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NOTES AND COMMENTS

SMOKELESS TOBACCO: DEFECTIVE MARKETING CREATES A NEW TOXIC TORT

Warning: Use of snuff can be addictive and can cause mouth cancer
and other mouth disorders¹

I. INTRODUCTION

Smokeless tobacco² (smokeless) appears destined to join the ranks of the Ford Pinto, MER/29, DES, the Dalkon shield, and asbestos in legal history. In cases involving each of those products a proverbial smoking gun was disgorged from the defendants' files. Smokeless will undoubtedly produce similar stonewalling and then damning revelations. Another similarity with those products exists in that the smokeless problem is surprisingly widespread. As one state official has described it, "[t]here is a chemical time bomb ticking in the mouths of hundreds of thousands of boys in this country."³

1. Mandatory warning label on smokeless tobacco products sold in Massachusetts, the first state to require such a label. Mass. Dep't of Pub. Health, 105 C.M.R. § 650.105 (Supp. 1985). This regulation, as well as comparable legislation proposed in nearly 30 states, will undoubtedly be preempted by federal legislation. Comprehensive Smokeless Tobacco Health Education Act of 1986, S. 1574, 99th Cong., 2d Sess., 132 CONG. REC. H245-47 (daily ed. Feb. 3, 1986).

The new federal law would prohibit all radio and television advertisement. *Id.* at H246. It would require the rotating use of three warning labels:

- (1) WARNING: THIS PRODUCT MAY CAUSE MOUTH CANCER;
- (2) WARNING: THIS PRODUCT MAY CAUSE GUM DISEASE AND TOOTH DECAY;
- (3) WARNING: THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES.

Id. at H245-46. The bill also calls for ingredient reporting to the Secretary of Health and Human Services and permits the Secretary to make state grants and provide other assistance for the establishment of state laws setting 18 as the minimum age for the purchase of smokeless. *Id.*

2. Referring to all smokeless tobacco products as simply "smokeless" is currently in vogue, at least with the media and the tobacco industry. This idiom is adopted herein for the sake of brevity.

Smokeless products encompass basically chewing tobacco and snuff. Chewing tobacco is loose tobacco; a large quantity (a plug) is held in the cheek and the tobacco is chewed or sucked, and the juice is spit out. Snuff is finely shredded or powdered tobacco which is held in smaller quantities in the canal at the base of the lower gum next to the cheek. A new product offers snuff in a tea-bag like pouch which eliminates the need to "dip" one's fingers into the tobacco container, and also reduces the need to spit.

3. Wallis, *Into the Mouths of Babies*, TIME, July 15, 1985, at 68 (quoting Dr. Gregory Connolly, Director of the Dental Division of the Massachusetts Department of Public Health).

Product liability for death and injury incurred through the use of smokeless is but one type of suit among the numerous massive toxic tort claims which are predicted to dominate tort law during the next decade.⁴ Arguably, the individual or "private" civil suit may not represent the best solution to social problems such as tobacco usage. Nevertheless, the smokeless suits appear inevitable, and plaintiffs' attorneys may find fertile ground for individual recoveries based on the invariant concepts supporting the well established "failure to warn" tort theory.⁵

The scientific evidence linking the use of smokeless to oral cancer and other diseases is already so overwhelming as to leave little doubt that the use of smokeless exposes the user to a serious health risk.⁶ The 1982 Surgeon General's Report unequivocally stated that certain tobacco products, such as snuff, have the highest level of carcinogens (i.e., nitrosamines) in any consumer product taken into the body.⁷ Snuff contains carcinogens eight to ten times as concentrated as in cigarette tobacco.⁸

4. See Podgers, *Toxic Time Bombs Say Latent Disease Suits Will Be Key Battleground in '80s*, A.B.A. J., Feb. 1981, at 139.

5. See *infra* note 96 and accompanying text (noting political default). It is interesting to note that the courts will be forced to deal with the smokeless problem at a time when the law is evolving in the area of strict products liability in general, and latent disease suits in particular. The smokeless suits may result in the litigation of a number of fairly unique legal concepts—such as generic risk, assumed risk, and defective marketing. See *infra* text accompanying notes 97-105 (listing legal issues).

A recent publication concludes "that product liability law supports the imposition of liability on tobacco suppliers." Commentary, *The Smokeless Tobacco Industry's Failure to Warn: A Case for the Courts*, 6 J. LEGAL MED. 489, 490 (1986). Apparently, the author also concludes that once a warning is provided, the courts will cease to be an appropriate forum for smokeless victims. *Id.* at 507. This Comment, on the other hand, advocates liability despite a warning. See *infra* text accompanying notes 204-12, 254-60. See generally Brody, *Recovery Against Tobacco Companies*, TRIAL, Nov. 1985, at 49.

6. See *infra* App.

7. REPORT OF THE SURGEON GEN., THE HEALTH CONSEQUENCES OF SMOKING, CANCER 203-04 (1982).

8. Nitrosamines have been linked to cancer in thousands of epidemiological, experimental, pathological, and clinical studies. *E.g., id.* at 21, 202, 207, 220.

Chemical analysis of various types of smokeless tobacco has revealed the presence of polonium-210, a radioactive alpha-emitter and known radiation carcinogen, and representative of two classes of powerful chemical carcinogens, the polycyclic aromatic hydrocarbons and the nitrosamines.

Of the 19 nitrosamines identified in smokeless tobacco, the carcinogenic nitrosamines present the highest concentration are NNN and NNK, both of which are related chemically to nicotine. Snuff contains 1.6 to 135 mg per kilogram (mg/kg) of NNN and 0.1 to 14 mg/kg of NNK. For comparison, U.S. foods and beverages may not contain more than 0.01 mg/kg of nitrosamines. U.S. looseleaf and plug tobacco contain 0.2 to 8.2 mg/kg of NNN and 0 to 1.0 mg/kg of NNK.

Both NNN and NNK readily produce cancer in rats and hamsters in organs such as the nose, trachea, esophagus, and liver. Benign tumors (papillomas) of the mouth are induced when NNN and NNK are applied directly to the mouth of rats.

NAT'L INST. OF HEALTH, CONSENSUS DEVELOPMENT CONFERENCE STATEMENT: HEALTH IMPLICATIONS OF SMOKELESS TOBACCO USE, JAN. 13-15, 1986, reprinted in 132 CONG. REC. H253,

Indeed, the cancer risk associated with smokeless is greater than that associated with cigarettes.⁹

Recent media attention has certainly raised general consumer consciousness about the risks of smokeless,¹⁰ particularly with respect to usage by young people. However, the tobacco industry continues to foster myths which mislead consumers into believing that smokeless poses no particular health risks and offers a safe alternative to cigarettes.¹¹

This Comment will illustrate that smokeless is a serious public health problem. Such a discussion exemplifies the factual basis for a "smokeless" toxic tort action. This Comment will then provide an overview of the applicable theories of recovery for defective marketing. Then, to a limited extent, the significance of the smokeless suit is considered in the context of its role in the evolution of strict tort liability as a social policy.

