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CIGARETTES AND HEALTH: A LEGAL ANALYSIS

Richard A. Wegman†

In January, 1964, the Surgeon General of the United States declared cigarette smoking a health hazard of sufficient importance to warrant remedial action. In this article, the author considers the legal implications of the scientific evidence linking cigarette smoking with various major diseases. He reviews the remedial efforts of Congress and the Federal Trade Commission, as well as the tort suits by lung cancer victims against the tobacco companies. Mr. Wegman suggests that more comprehensive federal regulation may be necessary in this field.

I will summarily rehearse the hurts that tobacco infereth . . . It drieth the brain, diminisheth the sight, vitiateth the smell, dulleth and dejecteth both the appetite and the stomach, destroyeth the decoction, disturbeth the humours and the spirits, corrupteth the breath, induceth a trembling of the limbs, exsiccathe the windpipe, lungs and liver, annoyeth the milt and scorctheth the heart.

Dr. Tobias Venner, Bathe

This indictment, in the year 1650, initiated a controversy between the medical profession and the proponents of tobacco which in recent years has developed into an issue of acute national concern. New scientific studies have provided increasing support for the medical thesis that a causal link exists between cigarette smoking and a number of major diseases. The Surgeon General’s Smoking Report of January 1964 represents a culmination of these scientific efforts, and has provided an impetus for remedial action in both private and public spheres of law. In the sphere of private law several lung cancer victims have sought redress for their injuries by suing cigarette manufacturers in tort. In the public sphere, both Congress and the Federal Trade Commission have each taken steps to compel cigarette manufacturers to disclose the health hazard created by their product.

This article will treat the smoking-health controversy in broad perspective, concentrating on the legal and factual bases for each of these two approaches. As background, Section I will sketch the development of the American tobacco industry and its efforts to maintain sales in the face of oft-repeated health warnings. Section II will summarize the medical and statistical evidence which serves as justification for

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remedial action. The two principal legal remedies will be examined in subsequent sections: tort litigation in Section III, and regulation of cigarette advertising and labeling in Section IV. The efficacy of these and other possible solutions will be taken up briefly in the concluding section.

I
A BRIEF HISTORY OF THE PROBLEM

Although the tobacco leaf was originally native only to the Americas, it was in Europe that the consumption of tobacco first became popular. The early explorers brought tobacco home when they returned from the New World, and the novelty caught on quickly. Pipe smoking was the usual form of tobacco consumption until the end of the eighteenth century, although in fashionable circles the taking of snuff was more popular. The cigar was introduced in the nineteenth century, and while it was never very popular in England, it was well received on the European continent.

In the United States, the popularity of tobacco came much later, with the development of the modern machine-rolled cigarette around the turn of the twentieth century providing the necessary impetus. It was the introduction of the Camel cigarette in 1913, however, that firmly established the popularity of cigarettes in this country. Manufactured by R. J. Reynolds Tobacco Company, Camel owed its appeal to a blend of flavored burley and aromatic Turkish tobaccos. Wide public acceptance of cigarettes came with the return of the veterans just after the First World War, wartime pressures having made cigarettes enormously popular with soldiers.  

At the same time, the American tobacco industry began one of the most concerted advertising campaigns ever undertaken in this country. The primary goal was to convince the general public that cigarette smoking could be socially acceptable, for women as well as for men. An aim of purely secondary importance was to reassure smokers that no adverse health effects would be encountered. The campaign achieved phenomenal success. Per capita consumption in the United States (for those over 18 years of age) rose from 138 cigarettes in 1910 to over 1,800 in 1940, reaching a peak of 4,345 in 1963.

2 For an interesting account of the striking growth in popularity achieved by the "domestic blend" cigarettes, see Nicholls, supra note 1, at 35-44.
3 Newsweek, Jan. 18, 1965.
As the popularity of cigarettes became established, cigarette advertising changed emphasis and began concentrating almost entirely upon health. The most blatant of these advertisements appeared during the 1930's. A 1932 Lucky Strike advertisement inquired, "Do You Inhale?" and reassured rhetorically: "What's there to be afraid of?" Old Gold followed in rapid order with its familiar slogan: "Not a Cough in a Carload." Camel introduced its well-known "T-Zone" in 1936, promising the smoker that both his taste and his throat would react favorably to Camel's mildness. In addition, the statement that "More Doctors Smoke Camels" carried implications that Camels were healthier than other brands. By the 1940's, though, the Federal Trade Commission began to take action against these solicitations. They were found to be "unfair or deceptive acts or practices in commerce," and therefore violative of the Federal Trade Commission Act.\(^4\) The Commission proceeded against every major tobacco company at least once during this period.\(^5\)

In the 1950's the debate over the existence of a causal link between cigarette smoking and lung cancer first received public attention. The ensuing health scare impelled cigarette advertising to adopt a new approach. Without mentioning the health scare, advertisers assured smokers that their brand had gone much farther in reducing the health risk than had any competing brand. Cue brand asserted it was lowest in tars, another claimed to be lowest in nicotine; virtually every major brand participated in this "Tar Derby."\(^6\) The alleged proof for these claims was usually based on tests whose standards varied according to the brand being tested; some of these claims were so grossly exaggerated as to be wholly without justification.\(^6\) Nevertheless, these advertisements continued unabated throughout the rest of the decade, and it was not until 1960 that the FTC was able to persuade the cigarette companies to call off the "Tar Derby."\(^7\)

But reassuring advertising alone could not offset the "health scare" that had begun to sweep the country. Something more was needed, and filter cigarettes proved to be the answer. Promoting the filter cigarette


\(^5\) See note 247 infra and accompanying text.

\(^6\) For example, when Old Gold's claims of lower nicotine were put to the test, it was found that the actual difference in nicotine content between Old Gold and other brands amounted to \(\frac{1}{177,187}\) of an ounce per cigarette. This meant that a pack-a-day smoker would reduce his consumption of nicotine by less than 1/24 of an ounce over the course of a year. See P. Lorillard Co., 46 F.T.C. 735, modified, 46 F.T.C. 853, aff'd, 186 F.2d 52 (4th Cir. 1950).

\(^7\) In a compact between the FTC and the leading tobacco firms, the manufacturers agreed to refrain from all tar and nicotine claims in their advertising. N.Y. Times, Feb. 6, 1960, p. 23, col. 2.
as a "safer" cigarette enabled the industry to alleviate the fears engendered by the health scare. The campaign succeeded in profoundly altering the country's smoking habits. Since 1952, when filters were introduced on a large scale, more than half of the cigarette smoking population—35,000,000—have begun to smoke cigarettes whose principal features seem to be that they are "harder to inhale, less aromatic, and yield less of a kick . . . ." The primary explanation appears to be that filters give the smoker an opportunity to rationalize his habit.

The unprecedented success of the filter cigarette is indicative of the alacrity with which the public reacts to potential dangers and its willingness to make concessions to them. Moreover, the mass changeover to filters demonstrates the remarkable resourcefulness and resiliency of the tobacco industry, and its ability to allay the public's fears by modifying its product.

Unfortunately, the highly touted health benefits of filter cigarettes have failed to materialize. To date, there has been no scientific proof that the filters currently in use are capable of minimizing the health risk. The tobaccos used in these cigarettes may often be stronger and more irritating than those used in their predecessors, with the result that the smoker inhales almost as much tar and nicotine as he did before. The blame cannot be placed solely upon the tobacco companies; the public has simply not been receptive to an effective filter. In 1952, for example, when Kent first introduced its Micronite filter, only two milligrams of tar and 0.5 milligrams of nicotine were given off by each cigarette. This represented an 80% improvement over competing brands. Kent's filter, however, was too good; puffing a Kent was likened to "smoking through a mattress." Popular demand forced Kent to loosen up its filter, and the result was a fourfold increase in nicotine and a sixfold increase in tars. Other manufacturers producing "safer" cigarettes were similarly forced to abandon them.

8 The striking increase in the popularity of filter cigarettes attests to this change. In 1952, just prior to the onset of the health scare, filter and menthol cigarettes occupied only 4.2% of the total cigarette market. As studies appeared linking cigarettes with lung cancer, the sales of filters and mentholated cigarettes increased sharply. By 1965, filters and mentholated cigarettes occupied 61.3% of the market, an increase of more than 57% in a little over 12 years. Federal Trade Commission, Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8334-36 (1964) [hereinafter cited as Statement of FTC Basis]; N.Y. Times, Jan. 17, 1966, p. 130, col. 5.

9 Consumers Union Report 128.

10 5 Lawyers Medical Cyclopedia § 38.68, at 666-67 (1960); Whiteside, "A Cloud of Smoke," The New Yorker, Nov. 30, 1963, p. 74. But see N.Y. Times, May 4, 1965, p. 52, col. 1. The Whiteside article also observes that filter cigarettes created a larger profit margin for the tobacco companies, since premium prices were being charged for the filter cigarettes, while the filters themselves actually cost less to produce than the tobacco they displaced.

11 Consumers Union Report 151.
As the public has reacted ambivalently toward smoking—insisting on filters for "protection" while demanding that cigarettes still have some "kick" to them—the medical evidence has mounted steadily, each year becoming more and more convincing in its indictment of cigarettes as a serious health hazard. The promotion of filter cigarettes was designed to counteract this accumulating medical evidence, but the warnings gradually became so strong that they could no longer be minimized. The following statements reflect the growing belief in the strength of the medical position over the past ten years.

October 22, 1954:

[Presently available evidence indicates an association between smoking, particularly cigarette smoking, and lung cancer, and to a lesser degree other forms of cancer.]

July, 1957:

[The weight of the evidence is increasingly pointing in one direction: that excessive smoking is one of the causative factors in lung cancer.]

November 20, 1959:

[The evidence indicates] that cigarette smoking is a major causative factor in the increasing incidence of human carcinoma of the lung.

January 21, 1960:

[The clinical, epidemiological, experimental, chemical and pathologic evidence . . . indicates beyond reasonable doubt that cigarette smoking is the major cause of the unprecedented increase in lung cancer.]

February 27, 1960:

[Cigarette smoking is a major cause of lung cancer . . . . No present method of treating tobacco or filtering the smoke has been proved to reduce the harmful effects of cigarette smoking.]

March 7, 1962:

Cigarette smoking is a cause of lung cancer and bronchitis, and probably contributes to the development of coronary heart disease and various other less common diseases.

The tobacco industry has not allowed these statements to go unchallenged. In 1953, when the public first began to take seriously the warn-

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15 Statement by the American Cancer Society, Consumers Union Report 65.
17 Royal College of Physicians of London, Smoking and Health 57 (1962).
nings about tobacco and health, the tobacco companies undertook to com-
bat the warning signals with statements of their own. To do so in unison,
five of the six major cigarette manufacturers formed the Tobacco In-
dustry Research Committee (TIRC), which since that time has acted as
a spokesman for the industry on public health matters. 18 The Commit-
tee announced its purposes on January 5, 1954, in a full page newspaper
advertisement entitled "A Frank Statement to Cigarette Smokers." TIRC
questioned the recent findings of research scientists and pledged
that it would sponsor impartial scientific studies concerning tobacco.
It promised to "let the results speak for themselves ...." 19

As data accumulated, however, TIRC could not remain impartial. In-
stead, the Committee acted to counter the medical pronouncements by
issuing statements challenging their validity. As of 1954, according to
TIRC's principal spokesman, Timothy Hartnett, "nobody ha[d] pro-
duced evidence proving that cigarette smoking causes lung cancer. 20
The following year, Mr. Hartnett labeled the results of a doctors' sur-
vey as "biased" and "nonscientific." 21 When the Surgeon General im-
plicated smoking in a 1958 statement, smokers were told by the TIRC
that this "adds nothing new." 22 A year later, in response to the con-
tinued efforts of the American Cancer Society to warn the public of the
health hazards involved, Mr. Hartnett suggested that their campaign
might be "a one-sided propaganda effort." 23 This position was reiterated
in 1963, with TIRC still maintaining that "in our present state of knowl-
edge, no one knows the answers." 24

Regardless of the merit of the TIRC position, the effect of these pro-
nouncements cannot be disregarded. Newspapers, fearful of offending
cigarette advertisers, have given full coverage to the industry's state-
ments. Undoubtedly, "TIRC's constant statements that the findings are
not conclusive have kept the speculation alive, and there is little doubt
that the steady smoker can find, in this conflict, the justification not to
stop." 25

The modern era in this field was ushered in by the Surgeon General's

18 For the material on TIRC, see Whiteside, supra note 10, at 68; Consumers Union
19 Consumers Union Report 107.
20 Id. at 109.
21 Ibid.
22 Id. at 109-10.
23 Id. at 110.
24 In recent years, much of TIRC's function has been taken over by the Tobacco
Institute.
25 Consumers Union Report 113.
was an indictment of cigarette smoking and a call for remedial action:

Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.

The Report has acted as a spur to governmental action on two fronts. Congress has enacted the Federal Cigarette Labeling and Advertising Act, requiring all cigarette packages to bear a warning label, and the Federal Trade Commission has promulgated a trade regulation rule compelling manufacturers, in all cigarette advertising and labeling, to disclose the health hazard of cigarettes. Both of these actions are designed to put controls on the promotion and sale of cigarettes. The FTC rule, however, is presently under a four year moratorium imposed by Congress, and is not scheduled to go into effect until 1969.

It must be recognized that the cigarette promotional methods which gave rise to these new strictures have undergone a considerable change in form from those of former years. Modern cigarette advertising has turned away from direct references to the physiological effects of smoking, emphasizing instead the smoker's psychogenic needs. Satisfaction, refreshing flavor, and taste are touted, usually in the form of a slogan—e.g., "Parliament lets you enjoy true, rich tobacco flavor," or "Pall Mall travels pleasure to you." Cigarettes are frequently linked with scenes depicting romance and the outdoors—"couples cavorting in menthol mists," as one observer described it.

Attempts to allay smokers' fears still exist, of course, but are far more subtle than in the days of the "Tar Derby." Modern advertisements generally concentrate on the physical attributes of the filter itself. Thus, Winston's "pure white modern filter," Viceroy's "deep-weave filter," and Lark's filter with charcoal granules are all prominent today. These advertisements, while scrupulously avoiding any specific mention of health benefits, may well be designed to convey the impression that technological advances have made for a healthier cigarette.

To date, the industry's efforts to maintain the level of cigarette smok-


27 A set of cigarette advertising guides, issued by the Federal Trade Commission on September 22, 1955, when the health scare was at its height, has had some influence in bringing about this shift in emphasis. The guides were aimed primarily at claims which referred to any physical effect to be derived from smoking. The guides were also designed to eliminate all representations as to nicotine and tar content, unless supported by "competent scientific proof."

In addition to the FTC guides, promotional copy today is governed by the Cigarette Advertising Code, which went into effect on January 1, 1966. The Code is an industry attempt at self-regulation, adopted in the hope of averting more stringent governmental measures. See note 214 infra and accompanying text.

ing have unquestionably been successful. Some 70 million people in the United States today are regular smokers, with the average smoker consuming approximately a pack of cigarettes a day. Despite this success, the industry is not sitting still. To cushion any possible decline in cigarette popularity, the companies have been diversifying their products and branching into other enterprises. R. J. Reynolds has been the most farsighted. Shortly after the 1953 scare developed, it entered the aluminum products field, and subsequently also acquired a fruit juice company. Reynolds' most recent acquisition is Penick & Ford, Ltd., makers of My-T-Fine desserts and Vermont Maid syrup.

The other tobacco companies have followed suit. P. Lorillard has entered the tire and cat food industries, U. S. Tobacco makes candy, Liggett & Myers has acquired the Allen Products Co., producers of Alpo dog food, and Philip Morris has become involved in razor blades, chewing gum, adhesive, and chemicals. American is the last of the major companies to attempt diversification. On February 3, 1965, American announced that it would acquire all of the stock of Consolidated Foods, a transaction which would have constituted one of the largest corporate mergers. The plan was thwarted, however, when the FTC failed to approve the merger.

Thus, in the relatively short period of a little over ten years, the rumblings of a violent upheaval have begun to shake the tobacco industry. The country's smoking habits, if not the volume, have undergone a drastic change. Cigarette advertising has been carefully scrutinized and thoroughly revised. Medical and scientific pronouncements have grown ever more convincing. The federal government has been moved to take remedial action. But the industry's dilemma has perhaps been made most vivid by the decision of the tobacco companies to gradually diversify their interests. If this is interpreted as a hedge against future losses now regarded by the industry as inevitable, then this fact alone, even absent the other manifestations, suggests that the cigarette interests may not be able to fend off the medical onslaught indefinitely.

II

A Summary of the Medical Evidence

By 1961 a number of groups—the American Cancer Society, the American Public Health Association, the American Heart Association,

29 Smoking Report 45.
30 Consumers Union Report 106.
33 Business Week, Dec. 11, 1965, p. 68.
and the National Tuberculosis Association among them—had become increasingly concerned about the health hazard of smoking and, in particular, about the indifference of the American public to the danger signals. They requested President Kennedy to appoint a commission to study the problem. In their request, they were supported by Surgeon General Luther L. Terry, who felt that significant developments of the early 1960's justified a comprehensive reassessment of the smoking-health controversy. These suggestions were heeded, and on June 7, 1962, the President and the Surgeon General jointly announced the establishment of the advisory committee.

It was agreed that the job should be completed in two phases. Phase I was to be "an objective assessment of the nature and magnitude of the health hazard..." The committee was not formed for the purpose of conducting new experiments or financing research programs. Rather, its function was limited to a critical review of the accumulated data, and the formulation of conclusions from this data.

Phase II was to encompass specific recommendations for action. This was not considered to be part of the advisory committee's responsibility, and no decisions on Phase II were to be made until after the completion of Phase I and the issuance of the committee's report.

The task took nearly 18 months. As the time for release of the report approached, both the tobacco industry and the general public grew apprehensive. It was feared that the causal link between cigarettes and lung cancer (and possibly other diseases) might at last be conclusively established. Finally, on January 11, 1964, the Smoking Report was published. The report pulled no punches. The conclusions were every

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35 Smoking Report 7. Among the developments cited by Dr. Terry were: (1) several new studies, in particular one by the Royal College of Physicians of London, indicating major adverse health effects created by smoking; (2) concrete action taken by the British, Danish, and Italian governments to curtail cigarette advertising; (3) a request from the FTC for guidance in regulating the labeling and advertising of tobacco products; and (4) an ever-increasing consensus among physicians as to the health hazards of smoking. Id. at 8.
36 Id. at 7-8.
37 Id. at 8.
38 Id. at 13.
39 Ibid.
40 Id. at 8.
41 With characteristic secrecy, the Government guarded the pending smoking report as if it were a highly confidential military matter. Formal meetings of the committee took place in a windowless underground chamber, and special keys were necessary to operate elevators leading to the meeting room. Committee materials were locked in subterranean vaults. The combination to open these vaults was not entrusted to any single member of the committee. Security precautions taken at top military or diplomatic conferences could hardly be more restrictive than those employed here. N.Y. Times, Jan. 12, 1964, p. 65, col. 8.
bit as forceful as had been feared, and the finding with respect to lung cancer was particularly striking:

Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far out weighs all other factors. The data for women, though less extensive, point in the same direction.

The risk of developing lung cancer increases with duration of smoking and the number of cigarettes smoked per day, and is diminished by discontinuing smoking.

The committee also adopted formal conclusions on the relation between cigarette smoking and other diseases. In determining the weight to be

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42 See text accompanying note 26 supra.
43 At no time does the Report assert that cigarette smoking is the sole cause of lung cancer. The fact that approximately 10% of the lung cancer cases occur in nonsmokers indicates that other causal factors do exist. In particular, two other factors were noted by the committee.
(a) Air pollution: Atmospheric pollution, urbanization, and industrialization are all causes of respiratory irritation, but to a much lesser degree than cigarette smoke. The explanation lies in the type of exposure. For nearly all smokers, the consumption of cigarettes takes place consistently and periodically throughout the day, every day of the year. Air pollution, on the other hand, varies considerably in concentration from season to season, even in the most densely populated urban and industrial centers. Id. at 296.
(b) Occupational hazards: An excess of lung cancer mortality has been observed among chromium and nickel workers, and among uranium miners. Smaller but significant excesses were found among coal gas and asbestos workers. The presence of arsenic as a common element in many of these ores has been suggested as a possible causal factor. But these occupational hazards are relevant for only a very small minority of the population, and do not account for the tremendous increase in lung cancer mortality for the population at large. Id. at 193-94.
44 The report was based on data drawn primarily from studies dealing with male subjects. The data for females, though drawn from smaller samples, tended to corroborate the results. Although female mortality was found to be below that for males, the report attributed the discrepancy to the difference between male and female smoking patterns, not to a biological difference between the sexes. It noted that there is an increasing percentage of nonsmoking females at the higher ages, that females consistently begin smoking later in life, and that males at all ages smoke considerably more cigarettes per day than do females. Id. at 177-78.
45 Id. at 37.
46 Cancers Other than Lung Cancer:
- Evaluation of the evidence leads to the judgment that cigarette smoking is a significant factor in the causation of laryngeal cancer in the male.

The evidence on the tobacco-esophageal cancer relationship supports the belief that an association exists. However, the data are not adequate to decide whether the relationship is causal.

Available data suggest an association between cigarette smoking and urinary bladder cancer in the male but are not sufficient to support a judgment on the causal significance of the association.

No relationship has been established between tobacco use and stomach cancer.

Chronic Bronchitis and Pulmonary Emphysema:
Cigarette smoking is the most important of the causes of chronic bronchitis in the United States, and increases the risk of dying from chronic bronchitis.
A relationship exists between pulmonary emphysema and cigarette smoking but it has not been established that the relationship is causal.
accorded these conclusions, the committee's conception of the term "cause" is crucial. Recognizing this, the committee took care to describe in detail the factors which had to be present before it would conclude that a causal association existed. It emphasized that wherever the word "cause" was employed in the report, it should be accorded full weight.

