabin, supra note 4, at 864-65. We are currently experiencing the third wave of tobacco litigation. For a discussion of the third wave, see Richard A. Daynard, The Third Wave of Tobacco Products Liability Cases, TRIAL, Nov. 1994, at 34.

7. See Rabin, supra note 4, at 857, 859.
8. Id. at 857.
9. Id. at 858.
10. Id. at 857-58.
11. Id. at 859.
12. See id. at 859-60.
13. See Rabin, supra note 4, at 859.
14. Id.
16. Id. at 860-61.
Reynolds Tobacco Co.' The Louisiana court found that the plaintiff could not recover from R.J. Reynolds Tobacco Company for the damage caused by its cigarettes. The court's reasoning illustrates the judicial thinking at that time. Partially relying on the then-tentative draft of section 402A of the Restatement (Second) of Torts, the Fifth Circuit upheld a defense verdict on the grounds that the evidence presented at trial supported the defendant's argument that the risks of smoking were unforeseeable at the time the plaintiff developed cancer. Without some evidence that the seller knew that the product might cause harm, the seller was not liable for breach of warranty. Because R.J. Reynolds Tobacco Company did not know of the dangers imposed by cigarettes, the court reasoned that the company should not be held accountable.

After the Lartigue decision, the final draft of the Second Restatement of the Law of Torts was adopted and published by the American Law Institute. In comment i to section 402A, Dean Prosser seemingly codified the rationale of the Lartigue court concerning the liability of cigarettes. A single sentence in that comment, "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous," brought the first wave of tobacco litigation to a screeching halt. In granting the tobacco industry what some commentators have characterized as per se immunity, the courts, with the knowledge requirement of section 402A, nullified any claims against the tobacco industry under then-existing law. Almost twenty years passed before such claims would arise once again from the ashes of defeat for the second wave of tobacco litigation.

B. The Second Wave

In the lull between the first and second wave, a number of significant events took place that would change the face of tobacco litigation. In 1964, the Surgeon General published its report on the effects of smoking on health. With this report,

17. 317 F.2d 19 (5th Cir. 1963).
18. Id. at 20.
19. Id. at 35-40.
20. See id. at 29 (construing the statutory bar to liability as limited by the "imputation of knowledge to a seller-fabricator").
21. Id. at 39-40.
23. Id. § 402A cmt. i.
24. See Rabin, supra note 4, at 864.
the most prominent physician in the United States confirmed the health risks involved with smoking. The connection between smoking and cancer was now firmly implanted in the minds of Americans. In response to the 1964 Surgeon General's report, Congress passed two important pieces of legislation concerning cigarettes. The 1965 Federal Cigarette Labeling and Advertising Act (1965 Act) and the Public Health Cigarette Smoking Act of 1969 (1969 Act) required tobacco manufacturers to place warning labels on cigarette packages and banned cigarette advertising through radio and television. The tobacco industry actually favored these acts to relieve pressure of potential liability for the harm caused by its products.

The most significant development after the adoption of the Second Restatement of Torts was the birth of mass toxic tort cases. The success of these new claims owed significantly to strict products liability under section 402A. By focusing on the unreasonably dangerous nature of cigarettes, plaintiffs attorneys believed this new theory against manufacturers could be used to attack the tobacco industry, ironically under the same principle of law that had ended the first wave. Thus, the second wave of tobacco litigation began.

Plaintiffs attorneys had to respond to the failures of the first wave. The most notable obstacles were obtaining substantial resources needed to survive the attrition tactics of the tobacco industry and circumventing comment i of section 402A. First, a group of plaintiffs attorneys pooled resources to survive the onslaught of tobacco companies' litigation tactics. Second, plaintiffs attorneys shifted their claims from warranty to strict tort liability, thereby shifting the focus from foreseeable harm to the unreasonably dangerousness of the product itself.

In addition to these responses, two new theories appeared favorable to tobacco claims. The first new theory was the emergence of a risk-utility analysis that weighed the health-related costs, including the number of people dying each year from cigarettes, against the individual's benefits derived from smoking. The

27. See Rabin, supra note 4, at 864.
30. See GLANTZ ET AL., supra note 1, at 54.
31. Manufacturers of asbestos and other toxic products such as DES, Agent Orange, Dalkon Shields, and Benedectin were overwhelmed with claims. See Rabin, supra note 4, at 865.
32. Id. at 866.
33. See id.
34. Id. at 865-66.
35. Id. at 866.
36. Id.
37. See, e.g., O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983) (utilizing risk analysis to determine that a manufacturer of a luxury product may shoulder the cost of Harm caused by the product even if the product was equipped with a warning). The O'Brien court specified that risk-utility analysis was appropriate "when the product may function satisfactorily under one set of
second new theory relied upon the prominent use of comparative fault. If the plaintiffs could win even a percentage of the damages sought, and they would not be completely barred by assumption-of-risk defense, then the gravity of the damages claimed would still ensure a profit for the attorneys.

Tobacco companies were also affected by the downfall of asbestos. When the once-powerful manufacturing giants in the asbestos industry began petitioning for bankruptcy reorganization under the weight of large potential liabilities, the tobacco industry could closely analogize its situation to asbestos, which instilled a new level of fear among the industry’s manufacturers. The tobacco industry felt that its never-give-in strategy needed to be followed more stringently than ever. It also developed some new tactics and defenses in response to the burgeoning new theories of tort law, strategies which worked rather well.

Tobacco lawyers instituted a revamped attack on causation. They would use a two-fold attack at trial, first attacking the plaintiff and his lifestyle, followed by a challenge of the Surgeon General’s findings. Tobacco lawyers would do an extensive investigation into the plaintiff’s background in an attempt to uncover any information to cast him in an unfavorable light. They would stress anything in the medical history which might show any other explanation for the illness. This evidence was presented to deflect causation from the tobacco products, yet in many instances, it functioned as a type of character assassination on the plaintiff. Past behavior of heavy drinking, promiscuity, fighting, or other unsavory lifestyle choices were often presented at trial in the name of causation. The tobacco lawyers attacked the Surgeon General Reports on the grounds that the research done to back up those reports was unscientific and incomplete. The industry would present research conducted by its own, supposedly independent, research group, the Tobacco Industry Research Committee, which later became the Council on Tobacco Research, as a public relations tool and a means of challenging reports citing the adverse health effects of smoking.

In response to the new risk-utility analysis, the tobacco companies doggedly stuck to comment i of section 402A. They argued that because a safer alternative design or product had not been shown, a risk-utility analysis should not be used. This argument was quite effective and met with success in a majority of courts.

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38. See Rabin, supra note 4, at 867.
39. See id. at 867-68.
40. See id.
41. See id. at 868.
42. Id.
43. See id.
44. GLANTZ ET AL., supra note 1, at 53.
45. See id. at 51-56.
Under a consumer expectations test, plaintiffs cannot recover if they knew the product was harmful to their health. However, in New Jersey and Louisiana, legislation was passed to overturn decisions that required a safer alternative design be shown before using risk-utility analysis. The tobacco industry lobbied for "common knowledge" statutes which were passed in a number of states. These statutes limited courts to using the consumer expectations test rather than risk-utility analysis.

However, in all jurisdictions assumption of the risk has proven to be the most effective defense for the tobacco industry. The general public knew that smoking could cause disease. The tobacco companies used this general awareness to argue that if a person chose to smoke knowing it could cause health problems, then tobacco companies should not be liable when such problems arose. Juries tended to agree. In numerous cases, plaintiffs would survive the barrage of pretrial motions and tactics of the tobacco lawyers only to be denied recovery by juries because the plaintiff chose to engage in conduct known to be harmful. The tobacco industry had complied with the federal mandate for warnings, and the plaintiff, having direct knowledge of the dangers of his actions, chose to smoke anyway.

To combat the effectiveness of the tobacco industry's defenses, plaintiffs lawyers developed two strategies to circumvent the assumption of risk defense. Plaintiffs first argued that even though they had assumed some risk in choosing to smoke, the tobacco companies were at least partially at fault under comparative fault theory. If the jury agreed, the plaintiffs could recover, depending on the jurisdiction's comparative fault system. In most cases, juries did not rule in favor

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47. See infra Part IV.B.2.


49. See Rabin, supra note 4, at 874 n.126 and accompanying text (discussing such common knowledge statutes in California, New Jersey, Louisiana, Arkansas, Indiana, Missouri, Ohio, Tennessee, Utah, and Washington).