Accepting for the sake of argument that smokeless is a serious problem, how effective a solution is our current tort system likely to generate? Private civil suits and media attention will have some direct impact. Furthermore, they trigger overdue government regulation such as required warning labels¹² and restrictions on sales to minors.¹³ Ironically,

H254 (daily ed. Feb. 3, 1986) [hereinafter cited as NIH STATEMENT]. See generally U.S. DEP'T OF HEALTH AND HUMAN SERVS., PUB. HEALTH SERV., THIRD ANNUAL REPORT ON CARCINOGENS SUMMARY (1983) (providing summaries of known risk with numerous nitrosamine variations).

9. While the incidence of lung cancer from smoking is greater than oral cancer from smokeless, the relative risk assumed of acquiring cancer is much higher with smokeless. E.g., Winn, Blot, Shy, Dr. P.H., Pickle, Toledo & Fraumeni, *Snuff Dipping and Oral Cancer Among Women in the Southern United States*, 304 NEW ENG. J. MED. 745, 747 (1981). Furthermore, the mortality rate with oral cancer is much higher, partly because it often goes undetected. See *infra* note 203.

10. Connant & Hager, *No-Risk Nicotine?*, NEWSWEEK, Jan. 27, 1986, at 57; see also *supra* note 3, *infra* notes 68, 88 (cites to other well known publications).

11. The tobacco industry has repeatedly publicly denied any causal link between their product and cancer. In fact, this is the primary message proffered by an industry public relations organization, the Smokeless Tobacco Council. See, e.g., Wallis, *supra* note 3, at 68.

You will recall that I appeared before your Subcommittee on July 26, 1985, to express the position of the smokeless tobacco manufacturers regarding proposed federal legislation concerning the labeling of smokeless tobacco products. I advised you that it was the position of the smokeless tobacco manufacturers that health warnings relating to their products were unwarranted in view of the unresolved scientific controversy regarding smokeless tobacco and health. The position of the smokeless tobacco manufacturers on this issues has not changed.

Letter from Michael J. Kerrigan, President of Smokeless Tobacco Council to Hon. Henry A. Waxman, Chairman of the Subcommittee on Health and the Environment (Jan. 27, 1986), reprinted in 132 CONG. REC. H245, H247 (daily ed. Feb. 28, 1986). A spokesman for the world's largest smokeless manufacturer appeared on a prime time national news program to repeatedly insist that it has not been scientifically proven that smokeless causes cancer. He stated that no product is perfectly safe; there is a risk in every single product. Interview on CBS news program *60 Minutes*, aired Feb. 2, 1985; see also *infra* text accompanying notes 73-78 (noting example of advertising).

12. At the time of this writing, federal hearings have already been held on requiring a nation-

such attacks may actually provide the industry with the legal insulation of assumed risk or informed consent defenses.¹⁴ Never having to acknowledge the ugly truth, the industry remains free to continue perpetuating the same myths.¹⁵ Criticizing the adequacy of that scenario, the final portion of this Comment opines that the unique characteristics of smokeless warrant the application of a legal theory which effectuates absolute liability.¹⁶

II. PROFILE OF THE PRODUCT

Negative aspects of smokeless include: marketing without regard for health dangers, use by young people, and the habit-forming nature of the product. Thus, smokeless considered as a whole reveals industry conduct and a resultant product¹⁷ with serious shortcomings. These aspects are explained as follows.

A. *A Deadly Danger*

A study of the type of oral cancer associated with smokeless during the period of 1973-1977 revealed an incidence rate of 7.7 per 100,000 population per year and a mortality rate of 3.1.¹⁸ These figures may grossly underestimate the current rates of occurrences in light of the in-

wide warning, and banning television and radio advertising. Passage of the bill is imminent. See *supra* note 1.

13. E.g., OKLA. STAT. tit. 21, §§ 1241-1242 (Supp. 1985) (proscribing sale to, or possession by, minors).

14. This is a result lamented by commentators on the legal history of cigarettes. E.g., Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1429. But cf. 132 CONG. REC. H245, H253 (daily ed. Feb. 3, 1986).

As a final point, I would like to briefly address the issue of product liability. I believe the amendment could not be more clear as to our intent. This measure is not intended to have any impact on product liability suits. It is not to be construed as relieving any person of his liability at common law.

Id. (statement of bill sponsor, Oklahoma Congressman Mike Synar).

15. Admittedly, it is absurd to require a profit oriented entity to tell its customers not to buy its product. More absurd, however, is a system which deals with problems by awaiting gross harm, and then reacts by imposing liability resulting in bankruptcy. This Comment searches for a middle ground.

16. See *infra* notes 254-60 and text accompanying notes 222-53. Like other mass toxic torts, smokeless presents legal problems which have prompted leading scholars to seriously question the adequacy of our current tort jurisprudence.

17. The concept of a 'product' should be taken to include all of the ambient circumstances which accompany that product in addition to the tangible item itself. The concept of defective marketing is encompassed in RESTATEMENT (SECOND) OF TORTS § 402A comment j (1977) (directions and warnings, or lack thereof, as part of the product).

18. NATIONAL CANCER INST., SURVEILLANCE, EPIDEMIOLOGY AND END RESULTS: INCIDENTS AND MORTALITY DATA 1973-1977, at Tables 5, 10(D), (J) (N.C.I. Monograph 57, N.I.H. Publication 81-2330 n.d.).

creased use of snuff.¹⁹ Estimates of the number of smokeless users today varies from 7 to 22 million.²⁰

There were an estimated 7,240 deaths from oral cancer of the type associated with smokeless in 1980.²¹ Given that 3.8% of the population had then used snuff long enough to develop cancer,²² conservative assumptions indicate that at least 10.2% or 738 of those deaths would have occurred due to that use.²³ A more accurate estimate of today's incidence of death due to smokeless may be 21.8% of a population stratum where 9.3% use smokeless.²⁴ Hence, the national smokeless death count is now, at a minimum, at about two thousand victims each year and rising.

Aside from the fact that smokeless contains known carcinogenic agents, the primary link between smokeless and cancer follows from the higher incidence of oral cancer among users than among the general population. Where sex, age, or regional differences were considered as control factors, studies have established a positive correlation which presents a convincing indictment against smokeless. For example, oral cancer rates among women in the southeast, where the use of smokeless is fairly common, run 30% higher in urban areas and 90% higher in rural areas than the comparable rates among women in the north, where the use of smokeless is rare.²⁵

The most often cited authority on the link is a 1981 study conducted in North Carolina.²⁶ It involved 255 women with oral and pharyngeal cancer and utilized 502 control factors.²⁷ The study revealed that the

19. See *infra* note 33.

20. E.g., Darmstadter, *Snuff and Chaw: The Tobacco Industry Plugs Nicotine by Osmosis*, BUS. & SOC'Y REV., Fall 1980, at 23, 24; see also PUBLIC HEALTH SERV., NAT'L INST. OF HEALTH, NAT'L CANCER INST., IN ANSWER TO YOUR QUESTIONS ABOUT SMOKELESS TOBACCO (April 11, 1983) (written statement from the Office of Cancer Communications).

21. PETITION OF PUBLIC CITIZEN HEALTH RESEARCH GROUP TO REQUIRE DISCLOSURE OF HEALTH RISKS ASSOCIATED WITH THE USE OF SMOKELESS TOBACCO, TRR-20947 at 3 & n.12 (F.T.C. filed Feb. 14, 1984) (citing National Center for Health Statistics) [hereinafter cited as FTC PETITION].

22. *Id.* at 5 & n.17 (citing NATIONAL CLEARINGHOUSE FOR SMOKING AND HEALTH, ADULT USE OF TOBACCO, 1975 (U.S.D.H.E.W., P.H.S. June 1976)).