No member of this Committee used the word "cause" in an absolute sense in the area of this study. . . . All were thoroughly aware of the fact that there are series of events in occurrences and developments in these fields, and that the end results are the net effect of many actions and counteractions.

Granted that these complexities were recognized, it is to be noted clearly that the Committee's considered decision to use the words "a cause," or "a major cause," or "a significant cause," or "a causal association" in certain conclusions about smoking and health affirms their conviction. 47

Elaborating further, the committee stated that "cause," as used in the report, was meant to convey "the notion of a significant, effectual relationship between an agent and an associated disorder or disease in the host." 48 Thus, despite the fact that "cause" was not employed in an absolute sense, the concept of causation as used throughout the Smoking Report clearly has legal significance.

The studies which comprise the Surgeon General's Smoking Report lie at the very heart of the cigarette controversy, for it is on their validity that the justification for all types of remedial action rests. Hence, the remainder of this section will present a brief summary of the factual and statistical content of the report.

For the bulk of the population of the United States, the importance of cigarette smoking as a cause of chronic bronchopulmonary disease is much greater than that of atmospheric pollution or occupational exposures.

Cardiovascular Disease:

Male cigarette smokers have a higher death rate from coronary artery disease than nonsmoking males, but it is not clear that the association has causal significance.

Other Conditions:

Epidemiological studies indicate an association between cigarette smoking and peptic ulcer which is greater for gastric than for duodenal ulcer . . . .

Increased mortality of smokers from cirrhosis of the liver has been shown in the prospective studies. The data are not sufficient to support a direct or causal association.

Women who smoke cigarettes during pregnancy tend to have babies of lower birth weight.


47 Id. at 21.
48 Ibid.
A. Population Studies

The Surgeon General's Report is based on data drawn primarily from epidemiological studies. These are broadly based population studies, generally of two types. In the first type, which are retrospective in nature, a group of individuals with a specific disease (e.g., lung cancer) and a control group of individuals without the disease are chosen at random, and their smoking histories are compared. Whenever the healthy control group is found to contain fewer smokers than the afflicted group, and the difference is large enough to be statistically significant, then an inference may be validly drawn that some relation between smoking and the particular disease exists.

The second category of epidemiological studies are prospective. A randomly chosen group of normal individuals are classified according to their smoking habits, and are then observed for a fixed period of time, with the aim of observing correlations between smoking and any diseases the subjects may develop.

Seven prospective studies involving a total of 1,123,000 men were subjected to careful scrutiny. These studies revealed that the death rate for all smokers49 (based on all causes of death) is 68% higher than for nonsmokers (mortality ratio = 1.68). Moreover, the studies revealed still higher mortality rates for a number of major diseases, including several types of cancer, bronchitis and various circulatory ailments.50 Within these generalizations, a number of variables were found to have a significant effect on mortality. Of most serious consequence were: (1) type of tobacco consumed (cigarettes vs. cigars or pipes); (2) daily rate of consumption; (3) age at which smoking began and terminated; (4) degree of inhalation; (5) and butt length. Each will be considered below.

49 "Death rate" and "mortality ratio" as used in the report are terms with definite mathematical and statistical meaning. For a discussion illustrating the statistical significance and potential faults of the terms, see Smoking Report 84.

50 The combined results for specific diseases are as follows:

<table>
<thead>
<tr>
<th>Cause of Death</th>
<th>Mortality ratio for smokers of cigarettes (normal = 1.0)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lung cancer</td>
<td>10.80</td>
</tr>
<tr>
<td>Bronchitis and emphysema</td>
<td>6.10</td>
</tr>
<tr>
<td>Cancer of larynx</td>
<td>5.40</td>
</tr>
<tr>
<td>Oral cancer</td>
<td>4.10</td>
</tr>
<tr>
<td>Cancer of esophagus</td>
<td>3.40</td>
</tr>
<tr>
<td>Ulcers</td>
<td>2.80</td>
</tr>
<tr>
<td>Other circulatory diseases</td>
<td>2.60</td>
</tr>
<tr>
<td>Cirrhosis of liver</td>
<td>2.20</td>
</tr>
<tr>
<td>Cancer of bladder</td>
<td>1.90</td>
</tr>
<tr>
<td>Coronary artery disease</td>
<td>1.70</td>
</tr>
<tr>
<td>Other heart diseases</td>
<td>1.70</td>
</tr>
<tr>
<td>All causes of death</td>
<td>1.68</td>
</tr>
</tbody>
</table>

Id. at 102.
Type of Tobacco Consumed. The type of tobacco consumed had a considerable effect on overall mortality. The mortality rate for cigar and pipe smokers was found to be far below that observed in cigarette smokers, and only slightly higher than that for nonsmokers. This difference is largely attributable to the fact that cigar and pipe smokers rarely inhale, while it is the unusual cigarette smoker who does not inhale at all. Studies have established a high correlation between the degree of inhalation and adverse health consequences.

Daily Rate of Consumption. Individual variations in the daily rate of consumption of cigarettes also produced very substantial fluctuations in mortality rates. A smoker who consumes fewer than 10 cigarettes per day has a death rate (from all causes) 40 per cent higher than a nonsmoker. But an individual who smokes in excess of two packs a day has a death rate that is 120 per cent higher than the nonsmoker's death rate. When the specific disease of lung cancer is considered separately, the figures are even more striking. Moderate smokers (less than 10 cigarettes a day) were found to be seven times as prone to lung cancer as nonsmokers, while the heaviest smokers (over two packs a day) are more than 20 times as likely to contract the disease.

Perhaps the most significant aspect of these figures is that even the moderate smoker incurs a risk that is substantially above that for the nonsmoking population. This serves to dispel any suggestion that it is only the overindulgent who are subjected to a health hazard. It is this,

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Because cigarettes are not only the most deleterious but are also the most popular form of tobacco consumption, our focus, and that of the Smoking Report, is on cigarette smoking and the hazards which it creates.

The risk of contracting certain specified diseases, though, is subject to more than a two-fold increase for cigar and pipe smokers:

<table>
<thead>
<tr>
<th>Cause of Death</th>
<th>Mortality Ratio (normal = 1.0)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oral cancer</td>
<td>3.40</td>
</tr>
<tr>
<td>Cancer of esophagus</td>
<td>3.20</td>
</tr>
<tr>
<td>Cancer of larynx</td>
<td>2.80</td>
</tr>
<tr>
<td>Lung cancer</td>
<td>1.70</td>
</tr>
<tr>
<td>Cirrhosis of liver</td>
<td>1.60</td>
</tr>
<tr>
<td>Ulcers</td>
<td>1.60</td>
</tr>
<tr>
<td>Cancer of kidney</td>
<td>1.30</td>
</tr>
<tr>
<td>Cancer of intestines</td>
<td>1.30</td>
</tr>
<tr>
<td>Other circulatory diseases</td>
<td>1.20</td>
</tr>
<tr>
<td>All causes of death</td>
<td>1.06</td>
</tr>
</tbody>
</table>

Id. at 107.

The complete chart is as follows:

<table>
<thead>
<tr>
<th>Cigarettes smoked per day</th>
<th>Mortality Ratios (all causes)</th>
<th>Mortality Ratios (lung cancer)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10</td>
<td>1.40</td>
<td>7.44</td>
</tr>
<tr>
<td>10-19</td>
<td>1.70</td>
<td>8.42</td>
</tr>
<tr>
<td>20-39</td>
<td>1.90</td>
<td>17.91</td>
</tr>
<tr>
<td>40 or more</td>
<td>2.20</td>
<td>20.64</td>
</tr>
</tbody>
</table>

Id. at 29; Consumers Union Report 36.
possibly more than any other factor, that makes cigarette smoking such an insidious menace to health.

(3) **Duration of Habit.** The duration of the smoking habit was found to have a significant effect upon mortality rates. Individuals who took up the habit at an early age, and who continued smoking late in life, had mortality rates as high as double those for smokers with shorter smoking spans. It was also found that ex-smokers generally had considerably lower mortality rates than current cigarette smokers. In the five prospective studies where this comparison was made, the ex-smokers consistently had 30 per cent lower mortality than current smokers, although their rates were higher than rates for those who never smoked.

(4) **Degree of Inhalation.** Inhalation was found to have a very marked effect upon the mortality figures, as one would expect. For example, moderate to deep inhalers who smoked an average of only 1-9 cigarettes per day actually had a higher mortality than people who smoked an average of 20-39 cigarettes daily but did not inhale.

Laboratory experiments with animals suggest the reason why the degree of inhalation is so significant. Through the use of radioactive elements, it has been possible to trace the various particles contained in cigarette smoke as they permeate the respiratory tracts of laboratory animals, and it has been found that substantial amounts are deposited permanently in the deepest passages of the tracheobronchial tree.

The results of studies with live human subjects point in the same direction. Despite the large amount of smoke that appears to leave the smoker’s lungs when he exhales, a very large percentage of the smoke constituents in each puff are retained in the smoker’s system after exhalation. When the smoke is inhaled and held in the lungs for a relatively short period of two to five seconds, the smoker’s system retains approximately 80-90 per cent of the particles in the cigarette smoke. If the puff is deliberately held for a considerably longer period (up to 30 seconds), his system retains nearly 100 per cent of the particles he has inhaled.

(5) **Butt Length.** Can also affect mortality to a marked degree.

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54 Where smoking was begun prior to age 20, the mortality for smokers was at least 98% higher than for nonsmokers. However, where the smoking habit was not started until after age 25, a maximum ratio differential of only 39% was observed. Similarly, it was found that stopping smoking after the age of 55 contributed to a higher death rate than if smoking ceased at an earlier age. Smoking Report 89, 93.

55 The differential between ex-smokers and current smokers actually may be well in excess of 30%, because any group of ex-smokers is likely to include a number of people who quit smoking because of some physical ailment (not caused by smoking), whose mortality would therefore be somewhat higher to begin with.

56 Smoking Report 91.

57 Id. at 265.

58 Id. at 264.
This is because the unconsumed portion of each cigarette acts as a natural filter, trapping many of the toxic substances that would otherwise reach the smoker's mouth. As the cigarette gets progressively shorter, not only does the tobacco provide less filtration, but each puff also contains a portion of the trapped substances from earlier puffs. Thus, the smoker who consumes one cigarette to its very end exposes himself to more toxic elements than the smoker who consumes two cigarettes but extinguishes each at the half-way mark.

It has been observed, for example, that British smokers have a significantly higher incidence of lung cancer than their American counterparts. Variations in their smoking patterns account for this, since American smokers generally waste more of each cigarette than the more economical Englishmen. This is confirmed by a recent study which found that the average length of an American cigarette butt was 30.9 millimeters, compared with 18.7 millimeters for the British discard. The affluent American smoker, by discarding his half-finished cigarette, is unconsciously reducing the health hazard to which he subjects himself.

When the statistical results for all these variants are taken into consideration, they lead to one conclusion: mortality rates from all causes, and particularly the lung cancer mortality rates, increase in direct proportion to any increase in exposure to cigarette smoke. The committee's logic seems unimpeachable:

If cigarette smoking is an important factor in lung cancer, then the risk should be related to the amount smoked, amount inhaled, duration of smoking, age when started smoking, discontinuance of smoking, time since discontinuance, and amount smoked prior to discontinuance. Herein lies the greatest coherence with the known facts of the disease. In almost every study for which data were adequate and which was directed to amount of smoking, duration of smoking and age when smoking was begun, the associations or calculated relative risks (direct or indirect) revealed gradients in the direction of supporting a true dose effect.

B. Laboratory Studies

Numerous laboratory experiments have been conducted over the past 15-20 years to determine exactly how substances contained in cigarette smoke affect the human body. While the inquiries have been directed toward a wide variety of ailments, the three categories of diseases which have received particular attention are (1) cancer (primarily lung cancer), (2) cardiovascular diseases, and (3) chronic bronchitis.

(1) Cancer (Primarily Lung Cancer). A series of aromatic hydrocarbons which are present in cigarette smoke have been isolated in

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59 Id. at 177.
60 Id. at 187-88.
laboratory tests and shown to have carcinogenic (cancer-producing) properties.\textsuperscript{61} The aromatic hydrocarbon which is most prevalent in the smoke\textsuperscript{62} is a compound called benzo(a)pyrene, which has been proven one of the most potent of all carcinogens now known.\textsuperscript{63} Moreover, when certain other compounds also present in cigarette smoke were added to benzo(a)pyrene, the carcinogenic potency of the whole was found to be vastly increased.\textsuperscript{64}

Having shown that these carcinogenic compounds are present in cigarette smoke, the next step in the scientific inquiry has been the development of a causal hypothesis to explain the process by which cigarette smoking is capable of breaking down normal lung functioning. The theory which has been advanced is that cigarette smoke paralyzes the cilia that line lung passages, thereby depriving the lungs of an important protective mechanism. This permits the smoke to come in contact with the surface lining (epithelium) of the respiratory tract. The chronic irritation which ensues would be quite capable of producing hyperplasia, the first stage in the development of cancer.\textsuperscript{65} Once this has taken place, further smoking gives the carcinogens in cigarette smoke an opportunity to induce an alteration in the cell nucleus, thereby initiating metaplasia.\textsuperscript{66} At this point, cancer has a foothold. Unless halted through prompt medical care, usually surgery, invasive cancer is the inevitable tragic consequence.\textsuperscript{67}

The results of a recent study financed by the American Cancer Society

\textsuperscript{61} Carcinogenicity is tested by brushing the backs of young mice with a dilute solution of tar in an organic solvent. The tests are begun when the mice are six weeks old, and are repeated three times a week for a year or more. During this time, the mice are kept under constant surveillance to detect the outbreak of cancerous lesions. Id. at 58.

\textsuperscript{62} Ironically, most of these carcinogenic substances are not present in the native tobacco leaf. Rather, they are formed by pyrolytic process (chemical decomposition) as the tobacco and cellulose burn together at temperatures in the neighborhood of 850° C. Id. at 59.

\textsuperscript{63} Id. at 55.

\textsuperscript{64} Id. at 58-59.

\textsuperscript{65} Hyperplasia involves an increase in the number of cells in a particular tissue (and a consequent increase in the size of the tissue), resulting from a division of cells at a faster rate. It can be caused by any sort of chronic irritation anywhere in the body. The subsequent stages in the conversion from normal cells to cancerous cells are metaplasia and metastasis, discussed, notes infra.

\textsuperscript{66} In this stage, an alteration in the cell itself occurs, most probably in the DNA chromosomes contained in the cell nucleus. When these metaplastic cells divide, they give rise to further cells of the same character. Eventually a lesion will develop, consisting solely of metaplastic cells. Initially, the cells contained in such a lesion will continue to live within their own boundaries, and will not invade the neighboring tissue. At this stage, the lesion is known as a cancer in situ, and if diagnosed and removed at this stage, the cancer will not recur. Consumers Union Report 40-44.

\textsuperscript{67} At this final stage, metastasis, the cells from the original lesion break away and are carried by the blood stream to be deposited in other parts of the body, where new cancers will then develop. Alternatively, the cells from the original lesion may simply break through their boundaries and invade neighboring tissues. If either or both of these processes take place, the disease is generally fatal to the host. Ibid.
have provided a great deal of support for this theory. Through the microscopic study of human lungs at autopsy, it was established that the incidence of hyperplasia, metaplasia, and cells with atypical nuclei was very much higher in the lungs of those who had been cigarette smokers than in the lungs of those who had not smoked. In addition, carcinoma *in situ* was found only in the lungs of individuals who had been smokers. Perhaps even more significant, the number of tissue samples that exhibited these various pre-cancerous and cancerous conditions increased in proportion to the amount of smoking done by the individual.

The Auerbach group made another finding that should be of even greater interest to current cigarette smokers: that these pre-cancerous conditions can be reversed by the cessation of smoking, as long as the lesions have not reached the invasive stage and metastasized. The Auerbach group encountered a rare type of “disintegrating cell” with a contracted nucleus, which was present only in the lungs of ex-smokers and was totally non-existent in the lungs of either the smokers or nonsmokers. Auerbach inferred that these disintegrating cells had previously reached a pre-cancerous state (through hyperplasia and metaplasia) and, due to the cessation of smoking by the ex-smoker, were dying out instead of multiplying. The group concluded:

> We believe that the findings of an increase in the number of cells with atypical nuclei following exposure to cigarette smoke, and a decrease in such cells with cessation of smoking, provide a reasonable explanation for the epidemiological findings [that a causal link exists between cigarette smoking and lung cancer].

Persons who have smoked cigarettes for many years sometimes express the opinion that the harm has already been done and that they might as well continue to smoke since it will do them no more harm. The evidence is completely contrary to that point of view . . . . Cigarette smokers who give up the habit thereby reduce their risk of acquiring lung cancer.

(2) *Cardiovascular Diseases.* In addition to their study of lung tis-

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69 Lung tissues of three categories of individuals—smokers, nonsmokers and ex-smokers—were examined by the Auerbach group. The percentages of lung tissue slides containing metaplastic cells were as follows: 1.2% in nonsmokers; 6.0% in ex-smokers; and 93.2% in current smokers. Id. at 120.
70 Id. at 124.
71 The 1.7 mortality ratio for heart disease, although relatively low, takes on far greater significance when it is considered that cardiovascular diseases claim more than 700,000 lives in the United States each year. Hence the 1.7 mortality ratio represents between 32.9% and 51.7% of all the excess deaths attributable to smoking. In contrast, deaths from lung cancer annually number approximately 39,000, and the much higher 10.8 mortality ratio accounts for only 13.5% to 24.0% of the total excess deaths. Smoking Report 317. Thus, any link between smoking and cardiovascular disease is cause for concern, even though the report does not formally denominate the relationship as causal.
sues for pre-cancerous cellular changes, the Auerbach group also investigated the extent to which cigarette smoking impairs the capacity of the lungs to function efficiently. The investigations revealed four specific conditions that were far more prevalent in the lungs of smokers: (a) thickening of the walls of small arteries, thus lessening the amount of blood that can flow through at a given speed; (b) thickening of the walls of the tiny arterioles; (c) thickening of the walls of the air sacs in the bronchial tubes, thus impeding the blood from picking up oxygen and depositing carbon dioxide; (d) rupturing of the membranes which separate the bronchial air sacs, thus depriving the sacs of their air-containing ability.

These four conditions impose a substantial burden on the heart, by forcing it to supply more blood to the lungs in order to meet the body's oxygen needs. They reduce the efficiency of the "heart-lung machine" and, depending upon their severity, would be capable of seriously impairing heart functioning. Given these findings, the observed statistical association between cigarette smoking and heart disease is not surprising.

These observations alone, however, are not enough to justify a conclusion that cigarette smoking is a cause of heart disease. The existence of a third factor—a coronary-prone personality—may serve equally well to explain these observations. Such an individual is depicted as "the aggressive, competitive person who takes on too many jobs, fights deadlines, and is obsessed by the lack of adequate time for the performance of his work . . . ." Frequently, these people are also heavy smokers. In such people, cigarette smoking and heart disease may both be effects of the same causal factor: a coronary-prone personality.

(3) Chronic Bronchitis. The Report's conclusions concerning chronic bronchitis are well supported by the laboratory findings. A number of morphological changes that are commonly associated with this disease have been observed in the respiratory tracts of cigarette smokers. Such conditions have generally not been found in nonsmokers. Hyperplasia of the tissue cells was usually present. The surface epithelium evidenced metaplasia in varying degrees. The goblet cells and mucous glands, which aid in cleansing the lung, were substantially affected. The goblet cells in particular had considerable distortion.

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72 Consumers Union Report 73-78.
73 Ibid.
74 Smoking Report 321.
75 See note 46 supra.
76 Smoking Report 271.
Prevalence studies point in the same direction. These have shown that the usual symptoms associated with chronic bronchitis—chronic cough, sputum, and breathlessness—occur with much greater frequency in smokers than in nonsmokers.\textsuperscript{77} When taken together with the laboratory analyses, this evidence provides a strong basis for the Report's conclusion that "cigarette smoking is the most important of the causes of chronic bronchitis in the United States . . . ."\textsuperscript{78}

In conclusion, the Smoking Report provides an excellent survey of the evidence bearing on the relationship between cigarette smoking and various diseases. In light of this evidence, the findings of the Advisory Committee seem entirely justified. Moreover, these findings are enhanced by the committee's scrupulous avoidance of dogmatism. Witness the detail in which it spelled out its concept of the word "cause,"\textsuperscript{79} the attention given to other possible causal factors in the development of lung cancer,\textsuperscript{80} and the suggestion that an altogether extraneous factor may be responsible for the observed association between cigarette smoking and heart disease.\textsuperscript{81}

The continued smoking of cigarettes on a large scale poses a serious health hazard to the American public. Efforts of medical and scientific groups to discourage smoking have proved to be of no avail. Remedial action, predicated on the conclusions of the Smoking Report, has become inevitable.

III

TORT LITIGATION

The cigarette smoker who contracts lung cancer as a result of a long history of tobacco consumption has but one potential legal remedy: to sue the cigarette manufacturer in tort, usually on the theory that the manufacturer has acted in breach of his undertaking to supply a product of merchantable quality. As of the present writing, four cigarette-cancer cases have been fully litigated, at both the trial and appellate levels. The facts in all four cases are remarkably similar: plaintiff, a confirmed smoker for many years, developed lung (or laryngeal) cancer; subsequently he (or his family) instituted suit against the cigarette manufacturer to recover for his injuries; and, most significant, in each instance plaintiff became apprised of his illness not later than the mid-1950's and stopped smoking on learning of his condition. Thus, every case litigated

\textsuperscript{77} Id. at 280-89.
\textsuperscript{78} Id. at 38.
\textsuperscript{79} See text accompanying notes 47-48 supra.
\textsuperscript{80} Note 43 supra.
\textsuperscript{81} See text accompanying note 74 supra.
to date has concerned a plaintiff who did all of his smoking and contracted cancer prior to the onset of the health scare. This is a fact of critical importance which, as will be shown, has largely influenced the outcome of the first round of cigarette-cancer cases, all of which have been decided in favor of the respective cigarette manufacturers. Parts A and B of this section are entirely devoted to these cases and the issues principally involved.