50. For example, California's statute, CAL. CIV. CODE § 1714.45(a)(2) (West Supp. 1997), provides an exemption from a risk-utility analysis if "[t]he product is a common consumer product intended for personal consumption, such as . . . tobacco . . . as identified in comment i to Section 402A of the Restatement (Second) of Torts."

51. Rabin, supra note 4, at 871.

52. Id.

53. The various states use three basic types of fault systems. In a few states, the contributory negligence standard bars a plaintiff from recovery if he is any way at fault for his injuries. The majority of states follow some form of comparative fault system. Under a pure comparative fault system, the plaintiff may recover the percentage of damages for which the defendant was at fault, no matter how small that percentage may be. Under a modified comparative fault system, the plaintiff is denied recovery if his or her fault reaches a specified percentage, usually 50%. See DAVID G. OWEN ET AL., PRODUCTS LIABILITY AND SAFETY 659-60 n.2 (3d ed. 1997). South Carolina uses a modified comparative fault system which bars a plaintiff from recovery if the plaintiff's fault is greater than
of the plaintiffs, holding the plaintiffs totally at fault for their own actions. The very few cases in which juries did find the tobacco companies at fault, the ratio of fault was decidedly in the defendant's favor. For example, in *Cipollone v. Liggett Group, Inc.*, a New Jersey jury found the defendant twenty percent at fault. However, under a modified comparative fault system, New Jersey law bars recovery when a plaintiff is at least fifty percent at fault. As a result, the plaintiff was barred from recovering altogether.

As a second strategy to bypass the assumption of risk defense, plaintiffs argued addiction. If the plaintiff was truly addicted to the nicotine in cigarettes, then the tobacco allowed no real freedom of choice. The tobacco lawyers vigorously attacked this theory. The Surgeon General had classified nicotine as only habituating and not addictive in the 1964 Report. Then, the 1988 Surgeon General's report on nicotine addiction classified nicotine as an addictive drug. The industry attacked these findings in much the same way as it did the causation findings of 1964. Defense counsel would remind the jury that almost everyone knew some ex-smokers, thereby showing that smokers could indeed quit if they wanted. As a result, juries could easily ignore the addiction argument presented by the plaintiffs. Even before the tobacco industry argued that plaintiffs assumed the risk, tobacco industry attorneys used preemption as the most effective pretrial defense. Tobacco lawyers argued that Congress had preempted all state common law damage claims by enacting the 1965 and 1969 Acts. If the courts heard state damages claims, then courts would be forcing tobacco companies to place additional warnings on their products and in their advertisements, thereby circumventing the intended purpose of Congress. This theory was rejected in some state courts, but a number of federal judges agreed and dismissed the state law claims. As a result of the disparity among the state and federal courts, the United States Supreme Court

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55. *See*, e.g., *Horton v. American Tobacco Co.*, 667 So. 2d 1289, 1292-93 (Miss. 1995) (finding the defendant to be at fault, but refusing to award any money damages, even under Mississippi’s pure comparative fault system which allows a plaintiff to recover if he is 99% at fault).


57. *Id.* at 215.


60. *See* Rabin, *supra* note 4, at 859.


63. *See* ROYSDON, 849 F.2d at 233-35; *Palmer*, 25 F.2d at 625-26.
intervened to lay down a uniform standard concerning preemption in *Cipollone v. Liggett Group, Inc.*

*Cipollone* signaled the end of the second wave of tobacco litigation and set the parameters for the next wave. Plaintiffs failed, as they did in the first wave, to register a single victory. The few minor breakthroughs in which the tobacco companies had been found at fault had been nullified either through comparative fault, including assumption of risk, or appeal. The central defense strategies—the moral high ground, assumption of risk, and preemption—appeared to create an impenetrable barrier for personal injury claims. In 1992, the tobacco industry seemingly had successfully survived the same fate as asbestos and other toxic products.

C. The Third Wave

*Cipollone* established a conceptualized framework for future claims against the tobacco industry. Rose and Antonio Cipollone brought the original complaint. A smoker since the age of 13, Rose developed terminal lung cancer. Although the jury found the tobacco company twenty percent at fault under the breach of warranty and failure to warn claims, Rose Cipollone's claims were barred altogether because her fault exceeded that of the defendant's. The jury awarded Antonio $400,000 in damages; however, the Third Circuit reversed this decision and held that all of the common law damage claims were preempted.

The Court granted certiorari to settle the issue of federal preemption of state damage claims in a decision that epitomized judicial interpretation and disagreement. Only four parts of the six-part decision garnered a majority vote of the Court, and the first three sections were discussions of the uncontested history of the law and facts of the case. Although a definitive precedent with respect to the 1965 Act existed, the Court was split on the preemption implications of the 1969 Act. The following discussion is an attempt to break the decision down into a framework for future litigation.

In the only substantive statement garnering a majority, Part IV of Justice Stevens’s opinion held that the 1965 Act did not preempt any state common law damage claims. The 1965 Act preempted only specific state-imposed legislative requirements on the labeling or promotion of cigarettes. The Court found that Congress intended the 1965 Act to avoid a myriad of requirements imposed by

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64. 505 U.S. 504 (1992).
65. See Rabin, *supra* note 4, at 874.
66. See, e.g., *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 581-82 (3d Cir. 1990) (finding that the plaintiff's intentional tort claims were preempted by federal law).
68. *Cipollone*, 893 F.2d at 581-82.
individual states which would create an undue burden on the tobacco industry.\textsuperscript{70} Therefore, state common law damage claims were not affected or preempted.\textsuperscript{71}

In Part V, the Stevens plurality found the fundamental difference between the 1965 Act and the 1969 Act in only a few words. The 1969 Act prohibited any "requirement[s] or prohibition[s],"\textsuperscript{72} where the 1965 Act prohibited just statements, and "advertising or promotion,"\textsuperscript{73} rather than \textit{just} normal typeface advertising.\textsuperscript{74} The opinion reasoned that this language significantly broadened the scope of Congress's intended preemptive effect. The language was not narrowly tailored to preempt only positive enactments by state legislatures but also preempted any practice under state law which may affect advertising and promotion.\textsuperscript{75} This broad construction included state common law damage claims. However, Justice Stevens did not believe that all common-law claims were preempted. His opinion stated that a court, in determining which claims are preempted, must conduct an analysis "in light of a strong presumption against pre-emption" as to whether the claim, under state law, would impose a requirement or prohibition with respect to either advertising or promotion of cigarettes.\textsuperscript{76} If so, the claim was preempted.

The Stevens plurality determined that the failure to warn claims are preempted "to the extent that they rely on a state-law 'requirement or prohibition . . . with respect to . . . advertising and promotion.'"\textsuperscript{77} Such claims affect what cigarette companies are required to place on their labels or ads. Similarly, claims based on state common law which challenge the tobacco industry's compliance with the 1969 Act are preempted. These claims are collateral to failure-to-warn claims and "inevitably bring[] into question [the tobacco companies'] advertising and promotional activities."\textsuperscript{78} Claims that are not preempted are those based "solely" on tobacco companies' research or testing of products.\textsuperscript{79} However, the opinion stated that claims of misrepresentation and conspiracy to defraud based on concealment of material fact are in no way preempted.\textsuperscript{80} Such claims are not based on a duty to comply but rather on a "duty not to deceive."\textsuperscript{81} The tobacco industry cannot hide behind the 1969 Act and deceive the public as to its knowledge of the dangers of cigarettes. Finally, the Court stated that breach of express warranty claims are not preempted because such claims are based on contractual duties, even where the terms of the warranty are in an advertisement.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 519.
\item \textsuperscript{71} \textit{Id.} at 520.
\item \textsuperscript{72} \textit{Id.} at 520 (quoting 15 U.S.C. \textsection 1331-40) (alteration in original).
\item \textsuperscript{73} \textit{Id.} at 521-23.
\item \textsuperscript{74} \textit{Id.} at 523.
\item \textsuperscript{75} \textit{Cipollone}, 505 U.S. at 524 (quoting 15 U.S.C. \textsection 1331-40).
\item \textsuperscript{76} \textit{Id.} at 525 (quoting \textit{Cipollone v. Liggett Group, Inc.}, 649 F. Supp. 664, 675 (D.N.J. 1986)).
\item \textsuperscript{77} \textit{Id.} at 524-25.
\item \textsuperscript{78} \textit{See id.} at 527-30.
\item \textsuperscript{79} \textit{Id.} at 528-29.
\item \textsuperscript{80} \textit{See id.} at 525-27.
\end{itemize}
As a whole, *Cipollone* provides plaintiffs with a good indication of the types of claims that will be viable in the future. The Court has maintained the availability of intentional tort claims, such as fraud and conspiracy, and express warranty claims. Preemption denies only claims that directly affect the promotion or advertising of cigarettes.\(^{81}\) Though one may argue that failure to warn claims have been, for practical purposes, preempted outright, such claims may remain viable. While a majority sustained the judgment that the Cipollones' failure to warn and misrepresentation claims were preempted, the case has uncertain precedential value because a majority did not support the rationale of Stevens's opinion. Nevertheless, the language of the opinion suggests that the presiding court should analyze a future claim to determine if the claim falls within the defined category of preempted laws. Therefore, the Court did not preempt categorically any of the claims; rather, it provided a guideline or test for the lower courts to use in the future. Two of the participating Justices, White and Blackmun, have since left the Court, making the precedential value of the Stevens's opinion even weaker. Although the two newest members of the Court, Ginsberg and Breyer, will not likely agree with Scalia and Thomas, the strict constructionists, one can only speculate whether either will choose the Blackmun rationale, the Stevens philosophy, or another line of reasoning on the preemptive nature of the 1969 Act.