23. *Id.*

24. FTC PETITION, *supra* note 21, at 4 & n.16, 5; see also Fincher, *Sean Marsee's Smokeless Death*, READERS DIG., Oct. 1985, at 110, 112 (quoting Dr. Connolly's claim that tobacco accounts for 70% of the 9,000 oral cancer deaths each year); Winn, *supra* note 9, at 747 (noting 60% cancer increase due to snuff).

25. Blot & Fraumeni, *Geographic Patterns of Oral Cancer in the United States: Etiological Implications*, 30 J. CHRON. DIS. 745 (1977); see also T. MASON, F. MCKAY, R. HOOVER, W. BLOT & J. FRAUMENI, ATLAS OF CANCER MORTALITY FOR U.S. COUNTIES: 1950-1969 (Gov't Printing Office 1975).

26. Winn, *supra* note 9.

27. *Id.* at 746.

exceptionally high mortality rate from these cancers among white women in the south was primarily related to the chronic use of snuff.²⁸ The estimated rate of cancer among southern women using snuff was found to be twenty-six cases per 100,000 population—significantly higher than the general population rate.²⁹ The study concluded that (1) snuff increased the risk of developing oral cancer by more than four times,³⁰ (2) chronic use of snuff (fifty years or more) resulted in a fifty-fold increase in cancers of the gingiva and buccal mucosa,³¹ and (3) 87% of the oral cancers in the group could be attributed to snuff use.³²

Oral cancer is fairly rare in America, accounting for only about 4% of all cancers:³³ that means over 27,000 new occurrences each year, of which 60% will be fatal within five years.³⁴ The incidence of oral cancer in males (5.8% of all cancers) is more than twice as common as in women (1.97%).³⁵ These statistics tend to reflect the pattern of smokeless use in America. A small percentage of the population uses the product,³⁶ and use is much more common in males.³⁷ In comparison, studies of Asia where the use of smokeless is common, revealed a high incidence of oral cancer.³⁸ For example, in some Indian villages over 40% of the population are smokeless users.³⁹ Oral cancer, India's most common form of cancer, accounts for about 40% of all cancer related deaths.⁴⁰ Numerous studies from Asia have scientifically documented the causal relationship.⁴¹ A 1982 article reviewing studies involving over 300,000 people condemned tobacco as the ingredient which caused a significantly higher risk of oral cancer vis-à-vis alternative chews (betel leaf or areca

28. *Id.* at 746-48.

29. *Id.* at 748.

30. *Id.* at 747.

31. *Id.*

32. *Id.*

33. *E.g.*, AMERICAN CANCER SOC'Y, CANCER FACTS & FIGURES 12-13 (1984).

34. *Id.* at 18.

35. *Id.* at 13.

36. FTC PETITION, *supra* note 21, at 5 & n.17 (in 1975, 3.8% used snuff, 5.5% chew).

37. *Id.* (snuff—2.5% male, 1.3% female; chew—4.9% male, 0.6% female).

38. See Hirayama, *An Epidemiological Study of Oral and Pharyngeal Cancer in Central and South-East Asia*, 34 BULL. WLD. HLTH. ORG. 41 (1966).

39. *E.g.*, Mehta, Pindberg, ODONT, Gupta & Daftary, *Epidemiologic and Histologic Study of Oral Cancer and Leukoplakin Among 50,915 Villagers in India*, 21 CANCER 832, 836 (1969); see also Mehta, Ayhi, Gupta, Pindborg, Bhonsle & Jainawalla, *An Intervention Study of Oral Cancer and Precancer in Rural Indian Populations: A Preliminary Report*, 60 BULL. WLD. HLTH. ORG. 441 (1980).

40. Paymaster, *Cancer and Its Distribution in India*, 17 CANCER 1026, 1027-29 (1964); see also Hirayama, *supra* note 38, at 44 (found oral cancer accounted for over 75% of cancers in regions where tobacco abuse was especially prevalent).

41. See *infra* App.

nut).⁴² The authors noted similar conclusions in a 1933 paper. They described the worldwide consensus among investigators as virtually unanimous.⁴³

Further studies are in process to more precisely establish the link and attempt to explain how and why the cancers occur.⁴⁴ While the research does not compare in volume and precision with that existing for the causal link between cigarettes and lung cancer,⁴⁵ there appears to be no doubt among the experts that a strong positive correlation between oral cancer and smokeless has been established. These experts include: the American Cancer Society,⁴⁶ the American Health Foundation,⁴⁷ the Public Health Service of the Department of Health and Human Services, including the Surgeon General⁴⁸ and the National Cancer Institute,⁴⁹ the American Dental Association,⁵⁰ the American Medical Association,⁵¹ Federal Centers for Disease Control of the Department of Health, Education and Welfare,⁵² and the International Agency for Research on Cancer of the World Health Organizations.⁵³ The one study often cited

42. Gupta, Pindborg & Mehta, *Comparison of Carcinogenicity of Betel Quid With and Without Tobacco: An Epidemiological Review*, 1 *ECOLOGY OF DISEASE* 213 (1982).

43. *Id.* at 217.

44. The National Cancer Institute has committed \$7.5 million to determine patterns of use and possible intervention techniques. Letter from Public Citizen, H.R.G., to C. Everett Koop, M.D., U.S. Surgeon General (Nov. 13, 1984) and response (Nov. 30, 1984); Letter from F.T.C. to Surgeon General (Jan. 21, 1985) (requesting comprehensive review).

45. The NIH has identified numerous areas where additional study is necessary, for example:

- c. Cancers of sites other than the mouth carried out in geographic areas with high rates of smokeless tobacco use.
- d. Potential role of smokeless tobacco in cardiovascular disease and adverse outcomes of pregnancy.
- e. Potential of users of smokeless tobacco to produce nitrosamines *in vivo*.
- f. Research on the relationship between amounts of smokeless tobacco used and plasma levels of lead, cadmium, and other potential toxins.

NIH STATEMENT, *supra* note 8, at H255.

46. AMERICAN CANCER SOC'Y, DON'T BITE OFF MORE THAN YOU SHOULD CHEW (Pamphlet No. 2643-LE 1981); AMERICAN CANCER SOC'Y, FIFTY MOST OFTEN ASKED QUESTIONS ABOUT SMOKING AND HEALTH . . . AND THE ANSWERS 22 (Pamphlet No. 2023-LE 1982).

47. *E.g.*, *infra* App. n.50 (sponsored study).

48. *E.g.*, Letter from C. Everett Koop, M.D., Surgeon General, to Hon. James C. Miller III, Chairman of the F.T.C. (Dec. 31, 1984); *see supra* note 7 and accompanying text.

49. *E.g.*, Fraumeni, *The Face of Cancer in the United States*, 19 *HOSP. PRAC.* 81 (1983) (sponsored study); *see also infra* note 61 and accompanying text.

50. *E.g.*, *infra* App. n.23.

51. *E.g.*, *infra* App. nn.50, 52.

52. *E.g.*, *Warnings Urged on Snuff, Chewing Tobacco*, *Tulsa World*, Feb. 7, 1985, at A5, col. 3. (article quotes Assistant U.S. Surgeon General, Robert Mecklenburg, statement that he and the Surgeon General believe smokeless presents a cancer threat and is associated with other pathological oral conditions).