The remainder of the section (parts C and D) considers the hypothetical case which will inevitably arise—that of the smoker who, in spite of the repeated warnings, continues to smoke, develops lung cancer subsequent to the onset of the health scare, and thereafter brings suit against the tobacco company to recover damages. This situation poses a new set of issues for the courts to consider. It is likely, however, that the outcome in these future cases will not vary significantly from the results in the cases already litigated.

A. The Cigarette-Cancer Cases to Date

The most famous of the cigarette-cancer cases, *Green v. American Tobacco Co.*,\(^8\) provides an excellent illustration of the long and tortuous road faced by a would-be plaintiff in one of these cases. Since the *Green* case highlights a number of the legal issues in this area, it is worth examining in some detail.

1. **The Green Litigation**

Edwin Green began smoking Lucky Strike cigarettes in 1924 or 1925, when he was sixteen years old. For the next thirty years, he smoked one to three packs of cigarettes a day. On February 1, 1956, Green learned that he had contracted cancer of the lung. Nearly two years later, in December 1957, he instituted suit against the American Tobacco Company for $1.5 million, claiming that the company was responsible for his illness. Green died the following February, at the age of 49, and the suit was continued by his son, the appointed administrator of his estate, and by his widow.\(^8\)

The plaintiff's theory\(^8\) was that the American Tobacco Company had warranted the fitness and merchantability of its product\(^8\) and should be

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\(^8\) Complete citations are given in connection with the subsequent discussion.

\(^8\) Such a procedure is authorized by Florida law, which provides for survival of the cause of action for personal injuries. Fla. Stat. Ann. \$ 45.11 (Supp. 1965).

\(^8\) Plaintiff originally asserted six separate counts in his complaint, but ultimately pressed only the implied warranty theory.

\(^8\) Under Florida law, no distinction was drawn between the two types of warranty. Since that time, however, Florida has passed the UCC which draws such a distinction. Fla. Stat. Ann. §§ 672.2-314-315 (1966).
held liable for any harm caused by breach of that implied warranty. At the close of the trial, the jury was instructed to answer four written interrogatories: (1) Did the decedent have primary cancer in his left lung? (2) Was lung cancer one of the causes of his death? (3) Was the smoking of Lucky Strike cigarettes a proximate cause of defendant's illness? (4) Could defendant, prior to February 1, 1956, "by the reasonable application of human skill and foresight," have known that users of Lucky Strike cigarettes would be in danger of contracting lung cancer?

The jury answered the first three interrogatories in the affirmative. Its response to the fourth, however, was negative, and consequently, it returned a general verdict for the defendant. Thus, the fourth interrogatory—reflecting the trial judge's view that inability to foresee harm constitutes a defense to implied warranty liability—proved decisive at the trial level.

It was the alleged invalidity of this legal assumption by the trial judge that served as the major ground for appeal to the Fifth Circuit. The Court of Appeals observed that implied warranty liability is predicated on the theory that the consumer, relying on the seller's superior knowledge and skill concerning his product, may justifiably expect that the product can safely be put to its intended use. Where such superior knowledge and skill does not exist, the buyer's reliance can no longer be justified and the predicate for implied warranty liability ceases to exist. Since, according to the jury verdict, American Tobacco Company was in no better position than the consuming public to appreciate the hazard inhering in cigarettes, the court found no implied warranty and affirmed the decision below.

In a strong dissent, Judge Cameron maintained that under Florida law the manufacturer's inability to foresee the harm does not constitute a defense. The essence of his dissent was that warranty liability is akin to strict liability and is unaffected by a showing that defendant exercised reasonable care.

A petition for rehearing was filed. In view of the strong dissent, the court granted the rehearing for the sole purpose of certifying the contested issue to the Supreme Court of Florida. Pursuant to the certification, the Supreme Court of Florida determined conclusively that the seller's knowledge of the danger inhering in its product was irrelevant, under Florida law, to an action in implied warranty.

86 Personal Injury Newsletter 110 (1960).
87 Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).
88 Id. at 77-85 (dissenting opinion).
Since the Fifth Circuit's decision had rested on an erroneous interpretation of Florida law, the case came before that court for a second time, with both parties urging that a new trial was unnecessary. The plaintiff contended that the advisory opinion rendered by the Supreme Court of Florida required an entry of judgment in his favor, with remand only to determine the size of the award. The defendant manufacturer, on the other hand, argued that its undertaking should be limited either to (a) providing an article of quality and workmanship equal to others currently on the market, or (b) supplying a product free from any foreign substance or substandard ingredient. Since the defendant had met both of these obligations, it urged the court to adhere to its former decision.

The Court of Appeals for the Fifth Circuit adopted neither approach. Rather, as a result of the Florida Supreme Court's advisory opinion, the court now interpreted the scope of the manufacturer's undertaking as an assurance that its product is "reasonably fit and wholesome" for human (i.e., public) consumption. Since the jury had never passed on the question whether the Lucky Strike cigarettes did in fact meet the reasonable fitness test, the court of appeals remanded for the jury to resolve this issue of fact.

This decision evoked another vigorous dissent by Judge Cameron. He was of the opinion that the breach of defendant's implied warranty had already been conclusively determined by the jury and that a remand was unnecessary:

The finding of the jury has settled the fact that the cigarettes sold to Green were not reasonably fit and wholesome for use by him. No other question is, in my opinion, involved under the law of Florida with which alone we are dealing.

The case was remanded to the United States District Court for the Southern District of Florida, the site of the original trial. On November 27, 1964, it was ready to go to the jury for the second time. The judge's rambling charge to the jury reflected the holding of the court of appeals:

The burden is upon the plaintiff, as I have stated before, to prove, first, that the cigarettes were not reasonably fit or wholesome, as the case may be, for the use of the general public and for the use for which they were sold.

... The mere fact that Green died would not in itself establish an unwholesome condition. But the question is, are cigarettes unwholesome

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92 Id. at 679.
93 Id. at 681 (dissenting opinion).
for the general public? If they are unwholesome, then Green and Green's widow and Green's estate would be entitled to recover damages.\textsuperscript{94}

After reviewing the instructions with counsel, the court called the jury back for the following clarification:

I also told you that the question was one of a common danger to the general public as distinguished from Mr. Green. That is for your determination. And if these cigarettes did endanger any important number of cigarette smokers—any responsible number—any large segment of those smokers—then it would be a breach of the implied warranty for fitness, which is imposed upon the manufacturer who sells the cigarettes.

If they did not, there would be no breach of warranty.\textsuperscript{95}

Side bar conference with counsel produced this further clarification:

Counsel do not like the words "important number." They think that it is a little bit too definitive. I mean, does it endanger any responsible segment of the general public? Does cigarette smoking endanger them as to the threat of lung cancer? If it does, the implied warranty is violated.\textsuperscript{96}

An hour and a half later, the jury was ready with its decision—a unanimous verdict in favor of defendant American Tobacco Company.\textsuperscript{97} Whether the case has been finally laid to rest, however, remains to be seen.\textsuperscript{98}

2. \textit{The Lartigue, Ross, and Pritchard Cases}

As of the present writing, three other cigarette-cancer cases have been fully litigated:\textsuperscript{99} \textit{Lartigue v. R. J. Reynolds Tobacco Co.},\textsuperscript{100} \textit{Ross v. Philip Morris & Co.},\textsuperscript{101} and \textit{Pritchard v. Liggett & Myers Tobacco Co.}\textsuperscript{102}


\textsuperscript{95} \textit{Id.} at 6096.

\textsuperscript{96} Ibid.

\textsuperscript{97} However, the jury foreman was sufficiently impressed by the trial to quit smoking himself. After the trial he remarked: "If we had had to decide if cigarettes are safe, we would have said 'no.' . . . But the judge told us specifically to decide if cigarettes are reasonably safe and wholesome for human consumption. . . . We decided the key word was 'reasonable.'" N.Y. Times, Nov. 30, 1964, p. 15, col. 1.

\textsuperscript{98} An appeal to the Fifth Circuit was filed by the Green family on January 25, 1965. N.Y. Times, Jan. 27, 1965, p. 20, col. 1.

\textsuperscript{99} Six other cases have been decided on various procedural grounds without having been heard on the merits: R. J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963) (statute of limitations runs from the time decedent's lung cancer first became apparent to him); Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961) (preclusion order arising out of insufficient pre-trial statement declared to be in conflict with the federal rules); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960) (similar to holding in Hudson); Cooper v. R. J. Reynolds Tobacco Co., 158 F. Supp. 22 (D. Mass. 1957), aff'd, 236 F.2d 464 (1st Cir.), cert. denied, 358 U.S. 875 (1958) (summary judgment for defendant, plaintiff having failed to show that representations complained of were actually made); Deshields v. Liggett & Myers Tobacco Co., (M.D. Pa. 1958, unreported) (mistrial—no decision on the merits); Sharp v. P. Lorillard Co. (E.D. La. 1958, unreported) (mistrial—no decision on the merits).

\textsuperscript{100} 317 F.2d 19 (5th Cir. 1963).

\textsuperscript{101} 328 F.2d 3 (8th Cir. 1964).

\textsuperscript{102} 295 F.2d 292 (3d Cir. 1961); 350 F.2d 479 (3d Cir. 1965).
In *Lartigue*, plaintiff sued both Liggett & Myers and R. J. Reynolds Tobacco Companies when her husband died of lung and laryngeal cancer, alleging that his illness was due to his long history of smoking defendants' tobacco products (from 1899 to 1954). Plaintiff contended that, since cigarettes are manufactured for human consumption, the manufacturer's warranty should be co-extensive with the warranty of a food processor. As such, a cigarette manufacturer should be held to warrant the wholesomeness of his product and be strictly liable for any injuries due to its unwholesomeness.

The court accepted the analogy to cases involving food, but observed that in food cases strict liability had been imposed only where the harm was a foreseeable consequence of the defect. Even in food cases no liability had been imposed where the type of harm involved could not have been foreseen at the time the injury occurred. The court attempted to distinguish between the extent of knowledge required to support a claim for negligence, and the very limited degree of foreseeability that is a prerequisite for breach of warranty:

Under the doctrine of strict liability it is not necessary for the plaintiff to show that the defendant failed to use due care or that the defendant had knowledge of the defective condition. However, it is necessary to show that the warranted product contained an element from which, on the basis of existing knowledge, harm might be expected to flow.

... Thus far, public policy has not decreed absolute liability for "the harmful effects of which no developed skill or foresight can avoid."103

In importing this quasi-negligence standard into the warranty field, the *Lartigue* court relied heavily upon the initial decision of the Fifth Circuit, in *Green v. American Tobacco Co.*,104 that inability to foresee harm affords the manufacturer a viable defense. All basis for reliance upon *Green* was destroyed, however, when subsequent certification to the Supreme Court of Florida forced a reversal in the *Green* court's initial position.105 The position taken in *Lartigue*, therefore, was weakened considerably by the subsequent about face in *Green*.106

103 *Lartigue v. R. J. Reynolds Tobacco Co.*, supra note 100, at 35, 39. A number of writers have suggested that this position is tantamount to exonerating the manufacturer from liability for breach of warranty whenever he can prove that he has not been negligent. See 1 Frumer & Friedman, Products Liability § 16.03[a][a], at 386.4 (1965); Rossi, "The Cigarette-Cancer Problem: Plaintiff's Choice of Theories Explored," 34 S. Cal. L. Rev. 399, 410-11 (1961); 3 Personal Injury Newsletter 165 (1960).

104 304 F.2d 70 (5th Cir. 1962).

105 325 F.2d 673 (5th Cir. 1963). See text accompanying notes 89-92 supra.

106 It is ironic to note that the majority of the court of appeals in the second Green decision relied upon the Lartigue case, even though Lartigue had in turn relied upon the faulty original Green decision. Judge Cameron, in his dissent, was strongly critical of the majority for placing reliance upon the Lartigue decision. *Green v. American Tobacco Co.*, supra note 105, at 679-82 (dissenting opinion).
Ross v. Philip Morris & Co., reached a similar result based on analogous facts. Between 1934, when Ross first became a confirmed smoker, and 1952, when he was operated upon for cancer of the larynx, he smoked as many as three to four packs a day of defendant's Philip Morris cigarettes. In his suit against the tobacco company for breach of implied warranty, the outcome again hinged on the defendant's ability to anticipate that cigarettes might be harmful. The analogy to food cases was again presented, but the cigarette suits were distinguished by the court. A food supplier can foresee the general type of harm that his product might create, i.e., that in a small number of instances, food might become contaminated—even though the particular type of contamination may be unforeseeable. In contrast, the tobacco manufacturer could not, at the time plaintiff contracted his illness, have anticipated the potentially harmful consequences of cigarettes. Hence, the court held the manufacturer's lack of opportunity for knowledge to be a valid defense, relying on similar outcomes in the Green and Lartigue cases.

The fourth of the major cases, Pritchard v. Liggett & Myers Tobacco Co., adopted a somewhat different approach from the other three cases. Otto Pritchard, a confirmed smoker of Chesterfield cigarettes since 1921, sued the Liggett & Myers Tobacco Company to recover damages for lung cancer which he contracted in 1953, basing his complaint on theories of negligence and breach of warranty. The first trial resulted in a directed verdict on the negligence count and a dismissal of the count based on warranty. When the negligence issue was presented to the Third Circuit, it suggested that the cigarette manufacturer might have been under a duty to conduct experiments for the purpose of determining whether his product was potentially hazardous. It was held a question of fact for the jury whether the manufacturer had acted reasonably in failing to conduct such tests at a time when adverse medical evidence was beginning to accumulate. The court also found that the evidence suggested support for the plaintiff's warranty claims, both express and implied, and ruled that the jury should be given an opportunity to consider these claims. On remand, the jury found that cigarettes caused cancer, but denied recovery on an assumption of the risk theory.

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107 328 F.2d 3 (8th Cir. 1964).
108 The Eighth Circuit recognized that the second decision in Green v. American Tobacco Co., supra note 105, had reached an opposite result based on Florida law. In deciding this question under Missouri law, the court pointed out that the Green decision was not dispositive of this issue. Ross v. Philip Morris & Co., supra note 107, at 12. The court failed to observe, however, that its reliance upon Lartigue was subject to the same defect, since Lartigue in turn had relied on the first Green decision.
110 Id. at 301.
111 Specific questions were submitted to the jury: "Q. Was the smoking of Chester-
When the case reached the Third Circuit for the second time, the court of appeals held that the jury had been erroneously instructed with regard to assumption of the risk. Noting that this defense is often confused with contributory negligence, the court decided that another remand was necessary to clarify the distinction for the jury. It also discussed the Pennsylvania Sales Act provision dealing with express warranty, and concluded that the plaintiff's failure to rely on the warranty should not necessarily preclude recovery.112

B. An Analysis of the Legal Issues Presented

1. The Plaintiff's Case

In his suit against the cigarette manufacturer to recover for lung-cancer damages, a number of theories of liability are available to the would-be plaintiff. He can bring his suit in negligence,113 he can sue for intentional misrepresentation, or he can press his claim in warranty—either express or implied. The first two theories, however, afford virtually no chance of recovery: the negligence claim because of the difficulty (or impossibility) of showing that defendant was aware or should have been aware of the hazard created by his product, and misrepresentation because of the insurmountable burden of establishing intent to deceive. Because warranty represents plaintiff's best hope for recovery, the warranty issues have been vigorously contested in all the cases to date.

In any warranty action, plaintiff must establish the following matters to make out his case in chief: (a) scope of the warranty (and breach thereof), (b) causal connection between defendant's breach and plaintiff's injury, and (c) privity.

(a) Scope of the Warranty. The plaintiff who sues in warranty has two potential bases for recovery. If the defendant has made affirmations relating to the quality of his goods, then an express warranty theory may be open to plaintiff. If the defendant has not made such express affirmations, plaintiff will be forced to fall back on implied warranty.

Express warranty, where available, eases plaintiff's burden consider-

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112 Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965).
113 A claim for negligence against the manufacturer would have to be based on one of the following grounds: (a) failure to keep abreast of scientific developments; (b) failure to test for composition of the product; (c) failure to warn of dangers which were known or should have been discovered; or (d) assurances of safety made without any reasonable basis. Rossi, supra note 103, at 402-03.
ably. He need not show that the product is "defective" (a prerequisite in any implied warranty action); he need only show that the product is not as represented. Express warranty suits have generally proceeded under Section 12 of the Uniform Sales Act,\footnote{114} although in many states today the more liberal provisions of the Uniform Commercial Code are available.\footnote{116}

In the cigarette-cancer cases, express warranty achieved its most notable success in the first \textit{Pritchard} appeal.\footnote{116} There it was argued that defendant's assurances that "nose, throat, and accessory organs [would not be] . . . adversely affected by smoking Chesterfields" amounted to an express warranty. The Third Circuit agreed, stating that: "The evidence compellingly points to an express warranty . . . [and] in addition the jury could very well have concluded that there were express assurances of no harmful effect on the lungs."\footnote{117}

Needless to say, Liggett & Myers Tobacco Co. has not been the only cigarette manufacturer to issue such statements. During the 1930's and 1940's, all of the major cigarette manufacturers were making statements intended to lull the smoker into a sense of security: "Do you Inhale? What's there to be afraid of?", "More Doctors Smoke Camels . . . .", etc. Such assurances of safety might well amount to express warranties,\footnote{118} and it would be no defense that at the time the statements were made defendant believed them to be true.\footnote{119} The chief issue presented in a suit based on such assurances is whether these statements are deemed expressions of fact or opinion. If defendant's statements (advertising or otherwise) are classified as factual assurances of safety, rather than mere puffing, then liability ensues with a showing that the product caused plaintiff's injury—\textit{i.e.}, that the goods were not in fact safe as warranted.\footnote{120} The categorization of these statements as fact or opinion is generally a question for the jury.\footnote{121}

\footnote{114} USA § 12 provides: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

\footnote{116} UCC § 2-313 provides: "(1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Thus, the reliance requirement of the USA § 12 has been dropped in the Code, and a "basis of the bargain" requirement has been substituted therefor.


If defendant's statements do not amount to an express warranty, then plaintiff will have to frame his suit in implied warranty. Such a warranty may take one of two forms: an implied warranty of fitness—an undertaking that the product be reasonably fit for the particular purpose for which it will be used, or an implied warranty of merchantability—an undertaking that the product be suitable for the general and ordinary purposes for which it will be used.\textsuperscript{122} Under either warranty, plaintiff makes out his case in chief by establishing (1) that the product was "defective" when it left the manufacturer, either by not being fit for the buyer's particular purpose (fitness) or by not being suitable for his ordinary purposes (merchantability), and (2) that the "defect" was responsible for plaintiff's injuries.\textsuperscript{123}

While the implied warranties of fitness and merchantability can often be used interchangeably,\textsuperscript{124} such is not the case in the cigarette-cancer suits. In these suits it is admitted by all that the cigarettes in question are fit for their primary intended use: smoking. In other words, they "work;" they are made of commercially satisfactory tobacco, and they deliver the pleasure and satisfaction expected of them. As such, they are unquestionably fit for the particular purpose for which they are to be used, thereby satisfying the manufacturer's implied warranty of fitness.\textsuperscript{125}

The implied warranty of merchantability, however, imposes different standards upon the manufacturer, requiring him to supply goods that are suitable for "the ordinary purposes for which such goods are used."\textsuperscript{126} This suggests that even though a product is fit for its primary intended use, it is nevertheless not merchantable if it cannot be used without risk.

\textsuperscript{122} See, e.g., USA § 15, which provides in part:
(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.


\textsuperscript{125} The case would be otherwise if the tobacco contained some foreign body—e.g., a human toe—that rendered it unfit for the primary purpose of smoking. See Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918).

of bodily harm. The distinction between primary and secondary purpose was first recognized in an early Supreme Court opinion in a case involving the sale of rags for paper-making purposes. The rags produced paper of excellent quality, but they were infested with smallpox bacteria. Several workers became infected, and an implied warranty claim ensued. In response to the defense that the rags were perfectly fit for making paper, the purpose for which they were sold, the Supreme Court said:

A warranty, express or implied, that rags sold are fit to be manufactured into paper, is broken, not only if they will not make good paper, but equally if they cannot be made into paper at all, without killing or sickening those employed in the manufacture.127

It might be thought that this kind of reasoning should not apply to the cigarette-cancer cases where, unlike smallpox bacteria in rags, the carcinogenic elements in cigarettes are not peculiar to one brand alone, but inhere in the very product itself. It is said to follow, therefore, that the cigarette manufacturer ought to be exonerated as long as the tobacco he uses is commercially satisfactory.128 This argument has been rejected by a long line of cases. In Chapman v. Brown,129 for example, a young girl was badly burned when her hula skirt caught fire and proved highly flammable. In a suit against the manufacturer, the court held that the implied warranty of merchantability did not simply mean that the skirt must conform to contemporary standards of style and appearance. Rather, the manufacturer was also held to have warranted that the skirt would be safe to wear as clothing. Significantly, the court expressly rejected the argument that all other hula skirts on the market were subject to the same infirmity. The fact that the manufacturer meets

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127 Dushane v. Benedict, 120 U.S. 630, 646 (1887). Accord, Davidson v. Wee, 93 Ariz. 191, 379 P.2d 744 (1963) (home permanent causing baldness); Flynn v. Bedell Co., 242 Mass. 450, 136 N.E. 252 (1922) (dye in fur collar creating dermatitis). An excellent recent example is Twombly v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960), where a spot remover performed competently in removing spots but caused plaintiff to contract infectious hepatitis. The court held that the fact that the product was fit for the particular purpose of removing spots did not preclude a further warranty that the product was fit for the general purposes for which it was sold. Id. at 490-91, 158 A.2d at 117-18.