Taking this uncertainty into account, plaintiffs lawyers in the third wave can construct their claims to circumvent the preemption question. Claims based on misrepresentations of material fact and conspiracy to defraud are immune to preemption under *Cipollone*, as is a claim for breach of express warranty. With respect to failure to warn claims, careful pleading should defeat a preemption defense. The plaintiff must base the claim on the tobacco companies' failure to release information derived from their own research or testing. If the claim is pleaded in terms of information from the general public, then a court may interpret the claim to be within the scope of preemption. A much better claim would be failure to release research results to legislatively defined administrative agencies under state consumer protection laws.\(^{82}\) From the language of the Stevens opinion, such claims would not fall within the scope of preemption under the 1969 Act.\(^{83}\)

The tobacco companies have played both sides of the fence by first arguing against causation, and then relying on assumption of risk by arguing that the plaintiff knew that smoking would cause serious health problems. Justice Stevens found the misrepresentation claims based on the tobacco companies' negation of consumer warnings within the preemptive scope of the 1969 Act.\(^{84}\) Some analysts have found this rationale confusing and contradictory.\(^{85}\) However, a careful read

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82. See supra notes 69-74 and accompanying text.
83. See id.
84. See *Cipollone*, 505 U.S. at 527-28.
85. See Thomas C. Galligan, Jr., Product Liability--Cigarettes and Cipollone: What's Left
ing of the opinion may present another vehicle by which to bring such claims. The Court recognized that prior FTC and FDA regulations "express[ed] a similar understanding of the relationship between required warnings and advertising that 'negates or disclaims' those warnings."86 The Court may allow similar claims if the claims are brought under those regulations rather than state common law claims.

In summary, Cipollone was a victory for future plaintiffs because it left most of the state common-law claims unaffected by the preemption defense. More importantly, the split in the Court left open the possibility that all such claims may ultimately succeed. Careful pleading and new evidence showing the tobacco industry's knowledge of the harmful and addictive nature of its product may finally provide the means for private plaintiffs to break through the virtual immunity the industry has enjoyed for over forty years.

III. THE BEGINNING OF THE END: THE MONUMENTAL CHANGES OF THE THIRD WAVE

A. The Cigarette Papers

On May 12, 1994, a box containing several thousand pages of documents arrived on the desk of Professor Stanton Glantz at the University of California, San Francisco.87 The documents were from Brown and Williamson Tobacco Corporation (B&W) and detailed over thirty years of fraud and deceit by not only B&W but also the entire tobacco industry. The documents revealed that the industry has known conclusively since the sixties that tobacco use directly correlated with cancer and that the central ingredient in cigarettes, nicotine, was an addictive drug.88 The documents also revealed that the tobacco industry commonly manipulated nicotine levels and used toxic additives in cigarettes.89

B&W hired the law firm of Wyatt, Tarrant, & Combs in Louisville, Kentucky, to sort and analyze roughly 8.5 million pages of company documents. Merrell Williams was a paralegal assigned to the project who systematically copied documents which he deemed the most important—about 10,000 pages—and eventually posted the documents to Professor Glantz with the return address of "Mr. Butts."90 The knowledge of the documents quickly spread throughout the media and eventually sparked the interest of some members of Congress.91 In response, B&W

86. Cipollone, 505 U.S. at 527-28 (citing 21 C.F.R. § 191.102 (1965)).
87. See GLANTZ ET AL., supra note 1, at 6. Presumably, Professor Glantz received these documents in part due to his involvement in the non-smokers' rights movement. See id. at 495. Professor Glantz has made available all the documents he received from Merrell Williams at the following Internet address: http://www.library.uscf.edu/tobacco.
88. See id. at 32.
89. See id. at 83, 211.
90. See GLANTZ ET AL., supra note 1, at 6-7.
91. See id. at 8. B&W issued subpoenas to the Congressmen Henry Waxman (D-CA) and Ron
claimed the documents were stolen. The company tried frantically to retrieve the documents, but the courts denied all requests of protection from disclosure by B&W.

1. The Tobacco Industry Research Committee

The tobacco industry created the Tobacco Industry Research Committee (TIRC) in 1954 for the publicly stated purpose of determining the nature of the health risks caused by smoking. However, the private documents of B&W show that TIRC served as a public relations ploy to allow the industry to: (1) aggressively attack reports concerning the negative health effects of cigarettes, (2) to reinforce the appearance of a controversy over the findings, and (3) to protect against liability for cigarettes. In fact, public relations firms were hired by tobacco companies to use the information presented by TIRC in advertising campaigns and attacks against the Surgeon General reports.

In addition to the involvement of public relations firms, industry lawyers had a significant amount of control over what research TIRC conducted and what was released to the public. First, lawyers could control efforts to limit the possible liability which could arise from the findings of TIRC. Attorneys would quash or destroy immediately any evidence produced by TIRC that could be used as a "smoking gun." Second, the infusion of lawyers into the research and testing aspect of the tobacco industry provided a means to avoid discovery in future suits filed against the industry. With lawyers involved in every aspect of the research process, the industry was able to claim attorney-client and work product privileges.

Wyden (D-OR) in order to obtain copies of the documents. These subpoenas were eventually quashed in Maddox v. Williams, 855 F. Supp. 406, 413-15 (D.D.C. 1994).

92. See id. at 10.
93. See id. at 8-10.
94. See Glantz et al., supra note 1, at 44. In 1964, the TIRC was renamed the Council for Tobacco Research - U.S.A. (CTR). Id. at 32.
95. Id. at 44, 53.
96. Id. at 40.
97. See id. at 40, 44.
98. See id. at 40. TIRC conducted "health oriented" research to find the actual health effects of cigarettes and any possible ways to reduce harm. In contrast, TIRC's "health image" research created a false sense of security among the general public concerning the connection between cigarettes and cancer, which the tobacco industry knew to be unassailable on scientific grounds. See id. at 26, 114.
99. See generally Glantz et al., supra note 1, chs. 5, 8, & 9 (containing a substantial amount of discussion concerning lawyer involvement in every aspect of the tobacco industry's treatment of research results.
100. See id. at 230, 246, 321-22.
to keep the most damaging findings out of the hands of plaintiffs throughout the first and second wave of litigation.\textsuperscript{101}

Attorney control had substantial effects in areas other than discovery. Industry lawyers routinely suppressed studies proposed by research scientists that attorneys thought might lead to damaging revelations exposing the industry to liability.\textsuperscript{102} Even more incredibly, lawyers often had the final say over what results would be published and, in some instances, edited the reports to lessen the detrimental effect they had in terms of liability.\textsuperscript{103} These examples show that the industry was far more concerned with protecting themselves than they were with encouraging any legitimate public discussion on the health effects of cigarettes.

2. \textit{What the Industry Knew}

\textit{a. Cancer and Compensation}

The tobacco industry has contested the causal link between smoking and cancer since the first reports arose in the early fifties. But the documents from B\&W show that the industry has known that a connection exists since shortly after those first reports were made public.\textsuperscript{104} TIRC reports and research conducted by British American Tobacco\textsuperscript{105} informed B\&W that smoking did in fact cause cancer.\textsuperscript{106} Thus, the tobacco industry has publicly promoted a controversy over this connection for decades, while its own researchers have told them that no such controversy exists.