53. Letter from H. Vainio, M.D., (I.A.R.C.) of the World Health Organization to A. Greenberg, Public Citizen, H.R.G. (Nov. 30, 1984) (presented by Public Citizen H.R.G. in statement before the Mass. Dept. of Health on Proposal to Require Warning Label on Tobacco Snuff on Feb. 6,

by the tobacco industry⁵⁴ offers conclusions disclaimed by its author as outdated and unreliable.⁵⁵ That study has also been denounced as statistically invalid on its face by an epidemiologist at the National Cancer Institute.⁵⁶

Other conclusions may reasonably be drawn from the available literature. It appears that snuff poses a significantly greater risk to users than chewing tobacco.⁵⁷ It also appears that smokeless may have a causal connection with cancers other than oral cancer. Smokeless has been associated with cancer of the bladder,⁵⁸ pancreas,⁵⁹ and other organs.⁶⁰ Smokeless causes excessive wear (abrasion) of the incisal and occlusal teeth surfaces, advanced periodontal destruction of hard and soft tissues of the mouth, erythema of the soft tissues, and leukoplakia.⁶¹ Finally, it appears safe to say that most of the health risks described in this section

1985). I.A.R.C. assembled a distinguished panel of experts from around the world to consider smokeless. The final draft of their evaluation (attachment to the letter) reads as follows:

There is *sufficient evidence* that oral use of snuffs of the types commonly used in North America and western Europe is carcinogenic to humans. There is *limited evidence* that chewing tobacco of the types commonly used in these areas is carcinogenic.

Epidemiological studies that did not distinguish between chewing tobacco and snuff provide *sufficient evidence* for the carcinogenicity of oral use of smokeless tobacco products, as reported in these studies.

In aggregate, there is *sufficient evidence* that oral use of smokeless tobacco of the above types is carcinogenic to humans.

There is *sufficient evidence* that oral use of tobacco mixed with lime (khaini) is carcinogenic to humans.

There is *inadequate evidence* that oral use of the other smokeless tobacco preparations considered (nass, nasswar, mishri, gudakhu, and shammah) is carcinogenic to humans.

There is *inadequate evidence* that nasal use of snuff is carcinogenic to humans.

Id. (emphasis in original).

54. Smith, Mincer, Hopkins & Bell, *Snuff-Dipper's Lesions*, 92 ARCHIVES OF OTOLARYNGOLOGY 450 (1975) (study of 15,000 dental patients who used snuff, found 1751 showed tissue abnormality mandating biopsies which revealed no cancer; among the 1550 observed 4½ years later, 2 carcinomas and 12 cases of dyskeratosis, a dangerous condition which may progress to malignancy, were detected; the fate of the other 201 is unknown).

55. Interview on CBS news program *60 Minutes*, aired Feb. 2, 1985 (Smith stands by his study, but admitted to *60 Minutes*: "I just don't think that I am any longer an authority on the subject of snuff. I am speaking as one who has not, admittedly has not, kept up with the literature." Smith advised, "If you're not using smokeless tobacco don't start. If you are using it stop. . .").

56. Letter from W.J. Blot to A. Greenberg, Public Citizen, H.R.G. (May 11, 1984).

57. Hoffman & Adams, *Carcinogenic Tobacco—Specific N-Nitrosamines in Snuff and in the Saliva of Snuff Dippers*, 41 CANCER RESEARCH 4305 (1981); see also *infra* App. nn.43, 50-52.

58. *E.g., infra* App. n.51.

59. *E.g., infra* App. n.49.

60. *E.g., infra* App. n.53.

61. *E.g., infra* App. nn.10, 32, 41 (all noting the association between leukoplakia caused by smokeless and oral cancer).

Leukoplakia is evidenced by white patches in the mouth. Those patches result from the irritation of tobacco being absorbed through the skin. Leukoplakia is considered a pre-cancerous cell condition which will ultimately become malignant in three to six percent of all cases.

are time/dose related.⁶² The risks increase as the quantity used and the duration used increase. In short, there is no real disagreement within the medical community; smokeless does cause cancer and death.

B. *The Target: America's Youth*

Justice Felix Frankfurter wrote "[t]he law of imitation operates, and non-conformity is not an outstanding characteristic of children."⁶³ A spokesman for U.S. Tobacco was more direct: "We're counting on peer pressure to increase sales."⁶⁴ The marketing plan is working; smokeless sales jumped 32% from 1970 to 1979 when 125 million pounds were sold.⁶⁵ In 1984, smokeless having a retail value approaching \$1 billion was sold. This trend indicates a sales increase of over 60% since 1978.⁶⁶ The typical snuff user has dropped in average age from about forty-five to about twenty-five.⁶⁷ The industry is not, however, publishing figures concerning a conspicuous segment of their customers—those under age 18. Reports from all over the country indicate use of smokeless among high school students has become increasingly common in recent years. School surveys have indicated that 10-30% of American high school students are regular users.⁶⁸ Furthermore, the use of smokeless is not un-

62. *E.g., infra* App. n.3.

63. *McCullum v. Board of Educ.*, 333 U.S. 203, 227 (1948).

64. *See Darmstadter, supra* note 20, at 25 (quoting William Nelson of the U.S. Tobacco Co.); *see also infra* text accompanying note 73.

65. FTC PETITION, *supra* note 21, at 7 & n.25 (citing Shelton, *Smokeless Sales Continue to Climb*, 109 TOBACCO REP. 41, 42 (1982)).

66. *See Wallis, supra* note 3, at 68; FTC PETITION, *supra* note 21, at 7; Darmstadter, *supra* note 20, at 24.

67. Darmstadter, *supra* note 20, at 23.

68. 132 CONG. REC. H245, H247, H250 (daily ed. Feb. 3, 1986) (noting about one in three users under age 18, and Texas study finding 88% of users began before age 15); Letter from A. Greenspan, Esq. and S.M. Wolfe, M.D., P.C.P.H.G., to C. Everett Koop, M.D., Surgeon General, at 5 & nn.3-4 (Nov. 13, 1984). The letter cites two such studies. These same studies are noted in SUPPLEMENT TO PETITION OF PUBLIC CITIZEN HEALTH RESEARCH GROUP TO REQUIRE DISCLOSURE OF HEALTH RISKS ASSOCIATED WITH THE USE OF SMOKELESS TOBACCO, TRR-20947 (F.T.C. filed June 21, 1984) [hereinafter cited as FTC PETITION SUPP.]. The first study was done in the Eugene, Oregon area and found 9% of 7th graders, 19% of 9th graders, and 23% of 10th graders were daily users. *Id.* at 2.

The other study cited was conducted in Bogalusa, Louisiana which found a six-fold increase since a prior survey five years earlier. The use of chewing tobacco was more prevalent than the use of snuff. The snuff numbers alone are shocking:

Age	8-9	10-11	12-13	14-15	16-17
Users	21%	26%	32%	30%	14%

Id. at 3; *see also Darmstadter, supra* note 20, at 25 (noting an Emory Univ. Dental School study of 500 Atlanta boys, age 10 to 16 showing 15% chewed, 11% used snuff, while only 4.5% smoked); Wallis, *supra* note 3 (noting Texas study showing 55% of users started before age 13); Jean, *Smokeless Tobacco Public Enemy No. 1*, Orlando Sentinel, July 7, 1985, at G7, col. 2 (quoting the Surgeon

common even among grade school students.⁶⁹ The industry has only recently taken some limited action in response to this phenomenon of usage by minors. For example, the industry has agreed not to use advertisements featuring athletes who have competed since 1975, and the U.S. Tobacco Co. agreed not to advertise smokeless during the last Super Bowl.