A line of cases involving caustic burns from handling wet cement has gone the other way. Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P.2d 26 (1956); Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959); Dalton v. Pioneer Sand & Gravel Co., 37 Wash. 2d 946, 227 P.2d 173 (1951). These decisions, however, have all been strongly influenced by the fact that the caustic nature of cement is common knowledge. 1 Frumer & Friedman, supra note 103, § 19.03[2][a], at 509. With cigarettes, of course, the cancer-causing properties were unknown before the health-scare period.


129 198 F. Supp. 78 (D. Hawaii 1961), aff'd, 304 F.2d 149 (9th Cir. 1962).
community standards is no defense, and does not relieve him of liability for putting an unsafe product on the market.\textsuperscript{130}

At least one of the cigarette-cancer cases seems to have recognized the distinction between primary and secondary purposes and required cigarettes to satisfy both standards. In the first \textit{Pritchard} case the Third Circuit interpreted the warranty as an assurance that “cigarettes were reasonably fit and generally intended for smoking \textit{without causing physical injury}.”\textsuperscript{131} Thus, the court envisioned the warranty as going beyond an assurance that cigarettes are made of commercially satisfactory tobacco. According to the Third Circuit, the manufacturer also warrants that his cigarettes will not cause physical injury.\textsuperscript{132} This test is akin to the test set forth in the Fifth Circuit’s second \textit{Green} decision, where the manufacturer was held to warrant that his product is “reasonably fit and wholesome for human consumption.”\textsuperscript{133}

The \textit{Pritchard} and \textit{Green} cases, by refusing to limit the merchantability warranty in the manner contended for by the cigarette manufacturers (\textit{i.e.}, to an undertaking to supply commercially satisfactory tobacco), are clearly in line with the trend of decisions that have considered this issue.\textsuperscript{134} With the scope of the warranty thus established, plaintiff must turn his attention to establishing that the defect in cigarettes caused his injury.

(b) \textit{Causation}. Proof of the causal connection between plaintiff’s cigarette smoking and his lung cancer is generally accomplished by presenting evidence in the following manner:\textsuperscript{135} A medical expert, who may or may not have been acquainted with the plaintiff, is given a set of hypothetical facts based upon the plaintiff’s smoking history, general

\textsuperscript{130} 198 F. Supp. at 94-95.

The allergy cases are to the same effect. In those cases, as long as the plaintiff can establish that he belongs to a class of persons who react in the same way, he establishes his right to recover (assuming the manufacturer has failed to provide an appropriate warning), despite the fact that other products on the market might be capable of inducing the same reaction. See Crotty v. Shartenberg’s—New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960) (hair remover ointment produced contact dermatitis; “an appreciable number of people” would suffer a like reaction); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697 (1939) (plaintiff sensitive to aniline dyes used in defendant’s face powder; at least “some” other persons would also be sensitive); Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4 A.2d 73 (Ct. Err. & App. 1939) (contact with hat sweatband caused severe skin reaction; “four or five percent” of all users would react similarly).

\textsuperscript{131} \textit{Pritchard} v. Liggett & Myers Tobacco Co., 295 F.2d 292, 296 (1961) [Emphasis added].

\textsuperscript{132} But see the dissent by Judge Goodrich, apparently taking a different view. Id. at 301-02 (dissenting opinion).

\textsuperscript{133} \textit{Green} v. American Tobacco Co., 325 F.2d 672 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964).

\textsuperscript{134} See cases cited in note 127 supra.

physical condition, past medical history, particular diseases suffered, and the type of cancerous cells found in the victim’s lung tissue. He is asked his opinion as to the probable cause of the lung cancer and given an opportunity to state that the cigarette smoking caused the disease. He is then requested to state the grounds of this opinion. In response to this question, most of the medical material set out in Section II, supra, may be introduced into evidence. In particular, the witness may testify to the physiological changes that have been observed in the respiratory systems of heavy smokers, the laboratory experiments in which condensed tars have produced skin cancer in mice, and the mass of statistical evidence showing a high correlation between smoking and increased mortality rates. An effective presentation of this evidence provides an extremely convincing case for causation.

It has been ruled that evidence of this sort cannot be withheld from the jury, and once such evidence is presented to them, juries have not been reluctant to find for plaintiff on the issue of causation. (c) Privity. Historically, it has been thought that a consumer who was injured by a defective product could recover from the defendant only if he could show that some sort of contractual relationship existed between them. Absent privity, the plaintiff’s suit was barred. Gradually, however, the courts recognized that this requirement made little sense where complex modern selling methods were concerned. Privity simply forced the injured consumer to recover from the retailer who sold him the product; the retailer then had to pursue his remedy against the wholesaler, and the wholesaler in turn had to sue the manufacturer. By abolishing privity, the consumer was encouraged to sue the manufacturer directly, and the loss could be placed where it ultimately ought to lie without the multiplicity of law suits.

The reform came first in the area of negligence with the decision in MacPherson v. Buick Motor Co. Since MacPherson, the privity doctrine in suits involving negligence has all but disappeared in virtually every American jurisdiction. The action in implied warranty, however, has generally been regarded differently, and the privity requirement has had a much more lasting influence in this area. But in

138 See, generally, 1 Frumer & Friedman, supra note 103, § 16.03.
139 217 N.Y. 382, 111 N.E. 1050 (1916).
141 Although privity has traditionally applied to all types of warranty actions—both express and implied—it has been more rigidly applied in implied warranty cases. Courts have generally found it much easier to overlook privity where an express warranty is
recent years, the privity "citadel" has been "assaulted" in breach of warranty actions as well, particularly where food, drugs and products intended for intimate bodily use are concerned.\textsuperscript{142}

A substantial majority of state courts have held that lack of privity should not constitute a bar to recovery against a manufacturer of food.\textsuperscript{143} In these jurisdictions, the courts have had little difficulty expanding the "food category" to include tobacco products on the theory that tobacco, like food, is a product intended for intimate bodily use.\textsuperscript{144} Since the four major cigarette cases to date have all been commenced in jurisdictions where the privity rule has been abolished with respect to food manufacturers, lack of privity has caused no serious difficulty thus far.\textsuperscript{145} With the barrier now beginning to crumble even in cases not involving food,\textsuperscript{146} it is likely that privity will continue to offer little difficulty in future cigarette-cancer cases. Even if such an action were commenced in a state still rigidly adhering to privity, the policy arguments against the doctrine are so compelling that a court might well seize the opportunity and do away with it once and for all.

In theory, once the plaintiff establishes these points, he has made out his case in chief and should be entitled to recover. That is, since warranty is in the nature of strict liability, a showing of defectiveness coupled with causation, without more, should establish plaintiff's right to recover.

\begin{itemize}
  \item Involved, generally on the theory that the manufacturer has aimed his representations directly at the ultimate consumer. See Manus v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932); 1 Frumer & Friedman, supra note 103, § 16.04[4][a].
  \item Twenty-one jurisdictions have abandoned privity in cases involving food manufacturers: Arizona, California, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Tennessee, Texas, Oregon, and Vermont. In addition, five states have done so by statute: Connecticut, Georgia, Minnesota, Montana and South Carolina. In 12 jurisdictions recovery on a theory of strict liability has been denied: Alabama, Arkansas, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, North Carolina, Rhode Island, South Dakota, West Virginia and Wisconsin. The remainder of the states have taken no definite position on the question. Prosser, Torts § 97; Restatement (Second), Torts § 402A (1965).
  \item For earlier cases involving chewing tobacco, see Liggett & Myers Co. v. Rankin, 54 S.W.2d 612 (Ky. Ct. App. 1932); Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918). For the purposes of the Federal Trade Commission Act, it has been held that cigarettes are neither a "food" nor a "drug" within the meaning of § 15 of that Act. FTC v. Liggett & Myers Tobacco Co., 108 F. Supp. 573 (S.D.N.Y. 1952), aff'd mem., 203 F.2d 955 (2d Cir. 1953).
  \item For applicability to cigarette-cancer cases, see Note, 36 St. John's L. Rev. 368-69 (1962).
  \item In the one case where the defense was raised, the court quickly disposed of the issue. Ross v. Philip Morris & Co., 328 F.2d 3, 8 (8th Cir. 1964).
  \item The landmark case is Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
\end{itemize}
In fact, however, the warranty action is a hybrid—a cross between tort and contract—and as a result the underlying strict liability rationale has become infused with concepts derived from these two fields. In the cigarette-cancer cases these engrafted concepts have, without exception, enabled the defendant tobacco company to defeat plaintiff's cause in every suit brought thus far.

2. The Defendant's Case: The Significance of Foreseeability and Reliance

Products liability law may be roughly divided into two broad categories: cases in which defendant is liable for some fault or neglect on his part, and cases in which defendant is liable in the absence of any fault or neglect.147 These two categories, however, are not mutually exclusive, and decisions nominally holding defendant liable without fault often turn out, on further analysis, to have been grounded on transmuted concepts of fault and neglect. This has typically been true of the implied warranty action. In theory, warranty liability ensues automatically when a defective product causes injury.148 In practice, however, it has not worked out that way. Over the years, the implied warranty action has been encumbered with certain prerequisites which have brought it closer on the spectrum to negligence than to strict liability. As a result, courts have generally been unwilling to hold the defendant liable in implied warranty unless these prerequisites, which will be called fault-substitutes,149 are shown to exist.

Fault-substitutes may take various forms. In the express warranty cases, the manufacturer's explicit undertaking to stand behind his product provides the necessary predicate for liability, and no further inquiry into the defendant's acts or state of mind is required. Where the action is based on an implied warranty of fitness, the buyer's reliance upon seller's superior skill and judgment serves as a substitute for fault.150 Where breach of implied warranty of merchantability is alleged, the required predicate is that the goods have been bought from a merchant.151

147 The number of products liability cases falling into a third category, involving intentional or willful wrongdoing, is negligible.
148 See Frumer & Friedman, supra note 103, § 16.01[11], at 358.1.
149 This term is not meant to be limited to negligence concepts. The term is designed to encompass pre-conditions of all types, drawn from tort and contract alike, which have transformed the implied warranty action from strict liability into a hybrid.
150 UCC § 2-315. See also USA § 15(1).
151 UCC § 2-314(1). See also USA § 15(2).

The Sales Act predicates this kind of liability upon the goods having been bought "by description." "By description" simply means that the buyer is relying on the seller to meet his specifications. In other words, he is relying on the seller's judgment to supply a product which will satisfy his needs. Cf. Prosser, "The Implied Warranty of Merchantable Quality," 27 Minn. L. Rev. 117, 140-41, 168 (1943).
In certain instances, an awareness by defendant of the dangerous propensities of his product has also been required before liability may be imposed. In each of the cigarette-cancer cases, the plaintiff's inability to establish the appropriate fault-substitute has been the chief factor responsible for the tobacco company's successful defense.

(a) **Opportunity for Knowledge.** With the possible exception of *Pritchard*, all of the cigarette-cancer cases to date have decided that the manufacturer’s total inability to foresee the cigarette health hazard should exonerate him. Thus, at the first *Green* trial, the jury was asked to decide whether, “by the reasonable application of human skill and foresight,” American Tobacco Company could have known that cigarettes might cause cancer. On appeal, the Fifth Circuit approved the use of this interrogatory.\(^{152}\) In *Lartigue*, although the court insisted that it was not confusing warranty and negligence, it held that the manufacturer could be liable “only for a defective condition... the harmful consequences of which, based on the state of human knowledge, are foreseeable.”\(^{153}\) And in *Ross*, the court approved the trial judge's instructions which stated that “implied warranty does not cover substances in the manufactured product the harmful effects of which no developed skill or foresight can afford knowledge.”\(^{154}\)

These decisions misconstrue the essence of the warranty action. Warranty was intended to impose strict liability on the supplier of a defective product for any injuries caused thereby, and the fact that the supplier exercised reasonable care has generally been deemed irrelevant. By permitting the manufacturer to escape liability on a showing that he was unable to foresee harm, the courts have engrafted a quasi-negligence standard onto the warranty action, thereby rendering the warranty concept virtually meaningless.

Furthermore, even the underlying factual assumption in these cases—that prior to the mid-1950's, the manufacturer had no intimation whatsoever that cigarettes might be harmful—may be open to question. As far back as 1912, a substantial bibliography on the various hazards associated with cigarettes began to accumulate,\(^{155}\) and statements specifically linking cigarettes with lung cancer began to appear in the

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\(^{152}\) *Green* v. American Tobacco Co., 304 F.2d 70, 76 (5th Cir. 1962).


\(^{154}\) *Ross* v. Philip Morris & Co., 328 F.2d 3, 6, 10 (8th Cir. 1964).

\(^{155}\) At the first Pritchard trial, plaintiff was frustrated in his attempts to introduce this bibliography into evidence. On appeal, the refusal to admit this evidence was held not to constitute an abuse of discretion. *Pritchard* v. Liggett & Myers Tobacco Co., 295 F.2d 292, 300-01 (3d Cir. 1961).
When it is also remembered that cigarettes had long been thought to have a generally adverse effect upon health, the possibility that cigarettes were harmful may not have been as unforeseeable as the courts and juries have intimated.

(b) Reliance. Traditionally, the buyer's reliance upon the manufacturer's superior skill and knowledge has been considered a prerequisite to any action for breach of warranty. The cigarette cases, however, have all involved purchases from a manufacturer who could not have known of the hazard inhering in his product. Since the manufacturer was unable to obtain superior skill and knowledge concerning his product, the predicate for reliance was lacking, and the buyer could not satisfy this requirement. Reasoning in this fashion, the majority in the first Green decision declared the cigarette manufacturer not liable. The court in Lartigue employed similar reasoning:

[It cannot be said that cigarette smokers who started smoking before the great cancer-smoking debate relied on the tobacco companies' "warranty" that their cigarettes had no carcinogenic element. Today, the manufacturer is not an insurer against the unknowable.]

In other words, where the seller is in no better position than the buyer to discover the defect or to eliminate the risk, reliance is necessarily lacking and liability will not be imposed.

The reliance requirement presented somewhat greater difficulty for the Third Circuit in the second Pritchard case. Judge Smith, writing for the court, apparently felt that absence of reliance ought not bar plaintiff's recovery. He adopted a somewhat contorted reading of the Pennsylvania Sales Act, thereby nullifying the statutory reliance requirement. The concurring opinion, taking a more conventional ap-
proach, disagreed with Judge Smith on his reading of the Sales Act, and argued that plaintiff's failure to establish reliance could preclude recovery.\textsuperscript{163}

In a modern commercial setting, involving the purchase by the smoker of a distantly-manufactured pack of cigarettes, it is surprising to find the courts emphasizing the consumer's reliance to this extent. The reliance requirement today is largely anachronistic, a remnant from the early origins of warranty as a quasi-contractual action. As a contractual matter, it was thought that the plaintiff could not hold defendant to his implied promissory conduct unless the plaintiff was influenced in some way by defendant's implied (or express) promise. This notion makes little sense, though, where personal injuries are involved. No one would suggest, for example, that a motorist who is injured by the driving of another should not recover in tort unless he can show, in addition to the other elements of his cause of action, that he relied on defendant's care and driving ability before venturing forth on the highways. Since the suit to recover for personal injuries caused by a defective product more nearly approximates the typical tort suit than a claim based on contract (albeit the motorist example is in negligence, not warranty), it would seem that the injured consumer should not be obligated to satisfy the reliance requirement.\textsuperscript{164}

Nevertheless, the Uniform Sales Act, the Uniform Commercial Code, and most courts have insisted on at least giving lip service to the requirement.\textsuperscript{165} Reliance today is largely used as a stopgap. Courts in most instances have been unwilling to pull out all the stops and hold the manufacturer as an insurer of his product. This had led to a considerable amount of uncertainty in the law; although courts have frequently managed to "interpret the reliance requirement out of existence,"\textsuperscript{166} they have adhered firmly to the requirement in instances where it has suited their purposes. In these instances, of which the cigarette cancer cases are notable examples, the courts have retained reliance as a fault-substitute and denied plaintiff's claim whenever he has been unable to establish this predicate to recovery.

(c) \textit{The Allergy Standard.} When Green \textit{v. American Tobacco Co.} came before the Fifth Circuit for the second time, it carried with it the instructions of the Florida Supreme Court that under Florida law warranty does not hinge on the manufacturer's ability to foresee harm. Accord-

\textsuperscript{163} Id. at 487-92.
\textsuperscript{164} See 2 Harper \& James, Torts § 28.20, at 1580-81 (1956).
\textsuperscript{165} USA §§ 12, 15(1); UCC § 2-314; Ryan \textit{v. Progressive Grocery Stores, Inc.}, 255 N.Y. 388, 175 N.E. 105 (1931); 2 Harper \& James, supra note 164.
\textsuperscript{166} Comment, 63 Colum. L. Rev. 515, 519 (1963).
ingly, the Court of Appeals redefined the scope of the manufacturer's warranty in terms of a guarantee that the product be "reasonably fit" for public consumption and remanded for the jury to determine whether cigarettes satisfied this standard.\textsuperscript{167} The trial court, in attempting to adhere to this directive on remand, instructed the jury that the product must endanger a "responsible segment" of the general public before the manufacturer could be held liable.\textsuperscript{168}

The "responsible segment" standard is reminiscent of cases involving allergies. These cases hold that while it is not necessary for the plaintiff to show that a normal individual would suffer harm, it is necessary for him to establish that there is a class of persons—some appreciable portion of the population—that would be adversely affected by the product.\textsuperscript{169} The rationale is that if damage is done to a sizeable sample of consumers, it is reasonable to expect that the manufacturer should have foreseen the injury and warned purchasers of the potential hazard.\textsuperscript{170}

Adhering to this rationale the trial court in \textit{Green} held that while it was no longer necessary to establish that the manufacturer knew (or should have known) of the risks entailed, nevertheless, the plaintiff must demonstrate that he belonged to a "responsible segment" which cigarettes endanger.

Thus, in one way or another, the court in each of the cigarette-cancer cases has balked at holding the cigarette manufacturer an insurer of his product and has insisted upon some fault-substitute as a predicate to liability. Finding none, the plaintiffs have without exception been denied recovery. Reliance was emphasized by the first \textit{Green} appeal and the second \textit{Pritchard} decision; \textit{Lartigue} and \textit{Ross} hinged on the manufacturer's inability to foresee harm; and the latest remand in \textit{Green} produced a \textit{sub silentio} analogy to the allergy standard. It is an open question whether some of these decisions can be reconciled with existing precedent. Even if they can, however, the courts have not been giving these plaintiffs their full due. The courts are seriously at fault for ignoring the underlying policy considerations which militate in favor of imposing strict enterprise liability. Instead of emphasizing so heavily the question of defendant's knowledge, the real debate should have

\textsuperscript{167} \textit{Green} v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963).


centered on the wisdom of holding manufacturers of products intended for human consumption strictly liable, notwithstanding the absence of any other predicate to liability.

3. **Strict Enterprise Liability**

Strict enterprise liability refers to warranty liability in its purest sense, unencumbered by the fault substitutes that surround the hybrid previously discussed. To impose strict enterprise liability, plaintiff need only make out his case in chief as in subsection (1), *supra*; concepts of reliance, injury to substantial numbers, and foreseeability are of no consequence.

Strict enterprise liability stems from an acknowledgment that as between the consumer and the manufacturer, the latter is the one who is in a position to exercise control over the product. Legal scholars have long debated its pros and cons, thoroughly analyzing the underlying reasons and sentiment in its favor. Two reasons have been most frequently advanced for imposing strict enterprise liability. First, the higher degree of liability can act as a deterrent, discouraging the irresponsible marketing of goods which might prove harmful to the consumer. The hope is that strict liability will encourage manufacturers to take every possible precaution to insure the safety of their products, ferreting out potential defects wherever possible. Even where the possibility of a defect is not readily apparent, the manufacturer can be encouraged to conduct a continuing program of research and experimentation. Needless to say, the manufacturer is the only one who has at his disposal the means to conduct such a program; the law cannot

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171 Professor Ehrenzweig was the first to coin this expression. James, "General Products—Should Manufacturers Be Liable Without Negligence?" 24 Tenn. L. Rev. 923 (1957).

172 The one cigarette-cancer case that acknowledged this concept, and took it into account, was Green v. American Tobacco Co., on certification to the Supreme Court of Florida. In holding that the manufacturer's implied warranty liability is not limited by foreseeability, the court said:

The assumption of responsibility, even implied assumption, is not, of course, necessarily co-equivalent with skill and knowledge. To the extent that our cases take note of a defendant's opportunity for knowledge, it is merely in recognition of a supplier's superior position, relative to the purchasing public, as a factor affecting policy considerations rather than determining the limits of implied warranty liability in a particular situation.

Green v. American Tobacco Co., 154 So. 2d 169, 171 (Fla. 1963) [Footnote omitted.]

possibly expect the consumer, or the retailer, to conduct extensive tests to unearth defects or potential hazards.

Second, it is pointed out that the manufacturer, once he has compensated plaintiff for his loss, need not shoulder the burden alone (as would the plaintiff). After absorbing the loss initially, the manufacturer can charge it off as a production cost, and eventually recoup by increasing his selling price to recover the cost. The result is that the loss, instead of being borne entirely by the plaintiff, is allocated evenly (and in minute amounts) among the consuming public.

Sentiment also favors the imposition of strict liability upon the manufacturer. The manufacturer, after all, set in motion the process which led to plaintiff's injury. He is the active party and ought to bear any loss that his activity entails. Moreover, as between the consumer and the industry, the manufacturer has a "deep pocket," and can better afford the loss. Should the manufacturer not be able to absorb the loss, he can always cover himself in advance by procuring products liability insurance.