In response to the 1964 Surgeon General’s report which established the causal link between smoking and cancer, the tobacco industry began to market low tar cigarettes for the “health conscious” smoker.\textsuperscript{107} Yet, the tobacco industry knew that smoker compensation falsified the reduction in health risks implied by these products.\textsuperscript{108} The Surgeon General recognized the possible negative effects due to compensation in some of the later reports,\textsuperscript{109} but the tobacco industry has made no public statement concerning its own research results which confirm these fears.

\begin{itemize}
  \item \textsuperscript{101} See id. at 235-47; see also Ronald L. Motley \& Tucker S. Player, \textit{Issues in “Crime-Fraud” Practice and Procedure: The Tobacco Litigation Experience}, 49 S.C. L. Rev. 187 (1998) (discussing the application of the crime-fraud exception to the attorney-client relationship in tobacco litigation).
  \item \textsuperscript{102} See id. at 243-47.
  \item \textsuperscript{103} Id. at 346-52, 377-85 tbl.9.1.
  \item \textsuperscript{104} See supra notes 88-93 and accompanying text.
  \item \textsuperscript{105} British American Tobacco is the parent company of B\&W.
  \item \textsuperscript{106} GLANTZ \textit{et al.}, supra note 1, at 139.
  \item \textsuperscript{107} Id. at 26-28.
  \item \textsuperscript{108} See id. at 27. Compensation is the practice of smokers to inhale more deeply and smoke more when smoking low tar cigarettes. The primary purpose of smoking is to obtain a certain level of nicotine. To obtain such a level through low tar cigarettes requires the smoker to inhale more of the smoke, thereby destroying any health benefit of the cigarette.
  \item \textsuperscript{109} Id. at 87.
\end{itemize}
b. Addiction

The tobacco industry's most vehement denials in the past concerned the addictive qualities of nicotine. To this day, the industry refuses to publicly recognize smoking as addictive rather than a mere habit easily broken.\textsuperscript{110} However, the B&W documents show that as early as 1963, the company received research results classifying nicotine as an addictive substance.\textsuperscript{111} Addison Yeaman, vice president and general counsel for B&W, stated in a 1963 memo circulated to the managing partners of B&W that they were "in the business of selling nicotine, an addictive drug" and that future decisions should be based on that fact.\textsuperscript{112} Not until the 1988 Surgeon General's report on smoking and health was nicotine publicly classified as an addictive substance under the Diagnostic and Statistical Manual IV of the American Psychiatric Association.\textsuperscript{113} In sum, the tobacco industry has known since 1963 that tobacco is addictive.

The B&W documents show more than just knowledge on the part of the industry and, at the very least, show that B&W made decisions with addiction in mind.\textsuperscript{114} B&W conducted numerous studies on levels of nicotine, some of which concerned what levels were consumed by the average smoker\textsuperscript{115} and others which sought methods of manipulating such levels in their cigarettes.\textsuperscript{116} In the development of low tar cigarettes, the industry worried that reduced levels of nicotine might provide a mode through which smokers could more easily abandon the habit, thus prompting enhanced levels of nicotine in low tar cigarettes.\textsuperscript{117} Because the industry viewed cigarettes as "nicotine delivery systems," the companies designed cigarettes to be efficient delivery mechanisms.\textsuperscript{118} Finally, because the industry recognized that increased tolerance levels were a key to the survival of cigarettes, the tobacco companies studied the effects of tobacco and the smoker's development of immunity to its effects.\textsuperscript{119}

Surprisingly, the research revealed certain benefits derived from nicotine in terms of its positive effects on the body. Findings showed that nicotine is primarily

\textsuperscript{110} See \textit{id.} at 100. Though the tobacco industry has preliminarily agreed to admit in the Global Settlement that nicotine is addictive, the admissions are not official and public until and unless Congress approves the Global Settlement. See \textit{infra} notes 230-33 and accompanying text.

\textsuperscript{111} GLANTZ ET AL., \textit{supra} note 1, at 15-17.

\textsuperscript{112} \textit{id.} at 15.

\textsuperscript{113} See \textit{id.} at 58.

\textsuperscript{114} See \textit{generally id.} at 58-107 (noting that the B&W documents show a continuous and systematic practice over the last 35 years on the part of the industry to protect this information from public disclosure and to manufacture and market cigarettes as nicotine delivery devices).

\textsuperscript{115} See \textit{id.} at 95-96.

\textsuperscript{116} GLANTZ ET AL., \textit{supra} note 1, at 124.

\textsuperscript{117} See \textit{id.} at 102.

\textsuperscript{118} See \textit{id.} at 58-60.

\textsuperscript{119} See \textit{id.} at 63. Tolerance is the process where the body develops an immunity to the effect of a drug and accordingly needs more of the drug to achieve the same effect. Tolerance is a key factor in the determination of whether a drug is categorized as addictive in the medical profession. See \textit{id.}
a stress reducer and can be a factor in weight control. In terms of weight control, tolerance was a significant factor. When a person begins to smoke, a decrease in appetite and a subsequent weight loss occurs. Eating habits then return to normal when the body develops a tolerance to the nicotine. When a smoker quits, the suppressant qualities of the nicotine are no longer present, and a corresponding weight gain normally occurs.

c. Second-hand Smoke

In 1986, the Surgeon General reported that second-hand smoke could cause disease in non-smokers. The tobacco industry had reached similar findings with their own research. However, lawyers in control of the research projects began a policy of protection in the late seventies which discouraged conducting any projects that might show any harmful effects of cigarettes. Thus, projects focusing on the possible carcinogenicity of “sidestream” smoke were stifled and replaced with new directives. The purpose of the new projects was two-fold. First, researchers would try to reduce the amount of sidestream smoke. Second, research would refute any findings on second-hand smoke. These documents illustrate that the industry ignored, and possibly knew but concealed, the damage to non-smokers to protect itself from liability and the likelihood of public relations problems.

3. A Safer Cigarette

When the first reports about the health risks of smoking surfaced in the fifties, the tobacco industry launched a research campaign through private research facilities funded by the individual manufacturers to find the toxic substances in cigarettes and remove them. Enormous effort went into finding a safer cigarette, but the industry eventually abandoned the campaign after it was deemed too difficult and too costly. Although manufacturers labeled these campaigns hopeless, the reasons for their conclusion could be characterized as improper. Two safety enhancements to cigarettes appeared promising—ariel and chemosol. Both approaches were eventually discarded for reasons based more on fear of liability and governmental regulation than on legitimate safety reasons.

120. Id. at 61-62.
121. See id. at 69.
122. See GLANTZ ET AL., supra note 1, at 22.
123. See id. at 394-410.
124. See id. at 316-27.
125. See generally id. at 394-434 (discussing various research studies concerning sidestream smoke).
126. See id. at 412-16 (discussing the Hirayama matter as an example).
127. See id. at 108-69.
128. See GLANTZ ET AL., supra note 1, at 74-77.
a. Ariel

In the late sixties and early seventies, tobacco researchers studied a filter design named Ariel.129 British American Tobacco, B&W's parent corporation,130 invented the initial design which controlled the concentrations of nicotine by means of the filter. While the Ariel filter would block the tar from a cigarette much like the low tar designs already on the market, it would also allow nicotine through the filter. The nicotine would then separate itself from the rest of the smoke, forming in a concentrated liquid in the smoker's mouth. Thus, the smoker would obtain the nicotine he sought without inhaling the smoke into his lungs.131

This process benefited smokers in two significant ways. First, it removed the need for a smoker to inhale any smoke into his lungs to obtain the nicotine fix he craved, greatly reducing the damage caused by tar and other substances in cigarette smoke which were not involved in the transmission of nicotine.132 Second, for those smokers who would still inhale, it destroyed the compensation phenomenon because the smoker would receive the nicotine he craved in his mouth rather than in his lungs.133 Therefore, the craving to smoke more often or to inhale more deeply would effectively be eliminated.

Although manufacturers initially embraced the Ariel design with optimism, this attitude was short-lived. Lawyers were quick to point out that publicizing the tobacco industry's manipulation of nicotine would surely invite federal regulation of cigarettes.134 The Ariel project never came to market for fear of admitting that other cigarette brands were, in fact, harmful to a smoker's health.135

b. Chemosol

In 1966, Dr. Perry Hudson, a scientist affiliated with Columbia University, experimented with a newly developed chemical called Chemosol.136 Researchers claimed that Chemosol greatly reduced the risk of cancer in smoking by facilitating increased combustion before inhalation, greatly reducing the level of carcinogens in cigarette smoke.137 This reduction in carcinogen intake produced, in turn, a significant reduction in cancer formation in his experimental subjects.138 Skeptical of the cancer reduction claims considering its own failure to find a safer cigarette,139

129. See id.
130. See id. at 74-76.
131. See id.
132. See id. at 76.
133. See id.; supra notes 104-09 and accompanying text.
134. See GLANTZ ET AL., supra note 1, at 80.
135. Id. at 77.
136. See id. at 211-16.
137. Id. at 212.
138. Id.
139. Id. at 213.
the industry planned an independent research project through Hazelton Laboratories, a private research facility in Virginia.\textsuperscript{140}

Dr. Hudson's testimony concerning Chemosol before the House of Representatives in 1969 pressured the industry to follow through with the planned independent research.\textsuperscript{141} Industry representatives publicly agreed to proceed with the Hazelton test,\textsuperscript{142} however, it appears this testing never happened.