C. *The Method: Advertise and Addict*

The blood nicotine concentrations within ten minutes after using snuff is about the same as that after having smoked a cigarette.⁷⁰ One tobacco executive has been widely quoted as admitting, "once a kid's hooked, he doesn't leave."⁷¹ There is no real debate; nicotine is an addictive drug.⁷²

The industry admits that it is targeting the eighteen to twenty-four year old age group.⁷³ The U.S. Tobacco Co. alone had over 400 college campus representatives promoting its smokeless products and spent over

General: 22% of 11th graders use smokeless); Genz, *Use of Smokeless Starts with Children in Florida Area*, Tulsa World, Mar. 20, 1985, at B1, col. 1 (noting widespread use, and reports of first use as young as 3 or 4); *Smokeless Health Threat*, Tulsa World, Nov. 26, 1984, at A10, col. 1 (citing an Oklahoma survey claiming 22% of 11th graders are using snuff).

69. As the *Marsee* case demonstrates, use by elementary school-age students has been going on for a while. See, e.g., Christen, McDaniel & Doran, *Snuff Dipping and Tobacco Chewing in a Group of Texas College Athletes*, 97 TEX. DENTAL J. 6 (1979) (study of 14 users for average of five years included three who had been using since age 10-12).

70. E.g., Smith, *supra* note 54, at 454 & table 2; see Darmstadter, *supra* note 20, at 27; Wallis, *supra* note 3, at 68.

71. See 132 CONG. REC. H243, H245 (daily ed. Feb. 3, 1986) (citing official industry statements and ad content); Glover, Christen & Henderson, *Just a Pinch Between the Cheek and Gum*, 51 J. SCH. HEALTH 415, 415 (1981).

72. See NIH STATEMENT, *supra* note 8, at H244-45 (noting physical, psychological, and behavioral effects of smokeless nicotine addiction); Interviews with Univ. of Tulsa College of Law students who use smokeless regularly, in Tulsa, Oklahoma (March 11-25, 1985). Of these users, 14 of 15 stated they found smokeless to be habit forming. Three of these students have had oral surgery for problems associated with the habit. See generally *supra* note 8; Bone, Phillips & Chowdury, *The Smoking Habit: Physical Dependence on Nicotine*, 2 J. REG. DIS. 10 (1981) (cited in FTC PETITION, *supra* note 21, at 5 n.18).

It is interesting to note that there is no nicotine or addiction warning mandated by the upcoming federal legislation. Evidently, this was part of the cost of industry acquiescence to the bill. The industry supported the bill for the stated purpose of avoiding the problems inherent in complying with numerous nonuniform state laws. 132 CONG. REC. H245, H247 (daily ed. Feb. 3, 1986) Bill sponsor Representative Mike Synar described the omission of a nicotine warning as a "casualty to compromise." *Id.* at H250. He went on to state, "[t]he substitution of warning labels should in no way be interpreted as an acknowledgment of ambiguity in the evidence on the addictive nature of smokeless tobacco. That evidence is clear and irrefutable." *Id.* at H252.

73. See FTC PETITION, *supra* note 21, at 6-7; see also Maxwell, *Chewing, Snuff is Growth Segment*, 107 TOBACCO REP. 32 (1980); Dougherty, *Moving Smokers to Snuff*, N.Y. Times, Jan. 13, 1984, at D4, col. 1; Salamon, *Many College Men Now Get Something Worth Chewing On*, Wall St. J., May 22, 1979, at 1, col. 3.

\$30 million on promotions in 1984.⁷⁴ Their advertising approach includes sponsoring college spring break programs, endorsements by famous athletes and musicians, sponsoring a racing team, and sexual connotations in advertisements.⁷⁵ These ads not only fail to mention any health risks associated with smokeless, but also show the use of smokeless as being consistent with an active and healthy lifestyle. The implications of some advertising, despite attempts to be subtle, is that smokeless is a safe alternative to cigarettes.⁷⁶ The headline of one advertisement read, "[t]ake a pouch instead of a puff."⁷⁷ The advertisement continued: "A lot of smokers want to enjoy tobacco—but don't want to light up. [Smokeless] is an easy alternative. You'll get real tobacco pleasure without lighting up. It's a taste you'll like anytime, anywhere. We think you'll like taking a pouch instead of a puff."⁷⁸

Undeniably, the dramatic decrease in smoking has resulted due to health concerns.⁷⁹ Presumably, most would also agree that chewing and spitting tobacco can hardly be considered more attractive, pleasant, or sophisticated than smoking. So why has there been a recent crossover from cigarettes to smokeless? While marketing efforts must be credited with making smokeless more desirable to consumers, it must also be recognized that the relative change is partly due to health-risk perceptions. It seems incredulous to suggest that smokeless consumers have actually made a cognitive decision to risk oral cancer rather than lung cancer. By encouraging the use of smokeless (which lacks a cancer warning) as an alternative to cigarettes (which has a cancer warning), the industry commits a form of deceptive advertising. Arguably, they are deliberately attempting to exploit and encourage the misperception that smokeless is less dangerous.

74. *E.g.*, Darmstadter, *supra* note 20, at 25; Letter from A. Greenberg, Esq., and S.M. Wolfe, M.D., of P.C.H.R.G. to J.C. Miller III, Chairman of the F.T.C. at 2 (Feb. 14, 1984).

75. See FTC PETITION SUPP., *supra* note 68, at 4-13.

76. "I am extremely concerned that the tobacco industry implies in advertising that smokeless tobacco is a safe alternative to smoking." *Warnings Urged on Snuff, Chewing Tobacco*, Tulsa World, February 7, 1985, at A5, col. 3 (Assistant U.S. Surgeon General Robert Mecklenburg testifying in favor of the Massachusetts warning).

77. Cover of smokeless product *Skoal Bandits* distributed as free samples by the U.S. Tobacco Co., copy included in FTC PETITION SUPP., *supra* note 68, at 11.

78. FTC PETITION SUPP., *supra* note 68, at 11.

79. Called "the major single cause of cancer mortality in the U.S." by the Surgeon General, smoking caused over 129,000 deaths in America in 1982. See AMERICAN CANCER SOC'Y, FIFTY MOST OFTEN ASKED QUESTIONS ABOUT SMOKING AND HEALTH . . . AND THE ANSWERS 6 (pamphlet no. 2023-LE 1982). Approximately two million Americans stop smoking every year and surveys show 85% of all smokers would like to quit. *Id.* at 17; see also AMERICAN CANCER SOC'Y, DANGERS OF SMOKING, BENEFITS OF QUITTING 63-69 (booklet no. 2052, 1980) (providing consumption statistics showing dramatic decrease in use even 5 years ago).

Consumer perceptions about the risks of a product are greatly influenced by industry conduct or the lack thereof. Accordingly, the industry should be held accountable for their chosen marketing methods. Furthermore, it should be noted that a heightened duty to market in a reasonable manner seems appropriate when the product is one which is addictive or habit forming.