Although these theories have been expounded by legal scholars for many years, they have not met with approval in the courts. Judges have long been reluctant to restrict the freedom of movement of a would-be merchant (or investor) by placing his incipient business under a cloud of strict liability. Recently, however, there have been rumblings which suggest that strict enterprise liability may no longer be regarded as mere academic theorizing. In Chapman Chemical Co. v. Taylor, defendant had marketed a new crop-dusting chemical, which was meant to be sprayed on crops from an airplane. The spray had a far greater capacity to drift than other sprays of a similar type, and as a result, foliage in an adjoining field was destroyed. In a suit to recover damages, the court held the manufacturer liable on the ground that defendant should be "charged with the knowledge which tests would have revealed." This represents genuine strict liability, since unlike previous cases holding manufacturers for failure to test, there was no showing in Chapman v. Taylor that defendant either knew or should have known of the need to conduct tests for drifting capacity.

California is the only state that has openly received strict liability. Ever since Judge Traynor's famous concurring opinion in Escola v. Coca-Cola Bottling Co., the California Supreme Court has been in the forefront in this area. Judge Traynor's argument finally became the

174 215 Ark. 630, 222 S.W.2d 820 (1949).
175 Id. at 644, 222 S.W.2d 820, 827.
opinion of the court in *Greenman v. Yuba Power Products, Inc.*, where the court established the concept of "strict liability in tort." Under *Greenman*, the plaintiff need only show that the manufacturer has placed a defective product on the market and that his injury was due to the defect. Notions of privity and reliance no longer govern:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . .

. . . [R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products . . . .

. . . The purpose of such [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Assuming that a court can be persuaded of the underlying soundness of strict enterprise liability, the question remains whether the cigarette industry is well suited for the accomplishment of its purposes. In that regard, strict liability insofar as it spreads the plaintiff's loss, clearly has a salutary effect. The cigarette manufacturer can absorb this loss initially and thereafter recoup by an across-the-board price increase. Several writers, however, have attempted to show that this may not work out in practice. They note that a price increase on an established product may place the manufacturer at a competitive disadvantage. Moreover, they point out that if the manufacturer has priced his product

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The Restatement of Torts (Second) has adopted strict tort liability for the seller of a defective product. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

According to comment (c), the rationale of section 402A is that the public has a right to expect sellers to stand behind their goods, that public policy demands that those who market goods shall bear the burden of any damage inflicted thereby, that this burden is simply a production cost, and that the seller can better afford this burden.

Comment - (i), which defines "unreasonably dangerous," notes that many products cannot possibly be made safe for all consumption. The comment states: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful."

179 Plant, supra note 173, at 946-47; Comment, 63 Colum. L. Rev. 515, 531-35 (1963).
to maximize profits, as presumably he has, a price increase may cause profits to slough off, at least where the demand for the product is relatively elastic. The cigarette manufacturer, though, is not subject to either of these infirmities. The tobacco industry has always been basically oligopolistic; where one manufacturer has seen fit to raise his prices, other manufacturers have invariably followed suit, thereby eliminating price as a competitive factor.\textsuperscript{180} Nor is a price increase likely to cause profits to slough off. The demand for cigarettes in the past has been highly inelastic; smokers, habituated to cigarettes, have rarely been discouraged from buying them simply because the price is increased.\textsuperscript{181} Hence, the cigarette manufacturer who is forced to compensate a plaintiff for his lung cancer damages should have little difficulty distributing the loss among the ultimate consumers.

However, the other frequently-offered justification for strict liability—the deterrent effect—carries little weight here. Even if strict liability were imposed in the cases which arise today, its effect would be but a passing phase in the history of cigarette tort litigation, posing no threat for the future. Cigarette manufacturers, secure in the knowledge that the defense of assumption of the risk will protect them against future tort claims,\textsuperscript{182} will not be motivated to seek additional protection through the marketing of a safer product.

This is not to say that any one of these considerations is so conclusive as to compel a decision either for or against the tobacco companies. Strict enterprise liability may or may not be an appropriate solution to the dilemma these cases present. But only by analyzing the policy considerations underlying strict liability, and the potential effect of strict liability on the tobacco industry, can the courts discharge their duty to provide a just and fair allocation of the plaintiff's loss.

C. \textit{Future Cigarette-Cancer Litigation: Assumption of the Risk as an Affirmative Defense}

In the cigarette-cancer cases that have thus far been litigated, assumption of the risk has not played a very prominent role. The reasons are primarily pragmatic: the defense based on inability to foresee the risk has proved to be effective;\textsuperscript{183} and the tobacco companies have been

\textsuperscript{180} Nicholls, Price Policies in the Cigarette Industry 78-89 (1951).
\textsuperscript{181} Id. at 122, 183-85.
\textsuperscript{182} Assumption of the risk, which is generally a defense to strict liability, would bar only those claims for damages incurred after the smoker became aware of the risk. The requisite awareness clearly exists as of January, 1966 at the very latest (by virtue of the new federal labeling law), and therefore the production of a safer cigarette from and after that time can have no effect in reducing the manufacturer's potential liability.
\textsuperscript{183} See parts A and B, supra.
somewhat reluctant to argue assumption of the risk because of the adverse publicity which might ensue if they were to emerge victorious on this ground. Moreover, it would be virtually impossible to show that a smoker could have been adequately apprised of this risk prior to the mid-1950's. Despite these factors, it is quite possible that the juries in these cases have rendered verdicts against the plaintiff on a sub silentio theory of assumption of the risk; at least one jury has already done so openly.

The defense will undoubtedly become a much more significant issue—indeed, the central issue—as later cases develop. As the body of scientific knowledge linking cigarettes and cancer has accumulated, it has become available to the tobacco companies and the consuming public alike. The case will inevitably arise where plaintiff's smoking extended well into the period when the link between cigarettes and cancer became common knowledge. In such a case, the advance in scientific knowledge will have two effects. The defendant will be deprived of its defense based on inability to foresee harm. But by the same token, the knowledge gained by the consumer may very well charge him with assumption of the risk, thereby affording the manufacturer an affirmative defense that should prove to be an effective substitute for the defense he is forced to abandon. It becomes relevant, therefore, to examine the requirements for pleading assumption of the risk and to inquire whether this defense may properly be raised in an action based on breach of implied warranty. In particular, we shall focus on the narrow distinction between contributory negligence and assumption of the risk.

1. The Requirements of Assumption of the Risk

There are two essential requirements upon which assumption of the risk is predicated: (1) the plaintiff must have incurred the risk voluntarily; and (2) he must have comprehended fully the nature of the risk. The former requirement presents difficulty in cases where the plaintiff has been forced to make a Hobson's choice, and has had no real alternative but to assume the risk. No such forced choice is presented

186 The Third Circuit's second opinion in Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 484-86 (3rd Cir. 1965) contains a detailed analysis of these issues, substantially along the lines of subsections (1) and (2), infra.
188 For example, where plaintiff's only reasonable means of egress from the landlord's building was to use a slippery winding staircase, she was not held to have voluntarily assumed the risk. Brandt v. Thompson, 252 S.W.2d 339 (Mo. 1952). Or where plaintiff's intestate suffered fatal burns while attempting to rescue her property which defendant railroad had negligently set on fire, her choice was deemed to have been
here. Plaintiff might contend that his habituation to tobacco\footnote{Although the Smoking Report characterizes tobacco as a drug, the drive to smoke cigarettes is characterized as a drug habituation, as opposed to a drug addiction. The distinctions are as follows: (1) the drive to continue the use of the drug is denominated a desire, rather than a compulsion; (2) there is little or no tendency to increase the dose; (3) there is no physical dependence upon the effects of the drug (a psychic dependence does exist to some degree); (4) detrimental effects, if any, are upon the individual only, rather than society in general. Smoking Report 349-51.} compelled him to continue to purchase cigarettes, and that the element of voluntariness is lacking. But this contention is easily met, since the plaintiff was certainly well aware of the habit-forming propensities of tobacco at the time he commenced smoking.\footnote{Note, 112 U. Pa. L. Rev. 620, 624, n. 19 (1964).} His desire to purchase and use the manufacturer's product is a voluntary one, made entirely of his own free will.

Somewhat more complex problems are created by the requirement that the purchaser fully comprehend the nature of the risk. In a recent Kansas case,\footnote{Wainscott v. Carlson Construction Co., 179 Kan. 410, 295 P.2d 649 (1956).} plaintiff had entered a room he knew to be filled with gas in order to open the windows. The gas exploded, and plaintiff was severely injured. The court held that it was for the jury to determine whether he had acted with full appreciation of all the risks involved. In the course of its opinion, the court supplied one of the best expositions on this rather vague standard:

\begin{quote}
It is not in every instance where one exposes himself to a known danger and injury results that he is denied a right to recover, but only in that class of cases where the danger is so obvious and imminent that a person of ordinary prudence under like circumstances would not subject himself to it. . . . [M]ere knowledge of the danger of doing a certain act without a full appreciation of the risk involved is not sufficient to preclude a plaintiff from recovery . . . .\footnote{Id. at 413, 295 P.2d at 652.}
\end{quote}

Accordingly, a distinction has been drawn between observation of circumstances which may give rise to a dangerous situation, and actual comprehension and appreciation of the full peril inherent in a proposed course of action.\footnote{In Shufelberger v. Wordon, 189 Kan. 379, 369 P.2d 382 (1962), for example, plaintiff agreed to assist defendant in moving a piano by truck. The truck lurched forward, both plaintiff and the piano were thrown to the ground (the plaintiff underneath), and serious injuries ensued. The court applied the Wainscott test, and held that plaintiff had not fully appreciated the risk when he agreed to assist defendant in moving the piano.\footnote{Cardozo, C.J., in Zurich Gen. Acc. and Liab. Ins. Co. v. Childs Co., 253 N.Y. 325, 328, 171 N.E. 391, 392 (1930). See also Dean v. Martz, 329 S.W.2d 371, 374 (Ky. 1959).}} The test is always whether the plaintiff "was so informed of the dangers inhering in [his acts] . . . as to be placed in the position of one willing to encounter them.\footnote{Cardozo, C.J., in Zurich Gen. Acc. and Liab. Ins. Co. v. Childs Co., 253 N.Y. 325, 328, 171 N.E. 391, 392 (1930). See also Dean v. Martz, 329 S.W.2d 371, 374 (Ky. 1959).}"
This rather nebulous standard must be applied to the purchaser of cigarettes. If the purchaser were only vaguely aware that tar and nicotine deposits might prove harmful in isolated instances, and were under the impression that the average smoker incurred little or no risk, then the requisite appreciation of the peril would probably be lacking. This may well have been the state of mind of the average cigarette consumer in the mid-1950's, when the first medical statements were beginning to appear, but when unequivocal statements on the subject were noticeably absent.\(^{195}\)

In light of the Surgeon General's Smoking Report, however, and the extremely broad publicity attendant upon it, it is almost inconceivable that a rational smoker could today adhere to such a view. The conclusive and unequivocal medical pronouncements of recent years to which the smoker has been exposed compel him to acknowledge that even the moderate smoker markedly increases his chances of contracting a serious disease, and that a smoker is much more likely to die prematurely than a nonsmoker of comparable age and physical stature. Should there remain any doubt on this score, though, it is unquestionably dispelled by the Federal Cigarette Labeling and Advertising Act,\(^{196}\) which requires every package of cigarettes to bear a label apprising the smoker of the risk involved.

Admittedly, juries are often reluctant to bar recovery on the ground that plaintiff has assumed the risk.\(^{197}\) But for a jury to find that a plaintiff today does not comprehend the risk, it would have to find that he had virtually no exposure to communications media. Certainly, if the defense is to have any viability at all, it ought to apply in a cigarette-cancer case based on a contemporary factual setting.

2. Applicability of Assumption of the Risk to an Action in Warranty

In a suit for breach of warranty, the narrow distinction between contributory negligence and assumption of the risk is highly significant. Contributory negligence is based on the plaintiff's failure to exercise due care. Assumption of the risk, on the other hand, presupposes no fault on the part of the plaintiff. Rather, it bars his recovery because of his willingness (express or implied) to endure the consequences of any hazards he encounters.\(^{198}\)

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\(^{195}\) See the recent decision in Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 486 (3d Cir. 1965), suggesting that the advertising campaigns of the mid-1950's, which "were calculated to overcome any fears the potential customers might have had as to the harmful effects of cigarettes," weaken any assumption of the risk argument.


\(^{197}\) Prosser, Torts § 67, at 462 (3d ed. 1964).

Where plaintiff's conduct is merely negligent, but falls short of a conscious and voluntary assumption of the risk, his action for breach of implied warranty will generally not be barred.\textsuperscript{199} (Of course, an ordinary claim of negligence would be precluded.) Where, however, the plaintiff willingly encounters a known risk and subsequently suffers harm, most courts have held that his appreciation of the danger precludes recovery for breach of warranty.\textsuperscript{200}

The reason for the distinction seems to be rooted in the biblical concept of "an eye for an eye." The theory of a negligence suit is that defendant has failed to exercise due care and must compensate the plaintiff for any injuries proximately caused thereby. He is absolved of liability where the plaintiff has also failed to exercise care. The carelessness of one party in effect "cancels out" the carelessness of the other, and the loss remains where it has fallen—with the plaintiff. In contrast, the action based on implied warranty is predicated on the manufacturer's \textit{voluntary} undertaking to produce a product which he \textit{knows} will entail certain risks. Accordingly, the theory of implied warranty imposes a stricter standard of liability upon the defendant manufacturer when his product does in fact give rise to harm. The manufacturer is not absolved from his liability by the contributory negligence of plaintiff, since it would be unfair to allow one who knowingly creates a risk to be relieved of liability by another's mere careless failure to protect himself. Only assumption of the risk will bar the plaintiff's action for breach of implied warranty, since the wrongs of the parties are once again matched; the manufacturer's conscious undertaking is balanced by the plaintiff's knowing and voluntary assumption of the risk. With the two in equilibrium, the law will again allow the loss to remain where it has fallen—with the plaintiff.

Cases analogous to the fact situation presented by a modern cigarette-cancer case are rare. The closest analogy would be to cases involving products liability for consumables—presumably food. Needless to say, it is not often that a consumer, having become aware of a deleterious element in his food, has continued to eat it. In a recent California case, however, the facts suggested that the consumer may have done

\textsuperscript{199} Prosser, \textit{Torts} § 78, at 538-39 (3d ed. 1964); 77 C.J.S. "Sales" § 357, at 1266 (1952).

just that. In *Kassouf v. Lee Bros.*, the plaintiff was munching on a candy bar and reading a book at the same time. She noticed that the candy bar "didn't taste just right," but nevertheless continued to eat it. It was only after more than a third of the bar had been consumed that she looked down at the remainder, and observed with horror that it was literally infested with worms. The ingestion of the candy caused numerous intestinal disorders, and plaintiff sued to recover damages for breach of warranty. The court intimated that assumption of the risk might have barred the plaintiff's action, if it could have been shown that she had continued to eat the candy after becoming aware of its deteriorated condition.

The cigarette smoker of today is in much the same position, except that the facts in his situation are even more compelling. He is aware that medical evidence has clearly indicated cigarettes are the major cause of lung cancer. He is aware that even the moderate smoker substantially increases his risk of premature death. Nevertheless, he continues to smoke. The requirements for assumption of the risk are all satisfied. It is difficult to imagine twelve reasonable men coming to any other conclusion.

D. *A Further Note on Future Litigation*

Assuming that inability to foresee and assumption of the risk are valid defenses when each is applied in the relevant time period, the question arises whether these two defenses can occupy the entire field. That is, can the tobacco companies continue to rely upon the inability-to-foresee defense in cases where plaintiff's disease was contracted prior to the mid-1950's, and rely upon assumption of the risk in cases where plaintiff's disease was contracted after that time? The answer to this question turns on whether general scientific knowledge in this field was at all times *equally* available to both the tobacco industry and the consuming public. If so, then the two defenses will "meet"; at the very time when scientific knowledge is regarded as having been adequate to appraise the manufacturers of the risk (thereby subjecting them to warranty liability), the consuming public will have become sufficiently knowledgeable such that their continuing to purchase cigarettes constituted an assumption of the risk.

However, the premise that knowledge *was* equally available is questionable. The tobacco industry, with its superior facilities and greater

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interest in the problem, was undoubtedly several years ahead of the consuming public in its awareness of the danger. This gap of several years constitutes a "gray zone," in which the cigarette manufacturers knew enough to deprive them of the defense that the risk was unforeseeable, while the consuming public knew so little that the average smoker could not be charged with an assumption of the risk.

Although the idea of a "gray zone" seems persuasive, it is unlikely that the courts will give an attentive ear to it. For plaintiff to recover, he would have to prove that the cancer damages were incurred during this period. Even worse, he would probably be required to apportion the damages—those incurred during the "gray zone" would be recoverable, while others would not. In view of the still rather limited state of medical knowledge with respect to the development of cancer, it would be well nigh impossible to establish this proof. If the plaintiff were permitted to attempt such proof, the burden upon the jury and the court to determine which portion of his damages were recoverable would be insurmountable.

To avoid these problems, courts are much more likely to make the unrealistic but not unreasonable assumption that the knowledge was at all times equally available to the industry and the general public. If this assumption is made, the two defenses will occupy the entire field, and any possible gap through which the industry's armor might have been pierced will be closed. Thus, in all probability, tort suits as a private legal remedy will continue to be as unfruitful in the future as they have been in the past.

IV
PUBLIC REGULATION

Whether or not the tort suits are successful, the health hazard created by the mass smoking of cigarettes has been deemed by the Surgeon General's Advisory Committee to be of sufficient magnitude to require public remedial action.203 The Committee was silent, however, as to the remedial measures to be taken204 and the governmental body to be charged with primary responsibility for implementing them. As a result, considerable internecine warfare has developed within the Government over the appropriate method for carrying out the Surgeon General's directive. The controversy has revolved around a central issue: whether regulation in this field shall emanate from Congress or from the Federal Trade Com—

204 This was originally to have been Phase II of the Advisory Committee's task. See text accompanying notes 37-40 supra. In the light of subsequent developments, however, the project has apparently been abandoned.
mission. This section will consider that controversy and the legal questions it presents.

The Federal Trade Commission was the first governmental body to take action, and it did so promptly. On January 11, 1964, the very day that the Smoking Report was released, the FTC announced that it would "move promptly, within the scope of its statutory jurisdiction and responsibility," to determine the remedial action which it should take in the public interest.\footnote{\textit{ftc} News Release, Jan. 11, 1964.} One week later, the Commission issued a notice of proposed rule making\footnote{29 Fed. Reg. 530-32 (1964).} pursuant to its own newly-promulgated Rules of Practice.\footnote{16 C.F.R. § 1.67(b) (1964).}

The Commission was in no mood to waste time. Public hearings on the proposed rule were held March 16-18, 1964. Those presenting their views included spokesmen for the Tobacco Institute, the Surgeon General's Advisory Committee, and the American Cancer Society. Many prominent doctors, research scientists and Congressmen also appeared.\footnote{N.Y. Times, Mar. 17, 1964, p. 13, col. 1; Id., Mar. 18, 1964, p. 1, col. 2; Id., Mar. 19, 1964, p. 55, col. 2.} Three months later, on June 22, 1964, the FTC issued its trade regulation rule:

\begin{quote}
In connection with the sale, offering for sale, or distribution in commerce (as 'commerce' is defined in the Federal Trade Commission Act) of cigarettes it is an unfair or deceptive act or practice within the meaning of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to fail to disclose, clearly and prominently, in all advertising, and on every pack, box, carton or other container in which cigarettes are sold to the consuming public that cigarette smoking is dangerous to health and may cause death from cancer and other diseases.\footnote{29 Fed. Reg. 8325 (1964).}
\end{quote}

January 1, 1965 was set as the effective date.

The promulgation of this rule jolted the tobacco industry. It was feared that if the rule were put into effect, vast segments of the economy might be affected. The tobacco industry, a $10 billion business, reaches every corner of the nation. More than $250 million annually is spent by cigarette manufacturers on advertising alone. Twenty-one of the fifty states derive a substantial portion of their income from the production of tobacco; 700,000 farm families in these states are dependent upon tobacco as a source of income. And, not least important, federal and state cigarette taxes exceed $3.3 billion annually, accounting for a sizeable percentage of all government revenue.\footnote{See, generally, Hearings on Cigarette Labeling and Advertising before the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess. (1964). See also}
In previous years, the tobacco lobby, skillfully making the most of these statistics, had succeeded in defeating all attempts to regulate the advertising and sale of cigarettes. This time, however, the political climate had shifted, and it soon became clear that the industry could not hope to escape completely unscathed.

The lobbyists, sensitive to the shift in the political climate, switched their tactics. They decided that outright nullification of the FTC rule and Congressional inaction on the matter were too much to hope for. Instead, a compromise was proposed: the industry would not oppose labeling legislation (for packages) if Congress would agree to abrogate the health warning in advertising.

To allow time for Congress to consider these proposals, a delay in the effective date of the FTC rule—to July 1, 1965—was sought and secured. While this was being done, the industry announced the adoption of a voluntary cigarette advertising code, designed to meet some of the FTC's objections, and presumably providing evidence of the industry's good faith and public conscience. Then, by summoning the support of southern Congressmen, and by fully utilizing the staggering economic statistics, the tobacco proponents pleaded their cause. The strategy worked, and Congress was persuaded to enact a weak labeling bill as a substitute for the strong sanctions of the FTC rule. The result


Since 1962, a number of bills and resolutions have been introduced which would have required, among other things, disclosure of filtration effectiveness, disclosure of nicotine and tar content, and a warning label. See H.R. 10910, H.R. 12233, and S. 3366, 87th Cong., 2d Sess. (1962); H.R. 3610, H.R. 4168, and H.R. 7476, 88th Cong., 1st Sess. (1963); H.R. 9693 and H.R. 9808, 88th Cong., 2d Sess. (1964). In addition, there were proposals to make the Federal Hazardous Substances Labeling Act applicable to cigarettes, H.R. 11714, 88th Cong., 2d Sess. (1964), to empower the FTC to regulate the advertising and labeling of cigarettes, H.R. 9655, H.R. 9657, and S. 2429, 88th Cong., 2d Sess. (1964), and generally, to control the health hazards involved in cigarette smoking, H.R. 11671, 11919, and S. 2430, 88th Cong., 2d Sess. (1964). Opposition by the tobacco industry and southern Congressmen doomed all of these efforts to failure.