From the outset, the possibility of truly independent research was minimal. The tobacco companies acted together because they felt the research would impact the entire industry.\textsuperscript{143} To protect the industry from the kinds of possible liability which might arise from such research, the companies allowed lawyers to dictate the manner in which the research would be conducted.\textsuperscript{144} This decision was the proverbial straw that broke the camel's back.

The Hazelton representatives proposed a test centered on the reduction of benzo(a)pyrene levels, considered the most carcinogenic toxin in cigarettes.\textsuperscript{145} The cigarette lawyers objected to this testing approach,\textsuperscript{146} but no specific evidence within the documents suggests why such a stringent objection existed. The lawyers may have feared that if the tests showed a reduction in benzo(a)pyrene but not a reduction in carcinogenicity, then the tests would show that other cancer-causing toxins existed in cigarettes.\textsuperscript{147} This proof could be an admission on causation, which the industry still contested at trial. The tobacco lawyers would not approve the testing protocol, and this stubbornness, for whatever reason, likely stopped the tests on Chemosol. Neither the documents cataloged in \textit{The Cigarette Papers} nor documents in the public domain contain evidence that the Hazelton research on Chemosol ever took place.\textsuperscript{148} The Chemosol incident is revealing: \textit{The true concern and motive of tobacco companies has been with liability and public relations rather than with the health of American smokers.}

4. \textit{Additives}

The documents from B&W show that the use of various additives in cigarettes had been commonplace since the introduction of cigarettes to the market.\textsuperscript{149} They also illustrate that the tobacco industry knew that certain additives increased the health risk of cigarettes, but continued to use them anyway.\textsuperscript{150} Some of the

\textsuperscript{140} See GLANTZ ET AL., \textit{supra} note 1, at 214.
\textsuperscript{141} Id.
\textsuperscript{142} See \textit{id.} at 215.
\textsuperscript{143} See \textit{id.} at 213, 216.
\textsuperscript{144} See \textit{id.} at 214-15.
\textsuperscript{145} See \textit{id.}
\textsuperscript{146} See GLANTZ ET AL., \textit{supra} note 1, at 214-15.
\textsuperscript{147} See \textit{id.} at 214-15.
\textsuperscript{148} Id. at 216.
\textsuperscript{149} See \textit{id.} at 218-25.
\textsuperscript{150} See \textit{id.} at 219-23.
revelations in the documents concerning additives are truly astonishing.

The tobacco industry is agriculturally similar to other farming industries that produce food for American consumption. This similarity includes the use of herbicides and pesticides by both types of industries. However, the consumption of cigarettes is different from food, and the risks posed by each chemical when placed on a plant is different. The tobacco industry’s own researchers stressed that the nature of some chemicals inhaled after combustion (pyrolysis) may be toxic even though the chemicals would be safe to ingest. In recent years, however, the industry has ignored these results.

The instances in which the industry knew the additives were toxic demonstrate little concern for safety. Farmers continued using Penar & MH-30, chemicals that increase crop yield, years after researchers found those additives highly toxic. Because the federal government did not require the industry to release any information concerning the additives used in cigarettes, the industry had little interest in publishing the health hazards from these additives. Manufacturers used additives such as Freon and antifreeze, and some are still used today. In 1994, due in large part to heavy pressure from health groups, the tobacco industry published a non-exhaustive list of common additives used in the processing of cigarettes.

*The Cigarette Papers* is the most startling and disturbing evidence ever released to the public concerning the nefarious intent and actions of the tobacco industry. For the first time, the iron curtain of secrecy was pulled back, if only a tiny bit, and the truth was able to seep through. The impact was immediate, but the magnitude of that impact has yet to be realized fully.

B. The Liggett Settlement

On March 20, 1997, the tobacco industry received the most devastating blow to date when one of its own broke ranks and agreed to settle with the states’ Attorneys General. Throughout the years of virtual tort and regulatory immunity, the industry worked together, not only to protect themselves at trial, but to mislead and defraud the public. *The Cigarette Papers* created a significant crack in the industry’s seamless wall of secrecy and immunity, but the Liggett Settlement threatened to bring the wall crashing down.

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151. *See Glantz et al., supra* note 1, at 203-11.
152. *See id.* at 210.
153. *Id.* at 211.
154. *Id.* at 203-05.
155. *Id.* at 216-17.
156. *Glantz et al., supra* note 1, at 223-25.
157. *Id.* at 231. The use of more dubious additives evidenced in the Cigarette Papers were not included in this list. The industry possibly stopped using the most toxic substances at some point out of fear of future liability for using certain additives.
The Liggett Group is one of the smallest tobacco companies in the United States. In 1996, a failed attempt at taking over R.J. Reynolds severely weakened its financial stability. This weakened condition, coupled with the enormous cost of the Cipollone litigation, forced Liggett to the brink of bankruptcy. To protect itself, Liggett struck a deal with the states’ Attorneys General and ended the conspiracy of silence and fraud which had endured for over fifty years.

The deal between Liggett and the Attorneys General provided protection for Liggett in exchange for establishing a fund to reimburse the states and for cooperating in the suits against all other non-settling tobacco companies. The settlement fund would consist of an initial payment of $25 million and payment of twenty-five percent of Liggett’s yearly pretax income at the end of the fiscal year for the next twenty-five years.

The most important aspect of the Liggett Settlement was the agreement to help in the cases filed against the non-settling tobacco companies. Liggett agreed to turn over all documents in its possession which may have led to admissible evidence in the actions against the non-settling tobacco companies. Liggett also agreed to aid in discovery proceedings, to direct the Attorneys General to possible witnesses, and to waive all claims of privilege to documents and testimony provided by Liggett in the pending actions. In short, Liggett agreed to switch sides and work with the Attorneys General to prevail in their suits against the non-settling tobacco companies.

The backlash from other tobacco companies was immediate. The non-settling tobacco companies filed for a temporary restraining order (TRO) on the day the settlement was announced. The TRO restricted the delivery of any documents to the Attorneys General that might have contained information to which the tobacco companies had joint privilege claims. The TRO specifically cited documents pertaining to the Committee of Counsel, an almost secret group of tobacco lawyers who were responsible for the litigation strategy of the industry. Though the TRO seemed to restrict only the dissemination of documents to which the companies had a valid claim of privilege, the non-settling tobacco companies used it to tie up all of the Liggett documents in in camera hearings to determine claims of privilege.

Though the TRO delayed the disclosure of the Liggett documents, the tactics did not prevent it. A judge in Florida ordered the industry to turn over the requested documents after the Attorney General defeated the industry’s claim of privilege.

160. Id.
161. Liggett Settlement, supra note 158, § 4.1(1), (5).
162. Id. § 6; See Menn & Mollenkamp, supra note 159, at A5.
163. Liggett Settlement, supra note 158, § 4.3.1.
164. Id.
by relying on the crime-fraud exception to the attorney-client and work-product privileges. Even the limited information available to the public about the Liggett documents holds damaging repercussions for the tobacco industry. While the documents detailed in *The Cigarette Papers* are mainly restricted to B&W, preliminary glimpses into the Liggett documents show that they will implicate the entire industry.\(^{167}\) Some documents, available to the public yet exclusive to Liggett,\(^{168}\) show conclusively that, at the very least, Liggett intentionally manipulated nicotine levels in cigarettes and directly targeted underage smokers in its advertising campaigns.\(^{169}\) Such documents, if applicable to the entire industry, would constitute the smoking guns for which attorneys have been searching.