III. PRODUCT LIABILITY THEORY

The products liability area of modern tort law is characterized by varying stages of evolution among jurisdictions.⁸⁰ The courts search the limits of liability and create this body of law on a case by case basis,⁸¹ considering a variety of public policy goals.⁸² The concepts underlying the varying theories⁸³ are often interrelated much to the frustration of those with taxonomic minds. Consideration of the possible theories supporting recovery in a smokeless suit will demonstrate this point. However, before considering the basic tort theories and the particular issue of failure to warn, it is notable that the first smokeless case is only now in process.⁸⁴

A. *The Marsee*⁸⁵ Case

The first smokeless case against a tobacco company was filed in fed-

80. Scott, *Products Liability*, 1982 ANN. SURV. AM. L. 709 (1983); see Gerber & Conway, *A Survey of State Products Liability Legislation*, TRIAL, Nov. 1981, at 92.

81. Comment, *Strict Liability and the Tortious Failure to Warn*, 11 N. KY. L. REV. 409, 410 (1984) (quoting Dean Prosser's expressions as to the uncertain limits of strict liability).

Widely cited articles by well-known authorities include: Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 109 (1970); Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 MO. L. REV. 579, 579-80 (1980) (citing 13 other publications on product liability by Keeton); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Wade, *On the Nature of Strict Tort Liability for Products*, 49 MISS. L.J. 825 (1973).

82. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A comment c (1977); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1371-86 (1974) (evaluating policy goals of (1) incentives for production of useful goods, (2) accident prevention, (3) loss distribution, (4) division of lawmaking functions, (5) economic stability, (6) controlling a base of power, (7) justice, and (8) respect for the law); see also Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980).

83. There are four possible theories of recovery under modern product liability law according to the leading hornbook on torts: (1) strict liability in contract for breach of warranty, (2) negligence liability in contract for breach of warranty of workmanlike construction or design, (3) negligence liability for physical harm to persons and things, and (4) strict liability in tort largely for physical harm to person and things. W. PROSSER & W. KEETON, LAW OF TORTS § 95 (5th ed. 1984).

84. See *infra* text accompanying notes 254-62.

85. Complaint, *Marsee v. United States Tobacco Co.*, No. Civ.-84-2777R (W.D. Okla. filed

eral court on November 13, 1984, by Betty Ann Marsee on behalf of her son Sean, who died an agonizing death from oral cancer at the age of nineteen.⁸⁶ He had used snuff since the age of twelve.⁸⁷ Sean, a star high school athlete who did not smoke,⁸⁸ had a particular awareness of the importance of a healthy lifestyle, having quit school for a year to help care for his father who was suffering from a fatal heart disease.⁸⁹ The seven-month period from when Sean's cancer was first diagnosed until three weeks before his death, when he was told his prognosis was terminal, is a tragic story of human pain and suffering.⁹⁰

The *Marsee* suit is an extraordinary lawsuit for two reasons. First, having already attracted considerable coverage by the media,⁹¹ the case may become something of a legal "cause celebre." The position of the tobacco industry is that a warning label on their product is both unwarranted and unnecessary.⁹² Their public position has been that the salient issue is whether there is legal duty to warn of a "scientific controversy" and how such a duty should be defined.⁹³ It is hard to believe that a jury anywhere, upon review of the available evidence, could find such a claim persuasive since there simply is no "scientific controversy."

One side views this as a case of corporate irresponsibility, immoral-

Mar. 21, 1985) (filed by Dania Deschamps-Braly of Braly & Braly, P.C., of Ada, Okla., also available from Public Citizen, Health Research Group).

86. *Id.*

87. *Id.* Mrs. Marsee is now personally committed to a campaign to educate young people and their parents about the risks of smokeless. *E.g.*, *Warnings Urged on Snuff, Chewing Tobacco*, Tulsa World, Feb. 7, 1985, at A5, col. 2 (regarding hearings before Mass. Pub. Health Dept. panel); Interview on CBS News Program *60 Minutes*, aired Feb. 2, 1985; Announcement from Public Citizen, Health Research Group, Nov. 13, 1984.

88. *See generally* Fincher, *supra* note 24, at 110-16 (describing Sean's life and the ordeal of his death).

89. Sean worked to help support the family during this period. *See* Complaint, *supra* note 85, at 11. Sean's mother, a registered nurse, has repeatedly claimed Sean stated his belief that smokeless was safe, and had he known differently, he would have adjusted his conduct accordingly. Newspapers and national magazines have also given press to the story. *E.g.*, Fincher, *supra* note 24, at 110; Wallis, *supra* note 3, at 68.

90. Marsee endured surgery three times: first, to remove one-third of this tongue; secondly, a radical removal of the lymph nodes of the neck; and finally, removal of the right side of his jaw. He suffered terribly from the effects of radiation treatment and chemotherapy and lived the final months of his life breathing and eating through tubes. Complaint, *supra* note 85, at 5-8.

91. The case has been noted repeatedly by all three of the major networks, and was the basis for a segment on the CBS news program *60 Minutes*, aired Feb. 2, 1985. The case has also commanded the attention of the Federal Trade Commission. Letter from Mr. Wolfe, M.D. and Mr. Greenberg, Esq., both of Public Citizen, Health Research Group, to James C. Miller III, Chairman of the F.T.C. (Nov. 28, 1984) and letter response from Carol J. Crawford, Director of Bureau of Consumer Production, F.T.C., (Dec. 14, 1984).

92. Telephone interview with Gail Balph, Smokeless Tobacco Council (Feb. 11, 1985); *see supra* note 11.

93. *See supra* note 11.

ity, and exploitation at its worst. In their view, the industry is pandering a product to young people which it knows is deadly—thus perpetuating a condemnable fraud.⁹⁴ On the other side, the industry view may be summarized by the quip that social reformers would next have the courts hold Elsie the cow liable for heart disease caused by cholesterol.⁹⁵ Hence, the case is a classic example of a court facing the task of setting public policy, balancing equity, and allocating economic burdens. In short, the courts are being called upon to further consumer law and social policy. Many observers debate whether courts are adequately equipped to handle such matters.⁹⁶

Secondly, the *Marsee* case is a law professor's dream case; it abounds with academic questions. It is actually a simple case of failure to warn; the vital questions are factual, not legal. However, the case exemplifies a number of legal questions. Examples of the legal issues include: (1) the use of statistics and the definitions, burdens, and limits of strict liability,⁹⁷ (2) if proof of failure to warn effectively turns a strict liability suit into a negligence action,⁹⁸ (3) the role of punitives in products liability,⁹⁹ (4) the limits of industry liability under *Sindell v. Abbott*

94. Such is the position of the Public Citizen Health Research Group as evidenced by their F.T.C. Petition. See FTC PETITION, *supra* note 21, at 9-11.

95. See Will, *Addiction to Litigation Grows*, Tulsa World, Feb. 11, 1985, at A4, col. 5. Will criticizes attorney Melvin Belli's pursuit of cigarette cases as a denial of the individual's responsibility for his own behavior. *Id.*; see also *Lartigue v. R.J. Reynolds Tobacco*, 317 F.2d 19, 38 n.40 (5th Cir. 1963); RESTATEMENT (SECOND) OF TORTS § 402 comments i & j (1977).