For an excellent account of the behind-the-scenes maneuvering of the tobacco lobbyists, and their highly organized assault on the FTC rule, see Drew, supra note 210.

The code, which went into effect on January 1, 1965, bans any cigarette advertisement which (a) is aimed at persons under 21, (b) contains unproved health claims, or (c) employs a “virility” theme. The use of models under the age of 25—in either age or appearance—is not permitted, and testimonials by famous athletes or entertainers may not be used. Any advertisement which depicts smoking as “essential to social prominence, distinction, success or sexual attraction” is outlawed by the code.

The code provides for an administrator whose function is to screen out objectionable advertisements prior to publication. The administrator is empowered to fine violators up to a maximum of $100,000.
was the Federal Cigarette Labeling and Advertising Act,\textsuperscript{215} signed into law on July 27, 1965.

**A. The Federal Statute**

The most significant feature of the new act is its requirement that, as of January 1, 1966, all cigarette packages must bear a label warning of the health hazard connected with smoking cigarettes. Each pack and carton of cigarettes is required to prominently display the statement

\textbf{Caution: Cigarette Smoking May Be Hazardous To Your Health}\textsuperscript{216}

Failure to comply is punishable by fine not to exceed $10,000. Undercutting this requirement, however, is the declaration that

No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.\textsuperscript{217}

The latter provision, which nullifies the FTC's trade regulation rule, is scheduled to terminate on July 1, 1969.\textsuperscript{218} Thus, a moratorium of four years (running from July 1, 1965, the date the FTC rule would have been effective) has been imposed on any FTC efforts to regulate cigarette advertising by requiring disclosure of the health hazard. The Commission is free, of course, to pursue its traditional cease and desist remedy with respect to any cigarette advertising practices which it finds to be unfair or deceptive.\textsuperscript{219}

The new law, representing as it does a resounding victory for the tobacco industry, has not escaped criticism. It has been described as a "shocking piece of special interest legislation," which "confers a favor on one industry that all the other industries under the [Federal Trade] Commission's jurisdiction would naturally like to have."\textsuperscript{220} Of the moratorium on FTC efforts, Senator Neuberger has wryly observed that "while Congress can impose a moratorium on warning statements in advertising, there will be no parallel moratorium on the deaths and disease caused by smoking."\textsuperscript{221}


\textsuperscript{216} 79 Stat. 283, 15 U.S.C.A. § 1333 (Supp. 1965). However, the statute does not specify on which panel the warning label shall be affixed. As a result, the warning has generally been placed on the side panel of the pack.


\textsuperscript{220} New York Times (editorial), July 9, 1965, p. 28, cols. 1-2.

\textsuperscript{221} S. Rep. 195, 89th Cong., 1st Sess. 32 (1965). In addition, both the Department of
At this early date, it is difficult to determine with any precision what effect the package warning label will have.\textsuperscript{222} Most authorities have predicted, though, that any reduction in cigarette smoking is likely to be inconsequential at best.\textsuperscript{223} Very early returns have begun to bear this out. Statistics covering the first quarter of 1966—a period in which the warning might be expected to have its greatest impact—indicate no significant change in current smoking trends.\textsuperscript{224} Thus, there appears to be little hope that the new labeling law will have any significant effect in curtailing smoking.\textsuperscript{225}

A health warning in \textit{advertising}, however, would be quite another matter. Advertising has always been regarded as the backbone of the industry. It was the chief factor in the phenomenal rise in cigarette popularity in the early part of the century,\textsuperscript{226} and in recent years it has enabled the industry to placate smokers’ fears in the face of mounting medical evidence. Cigarette manufacturers have felt that as long as the Congressional sanctuary for advertising remains in effect, continued prosperity for the industry will be assured.\textsuperscript{227}

But if the advertising health warning is permitted to take effect, the industry fears that its very survival will be at stake. By continuing to advertise, in effect it will be telling the smoker, “Buy Brand X. They may be harmful, but so what? A little cancer never hurt anybody.” Alternatively, the industry could drop its advertising altogether—a drastic step in view of the key role advertising has played in the past.

It is not surprising, therefore, that any regulation of cigarette adver-
tising has been regarded as an anathema by the cigarette industry. At the same time, however, it is rapidly becoming clear that regulation and control of cigarette advertising represents the only real hope for curbing cigarette smoking through voluntary action of the consumer. To this end, it seems inevitable that the FTC's strictures dealing with cigarette advertising will eventually have to be reinstated. When this occurs, the FTC's authority to exercise substantive rule-making power will undoubtedly be challenged, and the courts will have to resolve the legal issues thereby presented. We turn now to a consideration of these issues.

B. FTC Trade Regulation Rule

The basic authority for the Commission's trade regulation rule is derived from Section 5(a)(1) of the Federal Trade Commission Act, which declares unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." It has been the Commission's position that current cigarette advertising constitutes such an unlawful practice, so long as it contains subtle health assurances without intimating that a serious health risk may be involved. Needless to say, this position rests on the premise that cigarette smoking involves a serious health hazard. Rather than making an independent de novo investigation into this question, the FTC decided to rely entirely upon the conclusions of the Surgeon General's Advisory Committee, which it regarded as having primary jurisdiction to determine the relationship between cigarette smoking and health. Since the Advisory Committee, a subdivision of the United States Public Health Service, had acted in a formal governmental capacity, the FTC considered the findings of the Smoking Report to be a proper basis for remedial action.

228 Drew, supra note 210, at 76; Science, supra note 227, at 478.
230 After reviewing current advertising practices, the Commission concluded: "[t]he magnitude and pervasiveness of cigarette advertising are such that virtually all Americans, including most children, are continually exposed to the portrayal of the desirability of smoking and to assurances respecting the safety of healthfulness of cigarette smoking." Statement of FTC Basis, 29 Fed. Reg. 8325, 8348 (1964).
231 Id. at 8331.
232 The primary jurisdiction concept stems from the 1907 Supreme Court decision in Texas & Pac. R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). The doctrine arises out of the desirability of having an administrative body, and not the courts, make the determination of issues of fact that fall within its special field of expertise. "Preliminary resort to the Commission is required ... because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission," Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 570 (1922); Far East Conference v. United States, 342 U.S. 570 (1952). See also 3 Davis, Administrative Law § 19.01 (1958).
233 In this and other respects, the Smoking Report differs from the collected opinions of an independent body of experts which would have to be weighed against one another before a final determination could be made. Statement of FTC Basis, 29 Fed. Reg. 8325, 8331-32 (1964). Cf. James S. Kirk & Co.
The validity of the trade regulation rule will depend on whether its promulgation exceeds the power which Congress has vested in the Commission. The ultimate answer to this question hinges upon three intermediate questions: (1) If the traditional cease and desist procedure were used, would current cigarette advertising practices constitute unfair or deceptive acts? (2) If so, could the FTC lawfully frame its cease and desist order to require the respondent to take affirmative steps to disclose the health risk? (3) If the answers to questions (1) and (2) are affirmative, may the Commission achieve the same result in a quasi-legislative fashion, by promulgating a trade regulation rule, instead of acting through the medium of ad hoc adjudication?

1. Cease and Desist Order

The cease and desist procedure is the usual route by which the FTC takes action against unfair commercial practices. The procedure is initiated by the issuance of a complaint. A date for the hearing is set, and the charges are heard. If, after hearing full arguments on both sides, the Commission finds that respondent's practices are violative of section 5(a)(1), an order requiring him to cease and desist such practices will issue. The respondent, of course, can obtain review of the order in the appropriate circuit court of appeals.

Ever since the 1934 landmark decision in FTC v. R. F. Keppel & Bro., Inc., the Commission has been accorded very broad discretion in determining what practices are "unfair" in violation of the Act. The Keppel case involved penny candy manufacturers whose practice was to attract purchasers—especially children—by offering a chance feature, such as a pencil, ruler, or penny, as a prize. The FTC found this practice unfair and ordered respondent to cease and desist using the promotional feature.

When the case reached the Supreme Court (the Commission having been reversed en route by the Third Circuit), the question of the Commission's jurisdiction was squarely presented. Observing that the FTC had been created for the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them," the Supreme Court emphasized that the Commission's determination should be accorded weight and upheld its action.

v. FTC, 59 F.2d 179 (7th Cir. 1932), a case where the court felt itself, as well as the FTC, to be bound by the resolution of certain questions of fact in a report by the U.S. Bureau of Standards.

235 The steps culminating in a cease and desist order are set out in § 5(b) of the FTC Act, 52 Stat. 112 (1938), 15 U.S.C. § 45(b) (1964).

236 291 U.S. 304 (1934).

237 63 F.2d 81 (3d Cir. 1933).

238 Supra note 236, at 314.
In *National Candy Co. v. FTC*, this broad power of the Commission was re-emphasized. The respondent was again a penny candy manufacturer, and the facts were very similar to those in *Kepner*. In upholding the cease and desist order, the court noted that the use of the chance feature (gambling) was contrary to the established policy of the Federal Government. This alone constituted a sufficient basis for remedial action, since "a method of competition which is contrary to the established public policy of the United States is an unfair method of competition within the intent and meaning of section 5 of the statute." In the instant situation, the Public Health Service, an arm of the Federal Government, has declared that the continued distribution and sale of cigarettes necessitates some form of remedial action. Hence, the Commission would certainly be acting within its broad discretionary power were it to declare the continuation of these practices, absent remedial action, to be an unfair method of competition contrary to an established public policy of the United States.

However, this is not the sole ground upon which the Commission could justify a cease and desist order. Section 5 also declares unlawful attempts by the seller to deceive the consumer for the purpose of influencing his buying choice. Accordingly, the Commission has a broad mandate to move not only against positive misstatements, but against the use of half-truths as well. The latter has long been recognized as a well-known and highly successful form of deception.

The classic example of a half-truth came to light in a section 5 proceeding against P. Lorillard during the heyday of the Tar Derby. Lorillard had been proclaiming that Old Golds were "lowest in nicotine" and "lowest in throat-irritating tars and resins." Technically, this was true; tests had actually proven the average Old Gold cigarette to contain less nicotine than other leading-brand cigarettes—by 1/177,187 of an ounce. Experts testified, however, that such a difference was "insignificant from a physiological standpoint." Accordingly, the Commission concluded

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239 104 F.2d 999 (7th Cir. 1939).
240 Id. at 1006.
241 "In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion." The sole proviso is that the public interest must be "specific and substantial" before the Commission may act. *FTC v. Klesner*, 280 U.S. 19, 28 (1929). This requirement is certainly satisfied here.
242 The broadening of the FTC standard was the product of the Wheeler-Lea amendments of 1938 which declared unlawful "unfair or deceptive acts or practices in commerce." 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1964). These amendments reflect the act's underlying policy that competition does not justify dishonest practices, that the doctrine of caveat emptor cannot be relied upon to protect the fraudulent purveyor of goods. "Laws are made to protect the trusting as well as the suspicious." *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937).
that Lorillard's representations were misleading and deceptive and directed the cessation of all such advertising.\textsuperscript{244} Its order was affirmed by the court of appeals:

To tell less than the whole truth is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.

In determining whether or not advertising is false or misleading within the meaning of the statute, regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public.\textsuperscript{248}

The FTC relied upon the Lorillard decision in a subsequent case involving the Liggett & Myers Tobacco Co. Chesterfield cigarettes had been advertised as "Much Milder" than competing brands. When the Commission charged deception, Liggett & Myers attempted to justify its advertising by relying on the dictionary definition of mildness as denoting a "moderate sensuous effect." The FTC rejected this argument, ruling that fine-spun distinctions do not determine whether advertising is false or misleading. The impression given to the general public was held to be the determinative factor; here the Commission found that the term "mild," when used in conjunction with health reassurances ("nose, throat and accessory organs not adversely affected by smoking Chesterfields"), implied that Chesterfields were less irritating than other brands. Since there was no showing that Chesterfields were in fact less irritating, the Commission directed the cessation of any further advertising along these lines.\textsuperscript{248}

On many other occasions throughout the 1940's and 1950's, the FTC declared certain cigarette advertising practices to be unfair and deceptive and issued the appropriate cease and desist orders.\textsuperscript{247} Not one of these

\textsuperscript{244} P. Lorillard Co., 46 F.T.C. 735, modified, 46 F.T.C. 853 (1950).
\textsuperscript{245} P. Lorillard v. F.T.C., 186 F.2d 52, 58 (4th Cir. 1950).
\textsuperscript{247} The following constitutes a chronological account of formal action by the FTC during this period with respect to cigarette advertising:

London Tobacco Co., 36 F.T.C. 282 (1943). Respondent used a crest simulating the British Royal Coat of Arms to promote his product, thereby implying that his product was a British import. A cease and desist order issued compelling respondent to abandon all implications that the product was British, including the London brand name and the British crest.

R. L. Swain Tobacco Co., 41 F.T.C. 312 (1945). Advertisements for Pinehurst cigarettes asserted that Pinchurts had been approved and endorsed by the medical profession; that they would soothe the mouth, nose and throat, and that coughs and throat irritation would completely disappear ("Yes, sir, no cough, no wheeze, no throat irritation when you smoke Pinehurst Cigarettes"); that Pinehurst cigarettes would not produce stale room odors; and that nicotine stains on fingers and teeth were considerably less than those caused by other brands. Upon Investigation, the Commission found all of these representations to be untrue and ordered respondent to cease and desist from any further representations along these lines.

R. J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950), modified, 192 F.2d 535 (7th Cir.
orders has been disturbed. Nor does it seem that a similar order today, directing the cessation of all cigarette advertising containing subtle assurances of healthfulness, would be disturbed. The Commission has determined, after a hearing in which all interested parties had an opportunity to present their views, that current advertising attempts to persuade smokers that cigarette smoking is not harmful, and does in fact create that impression. In the light of the well-documented findings of the Smoking Report, which the FTC has adopted, the Commission would be clearly warranted in finding that today's cigarette advertising is no less deceptive (and far more insidious) than the advertisements which prompted the cease and desist orders of the past two decades.

2. The Power to Require Affirmative Disclosure

The FTC Trade Regulation Rule is not merely aimed at directing the cessation of health appeals in cigarette advertising. The rule goes further, requiring tobacco manufacturers to take affirmative steps to disclose the

1951), modified order, 48 F.T.C. 682 (1952). Respondent's advertisements represented that Camel cigarettes were capable of relieving bodily fatigue, encouraging digestion, and soothing the nerves. In addition, it was asserted that Camels contained less nicotine than the four other leading brands, and that consequently Camels would not irritate the throat or leave an aftertaste. The Commission found that these representations were false and misleading and therefore deceptive, and issued an order compelling respondent to cease and desist from these practices.


American Tobacco Co., 47 F.T.C. 1303 (1951). Advertisements for Lucky Strike cigarettes stated that Luckies had achieved twice the popularity of any other brand among independent tobacco experts (buyers, auctioneers and warehousemen). It was also claimed that Lucky Strike contained less acid and less nicotine, and was less irritating to the throat than other leading brands. Investigation revealed that many of these so-called experts had no connection with the tobacco industry, and that most were completely unfamiliar with the grades and qualities contained in Lucky Strike cigarettes. Large numbers of them were not in fact exclusive smokers of Lucky Strike. Indeed, many of them had never smoked at all. Based on this information, the Commission concluded that the representations which had been made were "misleading and deceptive." As to the representations concerning acid and nicotine content, the Commission found no appreciable difference between Lucky Strike and other leading brands. The appropriate order compelling respondent to cease and desist from such practices was issued.

Philip Morris & Co., 49 F.T.C. 703 (1952). The Commission found insufficient evidence supporting respondent's claim that the use of diethylene glycol rather than glycerine as a moisturizing agent in cigarettes minimized throat irritation. A cease and desist order issued, but was subsequently dismissed on a showing that respondent had abandoned all advertisements that had been found to constitute unfair and deceptive practices.


Brown & Williamson Tobacco Corp., 56 F.T.C. 955 (1960). Pursuant to a consent order in accordance with § 3.25 of the Commission's Rules of Practice and Procedure, respondent agreed to cease and desist from the following advertisements in its promotion of Life cigarettes: 1) pictorial demonstrations purporting to prove that the filter used in Life cigarettes was capable of retaining all of the tar and nicotine contained in cigarette smoke (which in fact it was not capable of doing); 2) representations that Life was endorsed by the United States government (when in fact it was not); and 3) assertions that Life cigarettes were lower in tar and nicotine than other filter cigarettes.

248 See note 208 supra and accompanying text.


250 Id. at 8331.
health hazard inhering in their product. This is to be accomplished by including a warning in all cigarette advertising.

In the past, the Commission's power to compel affirmative disclosure has been upheld in a number of areas. Ironically, it was the Supreme Court that first recommended that the FTC make use of such a power. This occurred in a 1933 case, FTC v. Royal Milling Co.,\(^{251}\) where the use of the affirmative disclosure requirement was suggested as a less drastic alternative to an order compelling respondent to discontinue the use of a trade name altogether. The respondents were in the business of mixing and blending flour, but their trade name held them out as a "milling company," thereby creating the false impression that they ground the flour themselves. The Commission issued an order compelling respondents to drop the words "milling company" from the trade name. The Supreme Court thought this unnecessarily harsh, in view of the good will associated with the name, and recommended an alternative:

The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names . . . . This is a matter which the Commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine. And in doing so it will be enough if each respondent be required by modified order to accompany each use of the name or names with an explicit representation that respondent is not a grinder of the grain . . . .\(^{252}\)

The agency has not been reluctant to heed the Royal Milling suggestion. The courts, too, have been willing to grant the FTC extremely wide latitude in choice of remedy. The agency's competence in choosing the appropriate remedy is considered to fall within its special field of expertise, in much the same manner as its ability to sit as trier of facts in a field requiring specialized knowledge. "In striking that balance between the conflicting interests involved which the remedy measures [the Commission is] . . . for all practical purposes supreme."\(^{253}\)

The case which solidly established the Commission's competence to require affirmative disclosure was Hillman Periodicals, Inc. v. FTC.\(^{254}\) There, the respondent's business consisted of reprinting abridged versions of popular western and detective stories in paperback. Most of these publications involved substantial deletions from the original. To prevent deception, the FTC ordered the publisher to take the affirmative step of

\(^{251}\) 288 U.S. 212 (1933).

\(^{252}\) Id. at 217-18.

\(^{253}\) Henfield v. FTC, 140 F.2d 207, 209 (2d Cir. 1944).

\(^{254}\) 44 F.T.C. 832 (1948), aff'd per curiam, 174 F.2d 122 (9th Cir. 1949).
placing the word "abridged" on the front cover of its books. In addition, the publisher was directed to include in its advertising a notation that its publications were abridged. The order was affirmed on appeal.255

Three significant aspects of Hillman are worth noting: (1) it involved a respondent who had been guilty of making positive misrepresentations (he had actually asserted that the books were unabridged); (2) the Commission thought it necessary that positive steps be taken in order to erase the false impression created in the public mind, even though respondent had already discontinued his misrepresentations; and (3) placing the word "abridged" on the books was not sufficient—a notation in advertising was also required in order to stem deception.256 The situation of the cigarette manufacturers is quite similar. In the past, their advertisements have asserted that cigarettes are soothing to the throat, have no adverse affects, and are generally of a beneficial nature.257 While such practices have indeed been discontinued, largely through the efforts of the Federal Trade Commission,258 the affirmative disclosure requirements of the proposed FTC rule might well be thought necessary to erase the impression that cigarettes are not harmful—an impression created by constant pummeling over many years with misleading and deceptive advertisements. And since advertising has been the vehicle used in the past to convey this impression, the warning in advertising represents the most effective means of dispelling it.

The need to dispel false impressions created in the past has justified the affirmative disclosure power in a number of FTC cases. In Haskelite Mfg. Corp. v. FTC,259 for example, a tray manufacturer had advertised his product as made entirely of wood when in reality the surfaces were composed of paper that simulated wood. The Commission ordered the manufacturer to disclose the true content of his product. The Court of Appeals affirmed, holding that the affirmative disclosure requirements imposed by the agency were "calculated to aid in dispelling for the future the unfair and deceptive practices of the past...and they are well within the power of the...Commission."