**IV. FUTURE CLAIMS AND CAUSES OF ACTION**

The ramifications of *Cipollone*, the B&W documents from *The Cigarette Papers*, and the Liggett documents should open the door to a number of causes of action which have failed in the past. For the first time in the history of tobacco litigation, plaintiffs have several viable causes of action which have a good chance of succeeding at trial. The recent developments previously discussed have already had an impact in a Florida case in which the court awarded a plaintiff $750,000 in damages against the tobacco industry.\(^{170}\)

**A. Evidentiary Issues**

Considering the extremely damaging potential the Cigarette Papers and the Liggett documents may have in court, the primary question for a lawyer is whether they will be admissible. At the moment, the outlook is quite favorable. Despite B&W’s frantic attempt to retrieve the Cigarette Papers and to quash any public display, they have yet to obtain a legal victory.\(^{171}\) The courts have consistently held that the attorney-client and work product privileges are no longer viable because the documents are within the public domain.\(^{172}\) The policy behind the privileges is to keep the information from one’s opponent or from the public-at-large. With such widespread availability of the papers, the privileges offer no such protection. The horse having already escaped the barn, a court has little reason to order the door to be shut. Thus, the attorney-client and work product privileges are no longer available to shelter the Cigarette Papers and the Liggett documents from admission

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167. See id.
169. See id. (Memorandum from K.E. Cohn, *Development of Cigarette with Increased Smoke PH* (Sept. 7, 1977)).
171. See *supra* notes 90-93 and accompanying text.
into evidence.\textsuperscript{173}

A plaintiff can overcome the attorney-client and work product privileges by showing that they do not apply to the documents in question or that the documents show a perpetuation of fraud or deceit by the attorney and client.\textsuperscript{174} If the evidence shows ongoing or future fraud, the documents are not protected.\textsuperscript{175} Presumably, if the documents show proof of prior fraud only, then they are protected. Numerous rulings throughout the United States have found that industry documents are unprotected by privilege claims.\textsuperscript{176}

B. **Strict Products Liability and Negligence**

1. **Risk-Utility and the Restatement (Third) of Torts: Products Liability**

The proposed final draft of the new Products Liability Restatement employs risk-utility analysis as the method for determining design defectiveness, but it expressly bases liability on the availability of a reasonable alternative design.\textsuperscript{177} The Restatement specifically rejects the global balancing of risks against benefits undertaken in *O'Brien*.\textsuperscript{178} The Products Liability Restatement includes partial immunity for generically dangerous products, such as alcohol and firearms, though in a different form than that granted by comment i of section 402A of the Second Restatement.\textsuperscript{179} The Products Liability Restatement contemplates that a plaintiff

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\textsuperscript{173} See *supra* notes 91-93 and accompanying text. Privileges will present obstacles in claims against companies other than Liggett and B&W; yet, considering the information contained within the documents, plaintiffs lawyers should be able to overcome both privileges.

\textsuperscript{174} See generally Motley & Player, *supra* note 101, at 206-07 (discussing the means by which a plaintiff can overcome the defendant's assertions that the defendant's statements, actions, and documents are protected by the attorney-client privilege).

\textsuperscript{175} See id. at 194. See generally *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir. 1992) (discussing the parameters of the attorney-client privilege).


\textsuperscript{177} RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Proposed Final Draft 1997) [hereinafter PRODUCTS LIABILITY RESTATEMENT].

\textsuperscript{178} See *O’Brien v. Muskin*, 463 A.2d 298 (N.J. 1983). Commentators have widely criticized the *O’Brien* decision for its expansive view of the risk-utility analysis. The *O’Brien* analysis has been characterized as a global balancing test, a test that was previously rejected by the ALI. For an in-depth analysis of the proper risk-utility balancing test, see David G. *Owen, Toward a Proper Test for Design Defectiveness: ‘Micro-Balancing’ Costs and Benefits*, 75 TEX. L. REV. 1661 (1997).

\textsuperscript{179} PRODUCTS LIABILITY RESTATEMENT, *supra* note 177, § 2(b) cmt. d.

The requirement in Subsection (b) that plaintiff show a reasonable alternative design applies in most instances 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 . . . Common and widely distributed products such as alcoholic beverages, tobacco, firearms, and above-
must establish that the costs of adopting the proposed alternative design are less than the resulting benefits of the altered design. 180 Under such an approach, products liability claims against tobacco manufacturers should fare quite well. Comment d of the Products Liability Restatement 181 retains the immunity from O’Brien’s true global balancing test, initially provided by comment i of the Second Restatement. 182 Yet, new information concerning nicotine, additives, and alternate filter designs discussed above should provide ample ammunition for showing that a safer alternative design has existed for years. Though none of these alternative designs would make cigarettes safe, the alternative designs certainly indicate that manufacturers could have lessened the detrimental health effects, thus making cigarettes safer.

The tobacco industry may rely on the reduction of benefits in defending against safer alternative design claims. This defense is weak at best. The benefits derived from smoking are minimal. Arguments based on smoking satisfaction may be superficially valid in the case of Chemosol, Ariel, or other filter designs, 183 but such arguments are not available with respect to claims based on the additives. The taste derived from a harmful pesticide or toxic chemical is not critical to the flavor of a cigarette. The industry may argue that nicotine provides the major satisfaction benefit of smoking and that a reduction of nicotine would destroy the very purpose of smoking. While superficially true, this argument overlooks the addictive nature of nicotine which converts the satisfaction of an addictive craving from a benefit to a detriment. Surely a court would not permit a heroin supplier sued by an addict to defend the reasonableness of supplying such an addictive drug on the grounds that it “benefitted” the addict by satisfying his cravings for the drug.

Nicotine itself is a strong carcinogen. The evidence of industry engineering of nicotine levels provides a strong basis for a design defect claim. By increasing the levels of this carcinogenic substance in its product, the industry increased the risk of harm in its products without a corresponding increase in benefits. The requirements of a reasonably safer alternative design appear fully satisfied under this form of claim. Considering the new evidence of industry’s knowledge of nicotine’s

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180. Id.; see Owen, supra note 178, at 1664.
181. See PRODUCTS LIABILITY RESTATEMENT, supra note 177, ¶ 2 cmt. d.
182. See supra notes 23–24 and accompanying text (explaining that whiskey and tobacco are unreasonably dangerous only if they are more dangerous than reasonably contemplated by an ordinary consumer possessing common knowledge of their dangerous characteristics); see also Owen, supra note 178, at 1666 (noting that “the ability of consumers to perceive and control the risk” in a particular product is but one of the factors to consider in deciding if a product design is safe enough).
183. See supra notes 129–48 and accompanying text (discussing the development and testing of Ariel and Chemosol).
addictive nature, this type of attack on a cigarette’s design should be especially effective.

The problem of a smoker’s personal choice remains a consideration under the Third Restatement’s approach to design defectiveness; however, the consumer’s knowledge is merely one factor weighed by the court in its broad balance of risks and benefits. The implications of addiction should effectively negate any detrimental effect that such bogus “choices” would have in weighing such factors. Additionally, the consumer may have known that smoking imposed some risk, but he may not have known the severity of the risk. Even if a plaintiff knew the severity of the risk and chose to smoke anyway, his claim might not fail because the risk-utility balance seems to tilt so clearly in the smoker’s favor.

2. Consumer Expectations Test and Section 402A

Some judges have refused to adopt a risk-utility analysis, and the Third Restatement may not change their views. However, the recent developments affect claims brought in jurisdictions that still adhere to the consumer expectations doctrine of section 402A of the Restatement (Second) of Torts.

The consumer expectations test precludes recovery if a plaintiff had knowledge of the risks posed by a product and proceeded to use it regardless of such risk. This doctrinal hurdle proved to be the death knell of many cases in the second wave of tobacco litigation, because evidence of the addictive nature of nicotine and the tobacco industry’s knowledge of such was not known at that time. If a plaintiff began smoking before warning labels were placed on cigarettes in 1966, the smoker could argue that he or she neither understood nor appreciated the risks inherent in cigarettes. Once the smoker became addicted to nicotine, he or she was unable to stop smoking even after fully becoming aware of the risk. Thus, the addiction factor effectively negates the assumption of risk defense and provides a basis for design defectiveness under the consumer expectations test. Recognizing the weakness of the plaintiffs’ defenses, industry lawyers challenged any published report attempting to establish addiction. Considering the revelations in the Cigarette Papers and similar documents, tobacco lawyers will now find it more difficult to rebut the plaintiffs’ addiction arguments. Thus, the tobacco industry’s most vaunted defense, assumption of risk, has been destroyed. This development opens the door to numerous claims based on negligence and products liability.