96. *E.g.*, R. REEVES, AMERICAN JOURNEY 98-101 (1982) (Interview with former Supreme Court Justice Potter Stewart who laments, "[The courts] are inadequate. Society expects too much now. There are too many larger questions here—moral, social, political, economic. We have been given power beyond the ken of the courts . . . The courts became strong because of a default of the other branches of government.").

A case so threatening to the tobacco industry as is the *Marsee* case, certainly has political overtones. See, *e.g.*, Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. HEALTH POL. POL'Y & L. 277 (1980). Former President Jimmy Carter, regretting the lack of political and professional concern for the problem, has recently proposed that the Carter Center of Emory University be used as clearing house for lawsuits against tobacco companies. See *Carter Pushes Fight on Health Problems*, Tulsa World, Dec. 2, 1984, at A14, col. 3. See generally S. EPSTEIN, THE POLITICS OF CANCER (1979).

97. See generally SPECIAL COMM. ON THE TORT LIAB. SYS., REPORT TO THE A.B.A., TOWARDS A JURISPRUDENCE OF INQUIRY, THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, at ch. 4-71 to -85 (mass production and modern advertising), ch. 5-88 to -108 (crucial controversies in product liability), ch. 5-137 to -163 (role of experts and *res ipsa loquitur*), ch. 9-1 to -21 (empirical questions, effects of rules on risky behavior) (1984).

For a good summary of the discussion of the burdens and limits in products liability, see K. ROSS & B. WRUBEL, PRODUCTS LIABILITY OF MANUFACTURERS: PREVENTION AND DEFENSE 1985, at 11-191 (1985).

98. See *infra* text and accompanying notes 142-56.

99. See *infra* text and accompanying notes 172-73, 213-21.

Laboratories,¹⁰⁰ (5) the latent/patent danger analysis,¹⁰¹ (6) the limits to the duty to research,¹⁰² (7) pandering to young people,¹⁰³ (8) misleading advertising which implies safety,¹⁰⁴ and (9) the duties created by the addictive nature of a product.¹⁰⁵

As already suggested, the eventual disposition of the *Marsee* case will probably be decided upon existing legal concepts. Plaintiff's counsel has no desire to create new law,¹⁰⁶ relying primarily on a failure to warn theory.¹⁰⁷ Simplicity being one strategic goal, they omitted a warranty claim.¹⁰⁸ A physician familiar with the case displayed good insight when summarizing the case by analogy to the Scopes Monkey Trial.¹⁰⁹ It is predicted that the defense will rely heavily on their ability to discredit science. It is likely they will argue, in effect, that since current science cannot explain with any specificity how cancer is contracted, there can be no valid claim of cancer causation.¹¹⁰ However, such an argument has

100. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980) (shifting burden to multiple drug manufacturer defendants constituting majority of market.).

Sean Marsee used only one brand of snuff—*Skoal*, and his attorneys are suing only the manufacturer of that product. See Complaint, *supra* note 85. However, one could argue that Sean was a victim of the marketing of smokeless as done by the entire industry, since none of the manufacturers provide warnings. Some courts have relied upon a "substantial factor" doctrine, holding any defendant liable for the full extent of damages to the victim. *E.g.*, J. TRAUBERMAN, STATUTORY REFORM OF "TOXIC TORTS": RELIEVING LEGAL, SCIENTIFIC AND ECONOMIC BURDENS ON THE CHEMICAL VICTIM 88 (Env'tl. Law Inst. 1983).

A break-down of the company market share in the smokeless industry is provided in FTC PETITION, *supra* note 21, at 8-9, tables 2-3 (U.S. Tobacco Co. sells about 90% of all U.S. sold snuff, but only 22% of whole U.S. smokeless market).

101. One might reasonably ask if consumers shouldn't know better than to habitually put tobacco or any thing else in their mouth and leave it there. Fortunately, the law recognizes such an inquiry as hedging the real question. See, *e.g.*, Henderson, *The Demise of the Patent Danger Rule*, 3 CORP. L. REV. 78 (1980); Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturer's Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065, 1077 (1973); Philo, *New Dimensions in the Tortious Failure to Warn*, TRIAL, Nov. 1981, at 40, 44 (1981) ("if there has been an expression in law comparable to, '[t]he moon is made of green cheese,' it is '[t]he danger is open and obvious.'").

102. See, *e.g.*, Spradley, *Defensive Use of State of the Art Evidence in Strict Products Liability*, 67 MINN. L. REV. 343, 367-98, 433-37.

103. See, *e.g.*, *supra* notes 68-69 (indicating the scope of addiction among minors).

104. *E.g.*, *Smith v. Borg Warner Corp.*, 626 F.2d 384 (5th Cir. 1980).

105. See Garner, *supra* note 14, at 1437-40 (inadequacy of addiction warning as a theory of liability).

106. Interview with George Braly, attorney of Braly & Braly of Ada, Okla., in Ada, Okla. (Oct. 10, 1985).

107. *Id.*; Complaint, *supra* note 85, at 8.

108. See Complaint, *supra* note 85.

109. Interview with George Braly, attorney of Braly & Braly of Ada, Okla., in Ada, Okla. (Oct. 10, 1985).

110. See *supra* note 11.

The tobacco industry is once again lifting a cry that nothing should be done, nor even a whisper a caution be advised, because there is yet no ultimate proof. Is it necessary to be silent until the number of people who have massive oral tissue destruction and loss of life

the potential for backfire. In effect, the defense lawyers will be attempting to sell the same reasoning which caused the marketeers to be dragged into court in the first place. Their message is that same inane idea which most of us have at one time or another uttered with a shrug—"everything causes cancer." This shallow plea in the face of hard evidence is likely to be received as insulting or offensive, resulting in jury resentment or even anger. Furthermore, it is unlikely that the inconsistent positions taken by the tobacco industry will be lost on the jury. It will be easy for the plaintiff to show that the tobacco industry has taken a public stance encouraging the use of smokeless without any acknowledgment of the special risks. This position certainly makes courtroom claims of a known controversy or assumed-risk appear unjustifiable.

B. *Warranty*

Strict liability in contract for breach of an implied warranty is a theory of recovery largely replaced by strict tort liability. It nevertheless has a distinguishing basis¹¹¹ and therefore may be used as a supplemental or fall-back theory.¹¹² The common law warranty action, as now codified in the U.C.C.,¹¹³ originated not to provide security from dangerous products or conduct, but to hold sellers responsible for the quality of

becomes so large that the problem is glaringly obvious to everyone, except those who profit?

Warnings Urged on Snuff, Chewing Tobacco, Tulsa World, Feb. 7, 1985, at A5, col. 2 (quoting Assistant U.S. Surgeon General R. Micklenburg testimony in Massachusetts hearing on warnings.).

111. The focus in strict liability is on the *condition* of the product. W. PROSSER & W. KEETON, *supra* note 83, §§ 98-99. The focus in negligence is on the defendant's *conduct*. *Id.* § 96 (discussing conduct and duty). In a warranty action, the issue is the allocation of risk under the *contract*, a representational theory. *Id.* §§ 95a, 97.

112. See, e.g., Rasor, *The History of Warranties of Quality in the Sale of Goods: Contract or Tort?—A Study in Full Circles*, 21 WASHBURN L.J. 175, 175-76, 205 & n.222 (1982) (common law implied warranty merely supplanted by U.C.C. section and 402A, discussed in context of applicability of statute of limitations and comparative negligence).