Affirmative disclosure has frequently been decreed in cases involving hazardous commodities. Where silver

255 Hillman Periodicals, Inc., 44 F.T.C. 832 (1948), aff'd per curiam, 174 F.2d 122 (9th Cir. 1949).
256 Later cases involving similar factual situations have resulted in identical cease and desist orders. See New American Library of World Literature, Inc. v. FTC, 213 F.2d 143 (2d Cir. 1954); Bantam Books, Inc. v. FTC, 275 F.2d 680 (2d Cir. 1960).
257 See text preceding note 4, and note 247 supra.
258 See note 247 supra.
259 127 F.2d 765 (7th Cir. 1942).
260 Id. at 766. See also Theodore Kagen Corp. v. FTC, 283 F.2d 371 (D.C. Cir. 1960) (Manufacturer of watch cases simulating precious metal compelled to disclose the true metal composition).
polish containing 30 per cent carbon tetrachloride was marketed without any indication that the fumes might be harmful, the manufacturer was compelled to cease and desist from distributing his product unless purchasers were effectively warned of the potential hazard.\footnote{Rudolph R. Siebert, 49 F.T.C. 1418 (1953).} Similarly, a manufacturer of women’s dresses made of highly flammable brushed rayon has been compelled to attach tags to the garments, warning prospective purchasers of the flammable character of the material.\footnote{Academy Knitted Fabrics Corp., 49 F.T.C. 697 (1952). See also Isidore Sandberg, 49 F.T.C. 1278 (1953); Albert H. Fisher, 49 F.T.C. 77 (1952).} These two lines of decisions suggest that (1) where the public has been deceived in the past as to the true nature of a product, or (2) where the product contains a hazard that would not be immediately apparent to a casual purchaser, the FTC does not exceed its statutory authority by prescribing the disclosure necessary to apprise the consumer fully.\footnote{Two other lines of cases have also typically given rise to affirmative disclosure orders. The first line involves the so-called foreign origin cases, where an article imported from abroad is sold here without any indication that it was not made in the United States. The distributor has repeatedly been required to disclose the origin of the article. See Lucian V. Segal, 34 F.T.C. 218 (1941), aff’d per curiam, 142 F.2d 255 (2d Cir. 1944) (lenses for sunglasses made in Japan); L. Heller & Son, Inc., 47 F.T.C. 34 (1953), aff’d, 191 F.2d 954 (7th Cir. 1951) (imitation pearls imported from abroad); American Tack Co., 50 F.T.C. 202 (1953), aff’d per curiam, 211 F.2d 239 (2d Cir. 1954) (thumbtacks imported from Germany).} Cigarettes apparently fall into both of these categories. Thus, past precedent provides persuasive support for the Commission’s action compelling the tobacco industry to affirmatively disclose the health hazard in cigarettes.\footnote{At least one court has distinguished between “corrective” disclosure—that which is necessary to dispel deception, and disclosure which is merely “informative,” and held that the Commission’s jurisdiction extends only to the former. Albery v. FTC, 182 F.2d 36 (10th Cir. 1950), cert. denied, 361 U.S. 818 (1959).} There is, however, one counter-argument to the legitimacy of such an assumption of power. In 1938, the Wheeler-Lea Act amended the Federal Trade Commission Act. Inter alia, the amendments declared unlawful the dissemination of any false advertisement “for the purpose of inducing . . . the purchase of food, drugs, devices, or cosmetics.”\footnote{52 Stat. 114 (1938), 15 U.S.C. § 52(a)(1) (1964).} The definition of “false advertisement” includes one which “fails to reveal facts material in the light of such representations or material with respect to conse-
quences which may result from the use of the commodity... With the enactment of these Wheeler-Lea amendments, Congress encouraged the FTC to employ the affirmative disclosure remedy in order to dispel misleading impressions and half-truths.

The fact that Congress thought it necessary to add these sanctions suggests that prior to the Wheeler-Lea amendments in 1938, the Commission may have lacked the power to require affirmative disclosure in advertisements. Subsequent to 1938, the argument runs, the FTC would have the power with respect to cigarette advertisements only if it could be shown that cigarettes are one of the commodities specifically covered by the Wheeler-Lea amendments—i.e., a food, drug, device or a cosmetic.

The case of FTC v. Liggett & Myers Tobacco Co. is said to preclude any such showing. In that case, the Commission brought suit in the district court under section 13 of the amended act to enjoin allegedly deceptive claims by the manufacturer of Chesterfield cigarettes. To establish its authority to employ the injunctive remedy, the FTC was required to show that cigarettes were a "drug" as the term is defined in section 15(c). The court dismissed the action, expressly holding that cigarettes are not a "drug" within the meaning of the Federal Trade Commission Act.

The Liggett & Myers case precludes any reliance on the Wheeler-Lea provisions and forces the FTC to fall back on its general section 5 power to justify affirmative disclosure. But the original premise was that section 5 originally contained no power to require affirmative disclosure; otherwise, Congress would not have thought it necessary to add that power with respect to food, drugs, cosmetics, and devices. It is said to follow, therefore, that requiring cigarette advertising to disclose the health hazard would be an unauthorized assumption of power by the Commission.

This reasoning based on the Wheeler-Lea amendments and the Liggett & Myers case is faulty in several respects. First, the Liggett & Myers case was decided in 1953, a time when cigarettes were not generally thought to be harmful, unless used in excess. In interpreting Wheeler-Lea, an act avowedly aimed at protecting public health and welfare, the Liggett & Myers court was of the opinion that the injunctive remedy for "drugs" ought to be reserved for those products which might, in the

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270 The Commission was thereafter left to pursue the traditional cease and desist remedy under § 5 of the Act. Ultimately, the FTC prevailed by pursuing this much slower route. Liggett & Myers Tobacco Co., 55 F.T.C. 354 (1958).
course of moderate use, affect human health. In the light of today's knowledge, however, the court might well have decided that it was within the scope of the congressional purpose to include cigarettes as a "drug." Indeed, for a modern court to hold otherwise might be contrary to the basic spirit of the Wheeler-Lea amendments.

In addition, it should be noted that the Liggett & Myers decision involved a suit for injunctive relief, while the present issue concerns the power to compel affirmative disclosure. The power to seek affirmative relief was clearly and explicitly added to the act in 1938 by the Wheeler-Lea amendments; no provision in the act prior to that time could be construed as giving the Commission that power. The affirmative disclosure power, however, has been implicit in section 5 of the act from its inception. Prior to 1938, the Supreme Court in Royal Milling encouraged the FTC to make use of the section 5 power for this purpose. Since 1938, the Commission has on many occasions required affirmative disclosure within the framework of a cease and desist order, and in every instance its power has been derived from section 5 of the act. Thus, unlike the injunctive power, which without Wheeler-Lea would not have existed, the affirmative disclosure power has been implicitly contained in the act since 1914 when section 5 was originally enacted. It is most likely that Congress decided to make the power explicit with respect to foods, drugs, cosmetics and devices in order to encourage the Commission to make the fullest possible use of that power insofar as these commodities were concerned. Hence, the Liggett & Myers case concerned an assumption of FTC power that is quite different from the one involved here. This, coupled with the fact that the decision was premised upon a factual assumption subsequently proven invalid (that cigarettes are not particularly harmful) deprives any argument based on the Liggett & Myers interpretation of Wheeler-Lea of much of its force.

Lastly, Wheeler-Lea was not solely concerned with food, drugs, cosmetics and devices. In addition to sections 12-18 of the act (which dealt solely with these commodities), the amendments also broadened the scope of section 5 by declaring unlawful "unfair or deceptive acts or practices." Decisions since the Wheeler-Lea amendments were enacted have stressed the broadening of the Commission's section 5 power. They give lie to the argument that the 1938 amendments implied a narrowing

271 FTC v. Royal Milling Co., 288 U.S. 212 (1933) (See discussion in text accompanying notes 251-53 supra.)
272 See notes 260-63 supra.
of the Commission’s jurisdiction over deceptive advertising. In *Fresh Grown Preserve Corp. v. FTC*, the court was clear on this issue:

The amendment to § 5, 15 U.S.C.A. § 45 of the Act did not modify the term ‘unfair methods of competition in commerce’ but made unlawful what were called “unfair or deceptive acts or practices in commerce,” and by so doing enlarged instead of lessened the scope of the jurisdiction of the Commission. The additions found in §§ 12 to 15, inclusive, were also to give the Commission greater control over the advertising of food, drugs, cosmetics and the like by providing for criminal action as well as injunction; and only in proceedings under such sections is the definition of false advertisement in § 15 relevant, not in a proceeding like this under § 5.

While the *Fresh Grown Preserve* case was not immediately concerned with the affirmative disclosure power, its holding applies equally to that area. This was made clear in *Mary Muffet, Inc. v. FTC*, a case involving a manufacturer of ladies’ dresses and blouses. The garments, which resembled silk, were advertised as “crepe,” but in fact they were made of rayon. The FTC found that by such practices customers were being deceived into believing that they were purchasing clothes made of silk. To remedy the situation, the agency ordered the respondent to disclose to prospective purchasers the actual rayon content of the garments. On appeal, the Commission’s order was affirmed. Relying on the *Fresh Grown Preserve* holding, the court of appeals construed section 5 broadly, enactment of Wheeler-Lea notwithstanding:

> [A]ffirmative disclosure in the advertising of foods, drugs, curative devices and cosmetics, 15 U.S.C.A. §§ 52, 55(a), [does] . . . not tie the hands of the Commission from acting in the public interest in all other cases.

Thus, the courts seem primarily interested in ensuring that the FTC be free to act to protect the public interest. Questionable theories of statutory interpretation are not likely to be well received where they would hamper the agency in achieving this goal. With the statutory argument dismissed, there is ample precedent to support the Commission in its endeavor to compel disclosure of the cigarette health hazard by the tobacco industry. Any challenge to the Commission’s affirmative disclosure power is not likely to succeed.

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275 125 F.2d 917 (2d Cir. 1942).
276 *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917, 919 (2d Cir. 1942).
277 194 F.2d 504 (2d Cir. 1952).
In 1914, when Congress established the Federal Trade Commission for the purpose of ferreting out unfair or anti-competitive business practices, the new Commission was regarded as essentially an adjudicatory body, with little or no rulemaking power. For the most part, the Commission has exercised its regulatory powers within that framework, deciding each case on the particular facts presented and issuing an order directing the cessation of any practice found to be unfair.

It soon became evident, though, that this procedure was not adequate to deal with certain industry-wide practices, since repeated adjudications involving identical facts not only were extremely cumbersome, but resulted in considerable unfairness to all parties concerned.

Accordingly, the Commission early initiated the concept of the Trade Practice Conference. The conference is generally convened at the instance of representatives of an industry, who wish to bring to the Commission's attention particular practices within the industry. After a hearing, the FTC expresses its views of the law applicable to the matter in the form of a Trade Practice Rule.

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280 This section considers the arguments pro and con bearing on this question, and attempts to resolve them in the light of legislative history, judicial precedents, statutory language and relevant policy considerations. At this point, however, a representative sampling of the views expressed on this subject should be noted.


281 See notes 296-98 infra and accompanying text.

282 For further elaboration, see text accompanying notes 323-28 infra.

283 The first such conference was held in 1919, and resulted in an elimination of certain abuses in misbranding gold finger rings. MacIntyre, supra note 80, at 138. Since that time, the FTC has employed this procedure on a number of occasions, resulting in trade practice rules covering a wide variety of industries, ranging from artificial limbs to yeast. 16 C.F.R. §§ 18.1-227.201 (1960).

Trade Practice Rules are not intended as statements of existing law, nor do they carry the force of law. They are merely intended as guidelines for the industry. If the FTC does decide to prosecute a violator, the complaint charges a violation of the underlying law, not of the Trade Practice Rule. In prosecuting the respondent, the FTC must prove de novo the basic deception and unfairness that prompted the trade practice rule; it cannot rely upon the rule itself to satisfy its burden of proof. For example, if cigarette advertising were governed by a trade practice rule, and a subsequent section 5 proceeding were brought alleging deceptive advertising practices, the FTC would be required to prove de novo both the causal link between cigarettes and health and the deception being practiced on the consuming public.

In recent years, the use of the trade practice conference and the promulgation of trade practice rules has declined considerably. The inherent limitation of these rules—that they lack the force of law—has hampered their effectiveness, and the voluntary bonds between the FTC and a number of industries have begun to show signs of stress. To buttress the Commission's effectiveness in enforcing compliance with the act, the FTC decided to make use of the long-dormant substantive rulemaking power in approaching the cigarette-health problem. The result was the trade regulation rule.

Unlike its trade practice counterpart, the trade regulation rule is designed to have binding effect when applied to any matter within the scope of the rule:

Where a trade regulation rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the legality and propriety of applying the rule to the particular case.

Hence, it is clearly contemplated that in subsequent adjudications, the
Commission will be entitled to rely on the factual conclusions and the legal propositions contained in the trade regulation rule.\textsuperscript{290} The rule will have the force of law, and must stand or fall as such.\textsuperscript{291}

It is necessary, therefore, to inquire whether the FTC possesses substantive rulemaking authority to support this exercise of power. At no point in the act is the Commission expressly accorded substantive rulemaking power.\textsuperscript{292} To support such an exercise of power, the Commission must rely upon the general grants of power contained in sections 5 and 6 of the act.\textsuperscript{293} The two relevant provisions are section 5(a)(6),\textsuperscript{294} which is a general expression of the Commission's power to prevent unfair or deceptive practices, and section 6(g),\textsuperscript{295} which couples a vague rulemaking power with the authority to classify corporations.

In interpreting these vague statutory provisions, the legislative history of the Federal Trade Commission Act represents the one serious obstacle to the Commission's assumption of rulemaking authority. When the bill to establish the Trade Commission was reported back from the conference committee, it was presented to the House by J. Harry Covington of Maryland, the moving force behind the bill. In the course of his final presentation he made the following explicit declaration:

The Federal Trade Commission will have no power to prescribe the methods of competition to be used in the future. In issuing its orders it will not be exercising power of a legislative nature . . . . The function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair, and if it finds it to be unfair, to order the discontinuance of its use.\textsuperscript{296}

During the course of the debate that followed the Covington speech, analogies were frequently drawn between the Interstate Commerce Commission, at the time the only other comparable administrative body, and the proposed Federal Trade Commission. Established in 1887, the ICC had been given the power both to declare existing rates unreasonable, and to prescribe just and reasonable rates for the future.\textsuperscript{297} The sponsors of

\textsuperscript{290} The FTC has stated that it intends to so rely. See Statement of FTC Basis, 29 Fed. Reg. 8325, 8371-72 (1964).
\textsuperscript{291} MacIntyre, supra note 280, at 145-46; H.R. Rep. No. 3236, supra note 280, at 31. Thus, the possibility of construing the rule as interpretive rather than legislative would seem to be precluded. See 1 Davis, Administrative Law § 5.03 (1958).
\textsuperscript{292} There is one exception which, however, is not relevant here. In the Wool Products Labeling Act, the FTC has authority to prescribe substantive rules with respect to label disclosure requirements. 54 Stat. 1131 (1940), 15 U.S.C. § 68d (a) (1964).
\textsuperscript{293} For an analysis of the specific statutory provisions, see text accompanying notes 307-14 infra.
\textsuperscript{296} 51 Cong. Rec. 14932 (1914).
the Trade Commission bill were careful to assure their brethren that the proposed FTC would only possess powers of the first type, and would not have the authority to prescribe conduct for the future. Representative F. C. Stevens of Minnesota, one of the five House managers of the bill, was emphatic on this point when questioned during debate:

Mr. SHERLEY [Ky.]. If the gentlemen will permit, the Federal trade commission differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?

Mr. STEVENS of Minnesota. Certainly.

Mr. SHERLEY. In other words, it exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission?

Mr. STEVENS of Minnesota. Yes. The gentleman is entirely right. We desired clearly to exclude that authority from the power of the Commission.298

On its face, the legislative history seems dispositive on the issue of the agency's rulemaking power. But this is hardly the case. There are several reasons why this legislative history should not be heavily relied upon to dispose of this issue.

First, the history itself contains internal inconsistencies. Representative Stevens, for example, probably did not intend his remarks to be too heavily relied upon. This seems apparent from his general conception of the Commission's power as revealed in another statement:

This measure, for the first time in this country, attempts an administrative regulation of commerce itself. We have regulated the instrumentalties such as transportation and finance, but here we attempt to rule and help commerce. An executive alone with power of enforcement merely, or even a wise discretion, could not do it. The courts under their ruling could not wisely and liberally accomplish the needed results. The legislative branch can only prescribe rules for the future. It requires a combination of all those powers in one organization, with the highest obtainable talent well and thoroughly to work out the difficult problems which will be met.299

Also, the Senate Committee on Interstate Commerce evidently had a somewhat different view of the Commission than the House sponsors did. According to the report that followed hearings on the bill, the Senate Committee desired to accord the new agency wide discretion in filling in the gaps of the enabling act:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the

298 51 Cong. Rec. 14938 (1914).
299 51 Cong. Rec. 14939 (1914). [Emphasis added.]
commission to determine what practices were unfair. It concluded that
the latter course would be the better . . . . 300

Although the Committee probably had in mind gap-filling through a
series of successive adjudications, its statement need not be limited to
the ad hoc approach. It does not seem likely that the Committee intended
to force the Commission, when presented with an industry-wide problem
such as the cigarette hazard, to choose between the cumbersome case-by-
case approach and a complete abdication of its responsibility. Rather, the
Committee may well have expected the Commission to expedite such
matters in the most feasible and efficient manner—through a prospective
interpretation of "unfair and deceptive acts and practices" as applied to
the entire cigarette industry.

Second, much of this history has been rendered obsolete by subsequent
developments. Representative Covington's statement that the Commission
would have no power "to prescribe the methods of competition to be used
in the future" has been weakened considerably by the section 5 cases
explicitly upholding the Commission's power to require affirmative
disclosures. 301 The courts which have allowed the Commission to utilize
such powers do not seem to have been greatly troubled by the Congress-
al debates; similarly, there appears to be little reason why they should trouble a court passing upon the validity of the substantive
rulemaking power.

Third, it should be kept in mind that Congress in 1914 was still con-
cerned with the possibility that a delegation of legislative power to an
administrative agency might be declared unconstitutional. Any concern
along these lines dissipated with the cases of United States v. Rock
Royal Co-op, Inc., 302 and Yakus v. United States, 303 which established the
Supreme Court's liberal policy toward delegation of legislative power.
Today no one would seriously question whether Congress could constitu-
tionally delegate to the Commission the power to prescribe unfair
methods of competition for the future, so long as it provided some
minimum guidelines. But this was not clear to the Congress of 1914, and
the statements by Representatives Covington and Stevens may simply
have been attempts to allay the fears of their colleagues as to the con-
stitutionality of the proposed act.

Fourth, a number of courts and authorities have suggested that it is
generally unwise to rely heavily upon legislative history. 304 They argue

301 See text accompanying notes 251-79 supra.
304 See, e.g., Soon Hing v. Crowley, 113 U.S. 703, 710-11 (1885); Schwegmann Bros. v.
that the expression of opinion by a few individuals during floor debate does not accurately reflect the intent of the legislature as a whole, and point out that the use of legislative history simply reintroduces the policy controversies that were presumably resolved by the legislature when it enacted the statute in its final form. The legislature is expected to discard those policies to which it does not adhere, reduce the remaining policies to an agreed formula, and enact a formal written expression of its intent. It is this written expression that receives the formal approval of the executive and then comes to the attention of the general public. Hence, the use of internal legislative debates to interpret a statute is a questionable practice and ought to be avoided where possible.\footnote{Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (dissenting opinion by Mr. Justice Jackson); Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L. Rev. 527 (1947). ("Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute." Id. at 543.)}

None of this is meant to suggest that the courts should entirely overlook the debates surrounding the passage of the Federal Trade Commission Act—and particularly the statements made by Representatives Covington and Stevens to the floor of the House. Indeed, it has generally been recognized that if legislative history is to be considered at all, explanatory statements by the sponsors of the bill are considerably more reliable than mere floor debates, committee hearings, and the like.\footnote{See Duplex Printing Press v. Deering, 254 U.S. 443 (1921); United States v. Coca Cola Co., 241 U.S. 265, 281-83 (1916); Binns v. United States, 194 U.S. 486, 495 (1904); Jones, "Extrinsic Aids in the Federal Courts," 25 Iowa L. Rev. 737, 743-50 (1940).} But the reasoning above does suggest that this history should not be dispositive on the issue of rulemaking power. Other factors—statutory analysis, judicial precedents, and policy considerations—bear on the issue, and must be examined.

(a) Statutory Analysis. Section 6(g) of the Federal Trade Commission Act provides:

The Commission shall also have the power—

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title.\footnote{38 Stat. 722 (1914), 15 U.S.C. § 46(g) (1964).}

The FTC relies upon a literal reading of section 6(g) as statutory authority for its trade regulation rule.\footnote{Statement of FTC Basis, 29 Fed. Reg. 8325, 8369 (1964). The FTC also relies upon the general expression of authority in § 5(a)(6) of the act: The Commission is empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. 66 Stat. 632 (1952), 15 U.S.C. § 45(a)(6) (1964).} But before one can be persuaded
to adopt a literal reading, two potential obstacles are presented: (1) Does the rulemaking power relate solely to the classification of corporations, or is it broader in scope?; (2) Even if not limited to the classification of corporations, is the rulemaking power limited to regulations of a procedural character?

(1) The legislative history of section 6(g) is clearer and therefore more helpful than is the previously discussed general legislative history of the act. It indicates that the power to make rules and regulations is separate and distinct from the power to classify corporations, and is not narrowed or limited by it. In contrast to the corporation clause, which was a much-discussed provision in both houses of Congress,\(^{309}\) the rulemaking clause was inserted into the act at the last minute. It was not contained in any of the original bills, or in either the House or the Senate draft; it was only appended to the list of general section 6 powers when the final draft was before the Conference Committee. Since subsection (g) (containing the corporation power) happened to be the last of the clauses in section 6, the authority to promulgate rules was simply annexed at that point. The proximity between the grants of power is therefore fortuitous, and no reason exists for permitting the corporation clause to limit or narrow the Commission’s authority to make rules.

(2) Nor is the Commission’s section 6(g) power limited to rules of a procedural character. Past decisions involving its use have upheld the Commission’s power to promulgate rules having the force and effect of law.\(^{310}\) Although these decisions all have involved rules of a procedural character,\(^{311}\) they in no way suggest that section 6(g) is so limited.\(^{312}\) This, after all, is the first instance in which section 6(g) has been relied upon to support a substantive FTC rule; an FTC case involving the use of a substantive rulemaking power is yet to be presented to the courts. The statute is not expressly limited to procedural regulation, and nothing in the act or in its underlying purposes suggests such a limitation.\(^{313}\) To read one in now would not only contravene the literal statutory language, but seems to be at cross-purposes with the very goals the act was designed to effectuate.\(^{314}\)


\(^{310}\) Hill v. FTC, 124 F.2d 104 (5th Cir. 1941).

\(^{311}\) In addition to Hill v. FTC, ibid., see, e.g., Hunt Foods & Indus. v. FTC, 286 F.2d 803, 810 (9th Cir.), cert. denied, 365 U.S. 877 (1961); Kritzik v. FTC, 125 F.2d 351 (7th Cir. 1942).

\(^{312}\) A semantic argument might lay stress on the procedural connotations of the words “carrying out” in § 6(g). But it seems unlikely that such an argument would be entitled to very much weight.

\(^{313}\) MacIntyre, supra note 280, at 142.