184. The consumer expectation test, which was dispositive under § 402A, has been relegated to a factor which courts should consider when making its risk-utility analysis under the Third Restatement. See David Owen, Products Liability Law Restated, 49 S.C.L. REV. 273, 286-87 (1998).
185. See supra notes 46-50 and accompanying text.
187. Id. cmt. n.
188. See GLANTZ ET AL., supra note 1, at 341.
https://scholarcommons.sc.edu/sclr/vol49/iss2/8
3. Failure to Warn

As stated earlier, failure to warn claims are not dead. Because the Supreme Court left some room for such claims to survive preemption,\(^\text{189}\) careful structuring of a claim may avoid this defense. Most significantly, a plaintiff can bring a federally based claim that the industry has not complied with the 1965 and 1969 Acts.\(^\text{190}\) Though the industry has complied with the literal requirements of the Acts by placing specified warnings on its ads and packages, the industry’s public actions have directly conflicted with the spirit of the law,\(^\text{191}\) The labeling law exists to provide effective warning to consumers of the dangers of smoking, but the industry has spent years creating a false controversy over causation in an effort to negate the mandatory warnings. Such conduct is in direct conflict with the intent and purpose behind the warnings.\(^\text{192}\)

Plaintiffs can also base claims on state consumer protection acts. If such a statute requires a manufacturer to release information about dangers from its product to certain state agencies, a failure to do so constitutes negligence. The Supreme Court recognized the viability of this type of claim in *Cipollone*.\(^\text{193}\) The Court stated that the 1965 and 1969 Acts did not usurp all of a state’s police power, thus maintaining protection for state-defined rights.\(^\text{194}\) Therefore, failure to warn claims are still viable when brought under state consumer protection acts.

4. Minor Incapacity

An emerging theory concerning minor incapacity and newly discovered evidence that the tobacco industry targeted minors in its advertising campaigns may provide yet another counter-argument to the assumption of risk defense. The concept of minor incapacity—the inability of a young person to rationally make important and informed decisions—has a long-standing history in American law.\(^\text{195}\) This issue is important in tobacco litigation because most smokers began their habit during adolescence or pre-adolescence.\(^\text{196}\) A number of recent law review articles have explored this aspect of tobacco litigation in terms of the assumption of risk defense.\(^\text{197}\) The theory is that if a person was so young that he or she could not make

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\(^{190}\) See supra notes 28-29 and accompanying text.
\(^{192}\) Id.
\(^{193}\) See *Cipollone*, 505 U.S. at 528.
\(^{194}\) See *id.* at 330-31.
\(^{197}\) See Karen E. Meade, *Breaking Through the Tobacco Industry's Smoke Screen*, 17 J.
a rational decision to smoke based upon an understanding of the dangers of smoking, the smoker cannot be held accountable for his actions or choices. Of course, the argument still exists that a person who continued to smoke after he or she came of age and developed the capacity to understand the danger assumed the risks inherent in smoking; however, such an argument runs headlong into the addiction rebuttal.

Adding fuel to the fire, recently discovered documents reveal that tobacco companies targeted minors in advertising campaigns. A memo from R.J. Reynolds which recently surfaced discussed the importance of eighteen-year-olds in advertising campaigns. No state allows the sale of cigarettes to minors, yet the tobacco industry has continued to target minors in their advertising campaigns. This behavior demonstrates their desire to prey upon the inability of children to make informed decisions concerning smoking. If a plaintiff started smoking at an age when he or she could not be expected to understand the consequences in response to ads directed at him or her by the industry, and then he or she became addicted, the plaintiff would seemingly have only involuntarily accepted the risk inherent in smoking.

C. Intentional Torts

Causes of action based on the tobacco industry's intentional misrepresentation and conspiracy to defraud may prove to be the most effective of any claim. The revelations in industry documents concerning the special projects division of the CTR (formerly TIRC) detail a consistent and prolonged practice of concealment and deceit by the industry. This type of evidence may well support claims for punitive damages, which adds an additional threat to the industry. Considering the effects the documents will likely have on a jury's attitude toward the tobacco industry, a jury may utilize a punitive damages award to show its disdain for the industry's flagrant indifference for consumer safety.

Claims of conspiracy and fraud were left unscahed after Cipollone, and, thus, remain available for a plaintiff to use. The Cigarette Papers contain ample evidence of a conspiracy, at least among the managing executives at B&W. The materials concerning the CTR also reflect collusion among the different tobacco

LEGAL MED. 113 (1996); Crawford, supra note 191.
198. Meade, supra note 197, at 139.
199. See Crawford, supra note 191, at 280.
200. See R.J. Reynolds Called 18 Year-Olds 'Critical' to Cigarettes' Success, WALL ST. J., July 11, 1996, at B6. In addition, the Liggett documents and admissions offer conclusive proof that such targeting took place. See supra notes 168-69 and accompanying text.
203. See supra notes 111-16 and accompanying text.
companies which would seem to lay the foundation for an industry-wide conspiracy. Judge Sarokin’s language in the *Haines* case rang loudly and honestly about the deceptive practices of the tobacco industry. A conspiracy claim, supported by the right documentary evidence, would appear to hold substantial promise in breaking through the industry’s previous coat of immunity.

A plaintiff claiming misrepresentation must pay heed to *Cipollone*, but that case is not an absolute bar to these claims. The Court left open claims based on the tobacco companies’ omissions of material fact. For over thirty years, the industry concealed the conclusive link between cancer, smoking, and the pharmacologically addictive nature of nicotine, all three of which are easily characterized as material fact. Carefully pleaded claims should thus effectively circumvent a preemption defense by the tobacco lawyers, and if supported by sufficient documentary evidence, these claims should also have a good chance of succeeding at trial.

The obvious defense to claims of fraud and misrepresentation is lack of reliance. If the plaintiff did not detrimentally rely on the industry’s deceit, he cannot recover damages. This lack of reliance is, at least in terms of tobacco litigation, a quasi-assumption of risk defense. If the plaintiff knew smoking was dangerous and, therefore, paid no heed to the false claims of the tobacco companies, the plaintiff failed to detrimentally rely on the companies’ assertions. Yet once again, the industry is trying to play both sides of the court. Why would the industry spend so much money creating this false controversy if it thought the resulting confusion would have no effect? In any event, a plaintiff may encounter difficulty in proving detrimental reliance.

However, two alternative approaches may succeed. First, a plaintiff must properly frame the question of reliance. The question is not whether the plaintiff relied on the deceit in deciding to smoke; rather, the question is whether he or she would have decided to smoke if he or she knew what the industry knew about the addictiveness and carcinogenicity of cigarettes. Second, a plaintiff must define reliance on a subconscious level. Rose Cipollone’s argument serves as a good example. Mrs. Cipollone argued that she relied on the false controversy created by the industry as rationalization to continue smoking. Though at some level she was aware that smoking was harmful, she used the industry’s false statements as an excuse to continue to smoke in good conscience. Should this form of reliance satisfy the requirements of fraud and misrepresentation? The author is uncertain; however, considering the change in attitudes that the new revelations will likely spawn, juries and courts may choose to look favorably upon certain creative applications of conventional doctrine.

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204. See supra notes 117-19 and accompanying text.
206. See *RESTATEMENT* (SECOND) OF *TORTS* § 525 (1965).
D. The Moral High Ground

The most critical change caused by the industry documents in the recent tobacco litigation will be a shift in positions on the moral high ground. In the past, juries refused to grant relief to plaintiffs who knowingly and willingly exposed themselves to the risks of smoking. The revelations in industry documents showing the industry's concealment and fraud regarding both addiction and carcinogenicity should drastically change jury attitudes. The ability of tobacco lawyers to assail the character of the plaintiff in the name of causation has been effectively undermined. Evidence of the industry’s conclusive knowledge that smoking causes cancer severely weakens its arguments against causation. While defense lawyers will continue to attempt such tactics, the causation argument has an increased potential to backfire. In the recent case of Carter v. Brown and Williamson Tobacco Co., a Florida jury awarded $750,000 in damages to the plaintiff.208 Interviews with jury members after the verdict illustrated the shift in attitudes against tobacco companies. Because the tobacco lawyers attempted to degrade the plaintiff's character, a common litigation tactic used in previous cases, the jurors thought the defense lawyers were abusive in their examination of the plaintiff.209 Instead of creating a disdain for the plaintiff, the evidence of B&W’s own bad deeds and concealment backfired against B&W and prompted the jury to find for the plaintiff.

In addition, the tobacco lawyers can no longer rely on the federal labeling acts. The evidence concerning the industry’s knowledge and its subsequent concealment and misrepresentation prohibits attorneys from arguing that tobacco companies exhausted every means of warning consumers. In Carter, the jurors stated that the industry “told lies” and approached the trial with “crass hypocrisy.”210 Tobacco executives’ public comments have only worsened matters. In a videotaped deposition of Robert Heimann, the former CEO of American Tobacco Company, he stated under oath that he was more qualified than the Surgeon General to testify about the addictive nature of cigarettes, which he claimed was non-existent.211 The public will increasingly view tobacco companies as stereotypical evil corporations. The symbolic removal of section 402A, comment i immunity for tobacco by the ALI in May, 1997, is indicative of this perception.212 The possibility of a favorable jury verdict for the defense in such a posture is minimal.

The industry documents are critical to this shift in the moral high ground. In another recent case captioned Connor v. R.J. Reynolds Tobacco Co., a Florida jury rejected a smoker’s claims against the tobacco giant.213 The judge did not allow

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208. See Hwang et al., supra note 170, at A1.
209. See id.
210. Id.
211. Id.
212. See supra notes 23-24 and accompanying text.
industry documents to be admitted into evidence, and the effect was decisive. The forewoman of the jury noted that the key issue was addiction. She stated the attorneys for the smoker "had claimed that Reynolds 'targets' a certain amount of tar and nicotine needed to sustain addiction—what they called the "Secret of Salem.' [The tobacco industry scientist] said the company didn't. Whom to believe?"\textsuperscript{214} Although the jury wanted to punish the cigarette manufacturer, it could not find its way around the law.\textsuperscript{215} If the judge had admitted into evidence industry documents which clearly showed the intentional manipulation of nicotine, the jury would likely have ruled for the plaintiff.

\textbf{E. The Global Settlement}

The most important event in the history of tobacco litigation occurred on June 20, 1997. On this date, the tobacco industry and the states' Attorneys General reached an end to their lengthy negotiations and presented a global settlement to begin a new era in the sale, promotion, and regulation of cigarettes.\textsuperscript{216} The scope of the global settlement is such that Congress must approve it before it takes effect. Though the eventual acceptance of the settlement is not certain, its effect on tobacco litigation will be monumental.

Under the settlement proposal, the tobacco industry agrees to pay $368.5 billion over the next twenty-five years.\textsuperscript{217} They also agree to place large warnings on cigarette packages which state that cigarettes are nicotine-delivery devices and cause cancer,\textsuperscript{218} to consent to FDA regulation of cigarettes,\textsuperscript{219} and to make available all industry documents relating to cigarette research by establishing a public resource depository of all such documents.\textsuperscript{220} In addition to making research documents available, the industry agrees to allow a three-judge panel to review all documents requested in discovery in future actions to which the industry has claims of privilege.\textsuperscript{221} This panel will review the documents in question, without the usual prima facie requirement which accompanies a challenge to privilege, and determine the claims of privilege \textit{in camera}. If the panel finds that the industry has not made a valid claim of privilege in good faith, the panel may assess fines against such claimant.\textsuperscript{222}

In return for its concessions, the industry obtains extensive immunity from future lawsuits. Under the settlement, plaintiffs cannot commence further state

\textsuperscript{214} \textit{Id.} (emphasis added).
\textsuperscript{215} \textit{See id.}
\textsuperscript{216} \textit{Proposed Resolution} (visited Jan. 18, 1998) <http://stic.neu.edu/settlement/6-20-settle.htm> [hereinafter GLOBAL SETTLEMENT].
\textsuperscript{217} \textit{Id.} tit. VI.
\textsuperscript{218} \textit{Id.} tit. I.B.
\textsuperscript{219} \textit{Id.} tit. I.E.
\textsuperscript{220} \textit{Id.} app. VIII.
\textsuperscript{221} \textit{Id.} app. VIII § 3.
\textsuperscript{222} GLOBAL SETTLEMENT, \textit{supra} note 216, app. VIII § 3.
claims for Medicare reimbursement, smoker class action suits, or punitive damages claims.\textsuperscript{223} Only tort claims brought by individual smokers will be allowed, and only compensatory damages may be awarded. In addition, a cap of 33% of the annual industry-based payment limits the amount of compensatory damages which will be paid each year.\textsuperscript{224} If a claimant receives an award in excess of one million dollars, the excess is rolled over to the next year.\textsuperscript{225} The settling tobacco companies will share all payments.\textsuperscript{226}

The settlement makes clear that the tobacco industry does not plan to enter a courtroom again in defense of its product. Two key provisions make this result obvious. First, any money not paid under the cap will be allocated to various health-oriented entities by a President-appointed Commission.\textsuperscript{227} Second, the industry will pay all defense costs.\textsuperscript{228} The industry will not pay extravagant legal fees to defend lawsuits in which, if it wins, it will pay damages regardless. The industry has calculated the amount of money it can afford to pay in compensatory damages and conceded that amount in the settlement.

The most probable future for tobacco litigation under the settlement is a quasi-administrative procedure in which a smoker must make sufficient allegations to survive a 12(b)(6) motion and then negotiate a settlement. Unsurprisingly, the same lawyers and firms that helped negotiate the settlement may represent the majority of future tobacco claimants. Under the proposed settlement, these firms will be able to service hundreds of clients, filing the requisite claims and obtaining their contingency fees with very little legal maneuvering. If approved by Congress, the Global Settlement may be the saving grace for the tobacco industry and a windfall for the anti-tobacco lawyers.

Considering the enormous scope of the Global Settlement, the inevitable bipartisan bickering which will accompany any Congressional consideration of its terms, and the expressed apprehension of many prominent figures involved with its ultimate approval, the settlement will not likely pass through Congress in its current form. For instance, some Congressmen do not agree with the settlement's handling of FDA regulation.\textsuperscript{229} Under the settlement, the industry has five years before the FDA can exercise full regulation over cigarettes.\textsuperscript{230} Yet, in a recent legal victory, the FDA obtained full regulatory authority over cigarettes.\textsuperscript{231} The five year grace period seems to be a concession by the Attorneys General. Additionally, Congress has

\textsuperscript{223} See id. tit. VIII.A § 1.
\textsuperscript{224} Id. tit. VIII.B § 9.
\textsuperscript{225} Id.
\textsuperscript{226} Id. tit. VIII.B § 4.
\textsuperscript{227} Id. tit. VIII.B § 10.
\textsuperscript{228} Id. tit. VIII.B § 11.
\textsuperscript{229} Comments from Congressmen Henry Waxman (D-CA) and Ron Wyden (D-OR), Tobacco Settlement Agreement, (C-SPAN television broadcast, June 20, 1997).
\textsuperscript{230} GLOBAL SETTLEMENT, supra note 216, tit. 1.
\textsuperscript{231} See Coyne Beahm, Inc. v. FDA, 958 F. Supp. 1060 (M.D.N.C. 1997).
clarified that it will revise the settlement as it sees fit before granting approval.\footnote{232}{See supra note 229.} If enough changes are made, the industry may not agree to comply, thus killing the proposal. As a result, the future of the Global Settlement is far from certain.

The general public will not know impact of the Global Settlement for some time. Whether it will be the virtual end to tobacco litigation as we have known it or a footnote in the eventual bankruptcy of a powerful American industry is yet to be seen. Any in-depth analysis of the Global Settlement at this stage would be pure speculation and would better be addressed in an article devoted to the Settlement alone. Until this proposal is validated by Congress, it has no effect on individual tort claims for compensatory and punitive damages.

V. CONCLUSION

Throughout the long history of tobacco litigation, the tobacco industry has been virtually immune to tort claims brought by smokers. However, recent developments are likely to bring an end to the industry’s long-enjoyed immunity from liability. The Supreme Court’s partial rejection of the preemption defense and the discovery of damaging new evidence of the industry’s deceitful and exploitive design and marketing techniques appear to have turned the tide against the industry. Both the Liggett and Global Settlements show that the industry is no longer willing to fight until the bitter end. The plaintiffs lawyers who decimated the asbestos industry have now joined the battle against the tobacco industry, and hundreds of smokers have sought representation in response to a plaintiff’s recent victory in a Florida court. Tobacco companies have targeted minors, created a false controversy over causation, and hid nicotine’s addictive nature from the public for thirty years. Armed with this evidence, a plaintiff may be able to prove the industry is one hundred percent at fault, a feat which seemed impossible a mere ten years ago.

However, the industry may avoid justice once again. The Global Settlement appears to be the tobacco industry’s last desperate attempt to avoid the tsunami of claims looming in the wake of the Cigarette Papers and the Liggett Documents. The Global Settlement may be the industry’s saving grace. If approved in its current form, the Global Settlement may prevent another tobacco trial. The cost seems phenomenal, yet it represents only about twenty-five percent of the industry’s income. Determining the settlement’s fate in the United States Congress is impossible; yet, the chances of it being approved unscathed is minimal. If the Global Settlement is not approved by Congress, perhaps the tobacco industry will soon learn the justice of the American tort system.

\textit{Tucker S. Player\textasteriskcentered}

\footnote{232}{See supra note 229.}

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