\(^{314}\) A related issue and its resolution may be relevant here. A perusal of the entire Federal Trade Commission Act reveals only one other instance where Congress employed
(b) **Judicial Precedents.** The courts have repeatedly held that the FTC has very broad discretion in framing remedies. This was well stated recently by the Ninth Circuit Court of Appeals:

The Commission is the expert body to determine what remedy is necessary to eliminate the unfair and deceptive practices disclosed by the record, and it has wide latitude for judgment. Shaping a remedy is essentially an administrative function. Congress has entrusted the Commission with the responsibility of selecting the means of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence . . . . Only in cases where the remedy selected has no reasonable relation to the unlawful practices found to exist should a reviewing court interfere.316

While it is true that this case, and most of the cases adopting a similar viewpoint, were concerned primarily with agency action within the framework of the traditional cease and desist procedure,316 these statements are not limited to that procedure.317 As long as the remedy bears a "reasonable relation to the unlawful practices" and is not flagrantly lacking in statutory justification, the courts have upheld the Commission's action. In fact, where broad prospective action is clearly the more reasonable solution, courts have expressed a distinct preference for the legislative approach.318 In the light of the courts' willingness to grant the FTC such wide latitude in framing the remedy, it would seem to make sense to read the statute broadly and thereby allow the agency to carry out its responsibilities in the most efficient possible manner.319

The Supreme Court has occasionally alluded to the quasi-legislative

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315 Carter Prod., Inc. v. FTC, 268 F.2d 461, 498 (9th Cir. 1959). [Emphasis by the Court.]
317 "The Trade Commission Act is one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process." United States v. Morton Salt Co., 335 U.S. 632, 640 (1950).
318 Witness the long Chenery litigation, where the Supreme Court repeatedly failed in its efforts to encourage the SEC to make use of its rulemaking power. "[T]he choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery, 332 U.S. 194, 203 (1947).
power of the Commission. In FTC v. Ruberoid Co., it elaborated upon this concept. The FTC had issued an order compelling respondent to cease and desist from certain price discriminations. Although every instance of discrimination had involved a price differential in excess of 5 per cent, the order was promulgated in such a form as to prohibit any and all price differentials in the future. By encompassing price differentials below the 5 per cent level, the order went considerably beyond the facts of the case. Over respondent's objection that the Commission had gone too far, the Court upheld the agency ruling. Significantly, the Court did not question the Commission's power to frame an order with a scope broader than the facts at issue.

The dissent by Justice Jackson was particularly illuminating. It was his position that the Commission had not only the power, but the duty, to promulgate rules in order to fill in the statutory gaps left by the legislature. Jackson would have remanded to the agency in order to obtain a clearer and more explicit statement on the conduct to be required in the future. In a significant essay on the powers of the Federal Trade Commission, the Justice was highly critical of the agency for failing to make fuller use of its quasi-legislative authority:

It may help clarify the proper administrative function in such cases to think of the legislation as unfinished law which the administrative body must complete before it is ready for application. In a very real sense the legislation does not bring to a close the making of the law .... Such legislation represents inchoate law in the sense that it does not lay down rules which call for immediate compliance on pain of punishment by judicial process. The intervention of another authority must mature and perfect an effective rule of conduct before one is subject to coercion. The statute, in order to rule any individual case, requires an additional exercise of discretion and that last touch of selection which neither the primary legislator nor the reviewing court can supply. The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts.

The fact that this essay appeared in a dissent should in no way suggest that this is a renegade position. Justice Jackson's disagreement with the majority centered upon the agency's duty, not its power. In fact, Jackson was merely reflecting a position that a majority of the Court had taken somewhat earlier:

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320 343 U.S. 470 (1952).
The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed. . . . In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the Commission acts in part quasi-legislatively and in part quasi-judicially.\textsuperscript{822}

In light of these views, it seems reasonable to argue that the Commission's power to control conduct prospectively does not exist solely within the adjudicatory framework, but rather extends to control through substantive rulemaking of general applicability.

(c) Policy Considerations. Where a decree of general applicability is called for, as it is here, policy considerations overwhelmingly favor the formal rulemaking approach over ad hoc adjudication which results in a quasi-legislative decree.\textsuperscript{323} An adjudicatory proceeding resulting in a quasi-legislative decree is initially far less valuable as a guide to future conduct than a formal rule. Businessmen who find themselves in the "gray area" on the outer edge of an adjudicated decree are more likely to continue their conduct in the hope that the decree will be strictly confined to the facts of the particular case that spawned it. Repeated violations and prosecutions will be necessary to apprise would-be violators of the scope of the new policy; only then will it become of significant value as a guide to future conduct. Formal rulemaking, providing a workable guide to conduct, can avoid this problem.\textsuperscript{324}

In addition, there may be a sacrifice of private interests if one particular adversary proceeding is used as a vehicle for promulgation of broad prospective policy. The agency is likely to devote its attention to the more encompassing task at hand, and in doing so it may place less emphasis on the primary interests of the parties themselves. Moreover, the particular company that happens to be the respondent when the

\textsuperscript{822} Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935). This language has been used to support the thesis that § 6(g)'s rulemaking authority should receive a liberal construction. MacIntyre, supra note 280, at 142-43.

\textsuperscript{323} The FTC relies heavily upon these considerations in support of its trade regulation rule. Statement of FTC Basis, 29 Fed. Reg. 8325, 8366-68 (1964).


One member of the President's Committee on Administrative Management was of the view that this consideration ought to be dispositive:

If policies for the guidance of individual conduct are to be determined by regulatory bodies it is desirable that such policies be embodied increasingly in carefully drawn rules that all may read and understand, rather than being pricked out point by point in ad hoc decisions. There is growing feeling, for example, that the law of unfair competition ought to be formulated in rules by the Federal Trade Commission, rather than being pieced together out of a long series of individual cease and desist orders. Cushman, supra note 280, at 230.
agency decides to frame its decree will suffer more than its competitors, since the latter will not be compelled to alter their practices until the Commission also takes action against them. The rulemaking approach assures that the entire industry will feel the weight of the FTC sanction at the same time.\(^{325}\)

Perhaps more important, there is a sacrifice of the public interest as well. The use of adjudication to promulgate prospective decrees of broad applicability deprives the various parties interested in the scope of the decree of an opportunity to present their views. Of course, amicus briefs may always be filed, but this does not approach the degree of public participation that would be afforded by an open hearing for a proposed rule. At such a hearing, the proposed rule could be subjected to thorough criticism and analysis, with undesirable and unforeseen consequences brought to light. This procedure is required for all rulemaking by section 4 of the Administrative Procedure Act (APA).\(^{326}\) It is even possible that an attempt by the agency to promulgate a broad prospective decree within the adjudicatory framework might constitute a violation of the APA.\(^{327}\)

Last, traditional factors that might influence an agency to act through adjudication are absent here.\(^{328}\) This is not a unique or specialized situation that is incapable of solution through a general approach. Nor does the agency have a need to accumulate experience before attempting to arrive at a generalized solution. The FTC has had a long history of dealing with cigarette advertisements and is well qualified to promulgate a rule applicable to the entire industry.

Uniformly, these policy considerations favor the legislative approach over a series of ad hoc adjudications. While standing alone, they are certainly not dispositive; when considered in conjunction with the statutory analysis and judicial precedents set out above, these policy considerations could well serve as a makeweight in persuading a court to uphold the FTC rule.

Although Congress has temporarily deprived the Commission of authority to issue prescriptive regulations covering cigarette advertising,\(^{329}\) it is gradually becoming clear that some action in this area will be necessary if consumers are to be convinced to give up smoking and current

\(^{327}\) Peck, supra note 324, at 754-57.
\(^{328}\) Baker, supra note 325, at 661-65.
\(^{329}\) Congress has explicitly stated that the moratorium shall have no bearing on the Commission's rulemaking authority. 79 Stat. 283, 284 (1965), 15 U.S.C. §§ 1334(c), 1339 (Supp. 1965).
trends are to be reversed. Since the FTC would undoubtedly be responsible for the enforcement of any action that is ultimately taken, it would seem that the Commission should frame the regulation to begin with. In the final analysis, though, it is of little significance whether public regulation—particularly control of cigarette advertising—is accomplished through congressional legislation or FTC regulation, as long as effective governmental action is taken to cope with the problem.

V

CONCLUSION

The American public is currently being exposed to a health hazard of very significant proportions. It has been estimated that more than 125,000 Americans will die annually from the effects of cigarette smoking if the current rate of consumption continues. A system of public regulation represents the only sensible approach to a problem of this magnitude. Such a system avoids the arbitrariness inherent in any self-help remedy whereby the individual smoker seeks recourse against a particular cigarette manufacturer. Public regulation, by establishing a sanction of general applicability, endeavors to achieve an even-handed solution to the problem.

The cigarette labeling legislation enacted by Congress last year represents a substantial step in the right direction. The significance of the warning label lies in its psychological effect upon the smoker. With every pack of cigarettes, he is informed and reminded of the risk to his health. The causal link between cigarettes and lung cancer should no longer have the status of debate in his mind. As long as causation remained debatable, a smoker was able to convince himself that the existence of any link was still tenuous, and that there would always be time to stop when the link was conclusively shown to exist. The warning on packages has upset this psychological status quo and compels the smoker to accept the truth.

The principal fault of the new legislation is that its effectiveness is limited. By the time the smoker has a chance to read the warning label on the side panel of the cigarette pack, he already has a cigarette in hand and is ready to light up. A warning label in advertising copy would

331 This argument was used by Senator Magnuson in introducing his proposed “Federal Cigarette Labeling Act” (S. 559) to the 89th Congress. He stressed that the bill was essential because the public had failed to accept the seriousness of the risk. “Too many are still tempted to say, ‘If cigarettes were really so harmful, the Government would certainly do something about it.’” 111 Cong. Rec. 716 (1965). See also Consumers Union Report 204.
overcome this difficulty. Such a warning, by undermining the smoking inducments of cigarette advertisements, affords the smoker an opportunity to strengthen any motivation he may have to refrain from smoking.

Nevertheless, the FTC regulation of advertising must not be viewed as a panacea. The confirmed smoker would undoubtedly continue to smoke despite a warning in advertisements. The hope is that he can be convinced to cut down. Furthermore, the advertising regulation provides a good chance of convincing the moderate smoker to stop altogether. The likelihood of accomplishing these goals can be measurably increased if smokers are made aware that the damage is reversible as long as invasive cancer has not actually developed. Many smokers understandably take the attitude: “I've smoked for many years, and the damage has already been done. Why stop now?”

By far the brightest hopes are for the younger generation on the verge of smoking. It is hoped that cigarette regulation will prevent the habit from taking hold in the first place. The proportion of nonsmokers would thereby increase as each succeeding generation attains smoking age. As increasing numbers of smokers give up the habit, the aura of social desirability which today surrounds smoking should gradually disappear. The ultimate goal is a return to the view—widely prevalent in this country at the turn of the century—that smoking is socially unacceptable. Through massive advertising campaigns, the tobacco industry was able to bring about a complete reversal of this social attitude in a relatively short period of time. There is no apparent reason why a similar reversal could not be effected today. The full circle would thereby be traversed; cigarette smoking would be left for the small minority who, lacking any social compulsion to smoke, would do so because they found the psychological satisfaction worth more than the heavy risks they knowingly choose to run.

The warning label also has a significant effect on the other remedy we have considered: individual tort suits. By apprising the average smoker of the risks involved, and by enabling him to make a conscious and knowledgeable decision whether to smoke, the warning provides the tobacco companies with a defense based on assumption of the risk. If

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834 However, nothing short of outright prohibition would be effective in his case, and this would be a most undesirable solution. See part (c), infra.
836 See text accompanying notes 2-3 supra.
CIGARETTES AND HEALTH

the smoker chooses to continue, there is no inequity in barring recovery for any injury that ensues.

Assumption of the risk, however, cannot apply to the tort suits of the present day, since most of the plaintiff's smoking occurred before he knew of the risk involved. Nevertheless, manufacturers can still escape liability on some fault-substitute theory unless the courts take a farsighted approach and impose strict enterprise liability. To do so, however, would open the gates to such a flood of recoveries (at its most extreme, manufacturers would have to make compensation for the 125,000 deaths each year allegedly due to smoking) that it is almost inconceivable that such claims would be allowed.

In addition to private tort suits, solutions most frequently suggested to augment or supplant public regulation are: (1) taxation; (2) counter-advertising and education; and (3) outright prohibition.

1. Taxation. It has been suggested that smoking might be discouraged through the use of increased state and federal cigarette taxes, which place a heavier economic burden upon those who wish to smoke. Today the total tax on an average pack sold in the United States accounts for better than half the retail price. Although high, this is considerably lower than the tax burden in many of the European countries; in Great Britain 79 per cent of the average 55 cent retail price is due to taxes, while in Denmark and Sweden a tax in excess of 80 per cent is levied on the retail price. If taxes at comparable rates were imposed in the United States, the price of cigarettes would increase to more than 70 cents a pack.337

However, it is quite probable that any attempt to use taxation to discourage smoking would prove unsuccessful. Economists have shown that the demand for cigarettes is a rather inelastic one and does not react very significantly to price variations.338 This has been borne out in Great Britain, where despite the high retail price there has been no significant drop in the smoking level.339

More important, imposing a tax for the purpose of deliberately raising the price could backfire and actually increase the adverse health effects. With higher priced cigarettes, Americans would be likely to react as their British counterparts have and smoke each cigarette down to the butt. The consequence would be a much heavier dosage of carcinogenic elements.340 Thus, public health might actually be impaired if the increased price were to induce a change in smoking habits.

337 Consumers Union Report 181.
339 Consumers Union Report 182.
340 See text accompanying note 59 supra.
To obviate these objections, a system of selective taxation has been proposed. Under this system, the rate of tax would be made proportional to the amount of tar and nicotine released by the smoke, as determined by some standard measure. Such a system might very well influence the public to purchase less harmful cigarettes by placing brands containing large amounts of nicotine and tars at a competitive disadvantage.\footnote{Consumers Union Report 183.}

2. **Counter-Advertising and Education.** In an attempt to fight fire with fire, a program of counter-advertising has been considered. Such a program has been under way in Great Britain since the publication of the Royal College of Physicians report in March, 1962.\footnote{Royal College of Physicians of London, Smoking and Health (1962).} Signs have been posted in conspicuous places with the admonition: “Before you smoke, \textit{think}. Cigarettes cause lung cancer,” and are signed by the Ministry of Health. The Soviet Union, Denmark, and other countries have instituted similar programs which also make use of graphic posters.\footnote{Consumers Union Report 172.} While it is unlikely that counter-advertising alone would curtail smoking to any substantial degree, such a concerted program could supplement enforcement of other measures by convincing the American public of the necessity for these measures.

Closely related to counter-advertising would be a program of education aimed at individual attitudes toward smoking. The American Cancer Society has been in the forefront of a campaign in this country to inform the public of the health hazards connected with cigarette smoking. Since 1954, the Society has distributed more than 3.5 million copies of the educational pamphlet “To Smoke or Not to Smoke.” It has also sponsored frequent radio and television announcements, and has been responsible for numerous newspaper and magazine releases.\footnote{Id. at 198.} Educational measures of this type are aimed at influencing the ultimate decision by each individual whether or not to smoke. In this respect, these efforts represent an attempt to achieve a solution by attacking the very core of the problem.

In the past, the public has been only temporarily influenced by the publication of reports linking cigarette smoking with health hazards. When the first reports were published in the early 1950’s suggesting a connection between smoking and lung cancer, a decline of 8.8 per cent in the per capita consumption of cigarettes ensued. The reaction was far from momentary; the recession in cigarette consumption lasted for nearly six years. But ultimately the reaction proved to be temporary, and by
1958 per capita consumption was higher than the 1952 figure. It has risen steadily since then. In 1964, after the publication of the Surgeon General's report, another decline in consumption occurred. This time, however, the smokers apparently were far better braced for the shock. The decline proved to be much more temporary, and by the end of the year, the level of consumption was higher than ever.

Clearly then, counter-advertising and education alone are insufficient to solve the problem on any permanent basis. If any lasting solution is to be achieved, these methods should be keyed in with strict controls of cigarette advertising and labeling.

3. **Outright Prohibition.** For many reasons outright prohibition would be an undesirable solution. *First,* the enforcement of such a solution presents practical difficulties. In our one previous experiment with prohibition of a popular commodity on a national scale, efforts at enforcement were unsuccessful. The gangsterism and underworld rackets that developed during liquor prohibition created enforcement headaches in other areas of the law as well, and today many of the remnants are still with us. There is no reason to believe that an outright prohibition on the sale and distribution of cigarettes would lead to any different result.

*Second,* tobacco must be distinguished from other physically harmful commodities such as narcotics, where prohibition is the accepted mode of control. Narcotics are harmful not only to the addict, but also to the segment of the population with which he comes into contact. The addict often steals or kills, or commits other socially undesirable acts in his quest for narcotics. Moreover, since narcotics addiction generally results in some form of incapacitation, society is deprived of any contribution the narcotics user might otherwise make. Cigarettes, on the other hand, affect only the individual who uses them, and do not incapacitate him or in any way render him a less productive member of society.

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347 It might be suggested that cigarettes shorten the potential life span, and that the number of years of useful contribution is thereby lessened. But the interest of society in
Third, the effect upon the economy cannot be ignored. The tobacco industry is a gigantic business, affecting large segments of the economy.\textsuperscript{348} If cigarette manufacturing were prohibited, the monetary flow generated by the industry would be abruptly shut off, almost certainly creating a serious economic tremor. Unquestionably, this tremor would be cushioned considerably if cigarette smoking were encouraged to taper off gradually. This would also give the tobacco companies time to complete the diversification process that they have already begun,\textsuperscript{349} and the ultimate impact on the economy could thereby be held to a minimum.

Fourth, the Advisory Committee to the Surgeon General recognized that there were some beneficial aspects associated with cigarette smoking. Cigarettes satisfy a certain psychogenic drive for sensuous pleasures. The committee feared that if 70 million American smokers were suddenly deprived of tobacco, many might satisfy this psychogenic drive in outlets far less socially acceptable than cigarette smoking. Accordingly, the Smoking Report expressly disavowed any intention to encourage legislation that would outlaw smoking.\textsuperscript{350}

Fifth, it is important to keep in mind exactly what we are trying to achieve. Cigarettes are not to be classified as a scourge to mankind that must be permanently eradicated. It is debatable whether the Government would be morally justified in depriving the American consumer of the opportunity to weigh the pleasure derived from smoking against the risk incurred, and to decide for himself whether the risk is one worth taking. We only require that the consumer be able to balance these factors intelligently in order to arrive at a free and informed decision.

To be successful, any solution must take account of these four goals—avoidance of unnecessary congestion in the courts, an equitable distribution of the loss among tobacco manufacturers, a gradual readjustment of the economy, and freedom of choice for the individual smoker. Of course, no solution can afford to lose sight of the primary objective—curtailment of the health menace. Until a solution is found that can achieve these objectives, the Surgeon General's call for "appropriate remedial action" cannot be regarded as answered.

useful contribution is simply too remote to justify an absolute prohibition. (Note that this is not limited to cigarettes—witness the much discussed link between dairy foods and cholesterol level.)

\textsuperscript{348} For specific data, see note 210 supra and accompanying text.

\textsuperscript{349} See text accompanying notes 31-33 supra.

\textsuperscript{350} Smoking Report 355. See also the statement of Surgeon General Luther L. Terry, testifying before the House Commerce Committee on behalf of labeling legislation. N.Y. Times, April 10, 1965, p. 14, col. 3.
§ 1331. Congressional declaration of policy and purpose.

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

§ 1332. Definitions.

As used in this chapter—

(1) The term "cigarette" means (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

(2) the term "commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island any any place outside thereof; (B) commerce between points in any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island, but through any place outside thereof; or (C) commerce wholly within the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Johnston Island.

(3) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, and Johnston Island.

(4) The term "package" means a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold or otherwise distributed to consumers.

(5) The term "person" means an individual, partnership, corporation, or any other business or legal entity.

(6) The term "sale or distribution" includes sampling or any other distribution not for sale.

§ 1333. Labeling; requirement; conspicuous statement.

It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking
May Be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package.

§ 1334. Preemption.

(a) Additional statements on packages.

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

(b) Advertising statements.

No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

(c) Authority of Federal Trade Commission: unfair or deceptive advertising acts or practices; issuance of trade regulation rules; affirmative advertising statements.

Except as is otherwise provided in subsections (a) and (b) of this section, nothing in this chapter shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Federal Trade Commission's holding that it has the authority to issue trade regulation rules or to require an affirmative statement in any cigarette advertisement.

(d) Reports to Congress; transmittal by Secretary of Health, Education, and Welfare and Federal Trade Commission.

(1) The Secretary of Health, Education, and Welfare shall transmit a report to the Congress not later than eighteen months after January 1, 1966, and annually thereafter, concerning (A) current information on the health consequences of smoking and (B) such recommendations for legislation as he may deem appropriate.

(2) The Federal Trade Commission shall transmit a report to the Congress not later than eighteen months after January 1, 1966, and annually thereafter, concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

§ 1335. Criminal penalty.

Any person who violates the provisions of this chapter shall be guilty of a misdemeanor and shall on conviction thereof be subject to a fine of not more than $10,000.

§ 1336. Injunction proceedings.

The several district courts of the United States are invested with jurisdiction, for cause shown, to prevent and restrain violations of this chapter upon the application of the Attorney General of the United States acting through the several United States attorneys in their several districts.

§ 1337. Cigarettes for export.

Packages of cigarettes manufactured, imported, or packaged (1) for export from the United States or (2) for delivery to a vessel or aircraft, as
supplies, for consumption beyond the jurisdiction of the internal revenue laws of the United States shall be exempt from the requirements of this chapter, but such exemptions shall not apply to cigarettes manufactured, imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States.

§ 1338. Separability of provisions.
If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the other provisions of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

§ 1339. Termination of provisions affecting regulation of advertising.
The provisions of this chapter which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to July 27, 1965.