113. U.C.C. § 2-314 states as follows:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

their goods.¹¹⁴ The confusion arises from the fact that this basis has been used as a stepping stone in the evolution of the tort of strict liability from negligence and breach of warranty for cases involving personal injury.¹¹⁵ Warranty language and theory continue to be used in some jurisdictions for personal injury suits, prompting debate as to its necessity and propriety in light of the 'preempting' adoptions of the U.C.C. and section 402A of the Restatement of Torts.¹¹⁶

If a breach of warranty theory is permissible, it might be used in conjunction with other theories if for no other reason than for the per-

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Id.

U.C.C. § 2-315 states as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Id.; see also U.C.C. § 2-719(3) (limitation on personal injury damage is prima facie unconscionable).

114. W. PROSSER & W. KEETON, *supra* note 82, § 95A.

115. *Id.* §§ 97-98.

The history of breach of an implied warranty is not a simple story. It originated in tort theory, evolved into a contract theory, again drifted into use as a tort theory as noted above, and now in light of the arrival of § 402A will again most probably be limited to contract actions and economic harm. For an extensive consideration of the historical development, see, e.g., Birnbaum, *Unmasking the Test for Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 593-602 (1980); Llewellyn, *Of Warranty of Quality and Society*, 36 COLUM. L. REV. 699 (1936); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124-34 (1960); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118-22 (1943); Rasor, *supra* note 112.

116. The current relevance of breach of an implied warranty to a personal injury suit has been considered by several commentators. E.g., Murray, *Products Liability v. Warranty Claims: Untangling The Web*, 3 J. L. & COM. 269 (1983) (arguing convincingly for "symmetry" in the law between assumpsit, warranty and § 402A); Rasor, *supra* note 112 (noting the confusing simultaneous applications of contract, warranty and § 402A in Kansas); Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1, 3-4 n.11 (1983) (citing eight articles which argue Article 2 pre-empts the tort of strict liability for products and thus precludes judicial development, and seven articles arguing no preclusion); see also W. PROSSER & W. KEETON, *supra* note 83, § 101 (concluding commercial codes should be amended to exclude personal injury in light of § 402A).

In short, whether a warranty theory is still useful in any jurisdiction boils down to two questions as to the statutes and case law of the jurisdiction: whether the early personal injury cases, notably food and drink cases, are pre-empted by strict tort liability and therefore no longer reliable on a warranty theory, and whether commercial law providing for economic losses can be extended to personal injury suits. See W. PROSSER & W. KEETON, *supra* note 83, § 95A n.14 (citing two early impure chewing tobacco cases which split on the question whether smokeless was "consumable"); *id.* § 97 (noting strict liability for defective food and drink ran ahead of any clear legal justification, noting case as early as 1913); see *id.* § 101 (summarizing the appropriate theories of recovery based on the interest protected); see also [1] PROD. LIAB. REP. (CCH). ¶ 4016, at 4026-27. Two jurisdictions utilize breach of warranty rather than adopting strict liability. *Id.* at 4026 n.3. Nine jurisdictions have adopted a form of strict liability while 37 jurisdictions have adopted § 402A, and three jurisdictions reject strict liability. *Id.* at 4026-27. One jurisdiction has indicated breach of warranty supersedes strict liability. *Id.* at 4026 n.2.

suasive value which the authority of the commercial statute language might have with the jury.¹¹⁷

The legal arguments for liability under a warranty theory are as follows. It has been black letter law for two centuries that a merchant, by virtue of the sale alone, impliedly warrants the quality of the goods.¹¹⁸ The seller becomes an insurer of the fitness of the goods for their ordinary purpose and for the particular purpose of the purchaser in those instances where the seller knows the buyer is relying on the seller's skill, judgment, or knowledge.¹¹⁹

The smokeless user might proceed under at least two warranty theories. The first theory is that a warranty arises from the sale. The seller should be liable since the product is not fit for its ordinary use by virtue of having caused the personal injury. The "product" would be the sum of the consumed smokeless. As a second theory, the plaintiff might acknowledge that the product may be fit for its ordinary purpose, but claim an implied warranty arises from the buyer's reliance on the seller's lack of a warning and the seller's advertising. The harm follows from the company's failure to warn that the use of smokeless may cause cancer among a known class of users: those individuals having an unknown susceptibility to cancer.¹²⁰

The tobacco industry has been successful in defending against suits claiming injuries caused by the indigenous components of tobacco smoke which were based on a recovery theory of breach of an implied warranty of merchantability.¹²¹ In *Hudson v. R.J. Reynolds Tobacco Co.*,¹²² the action was dismissed for failure to allege that the cigarette-induced lung

117. See *supra* note 113 (U.C.C. Language).

118. See Bogert & Fink, *Business Practices Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400, 415 (1931) (cited in W. PROSSER & W. KEETON, *supra* note 83, § 95A).

119. *Id.*; see also *supra* note 113 (U.C.C. § 2-315).

120. It is unknown if cancer results from an individual's susceptibility, or if the risk is present for all and results due to the fortuitous presence of some other factor. Until such a distinction can be made, the defective marketing of a product cannot be defended merely because the particular victim's harm was not predictable. A contrary view would insulate a gunman who shoots randomly into a crowd.

121. For a summary, see Garner, *supra* note 14, at 1425-31, 1431 n.67 (1980); Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L.Q. 678 (1966); see also James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550 (1966); White, *Strict Liability of Cigarette Manufacturers and Assumption of Risk*, 29 LA. L. REV. 589 (1969).

122. 427 F.2d 541 (5th Cir. 1970). The issue of statutory limitation was considered under an interlocutory appeal. The court found a continuing tort for which the continuing damage would toll the one year limit. Therefore, the statute would not run until the plaintiff knew or should have known of his injury and that the injury was caused by smoking. *R.J. Reynolds v. Hudson*, 314 F.2d 776, 780-82 (5th Cir. 1963).

cancer was foreseeable by the defendant.¹²³ In *Green v. American Tobacco Co.*,¹²⁴ however, the federal Court of Appeals held that knowledge was not a prerequisite to liability in an implied warranty action.¹²⁵ The court found that the plaintiff's lung cancer had been caused by smoking.¹²⁶ However, the defendant prevailed since the defendant's product was found to have met a "reasonable fitness" standard.¹²⁷ That standard required proof of a significant number of other tobacco induced deaths or injuries.¹²⁸ Finally, in *Pritchard v. Liggett & Myers Tobacco Co.*,¹²⁹ a federal court held that cigarettes would be deemed unmerchantable upon proof of causation in the plaintiff's case alone.¹³⁰ That plaintiff, however, chose not to pursue the action (after a reversal of a finding of assumed risk) due to problems of proof.¹³¹ While the industry has yet to lose a case,¹³² the law may eventually provide for recovery based on warranty. Suits are still pending, and a strict liability theory is presently being attempted for the first time.¹³³

In addition to the tobacco cases, there is additional common law support for implied breach of warranty for failure to warn of a risk of

123. Hudson, 427 F.2d 541, 541-42 (5th Cir. 1970) (citing *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963)). The Lartigue opinion provides a good discussion of negligence, warranty and strict tort liability, and disputed the claim that requirements of knowledge and foreseeability turned the warranty question into one of negligence. "[T]he foreseeability here involved is different from that required in negligence cases. It is not the foreseeability of unreasonable risks, but rather the foreseeability of the kinds of risks which the enterprise is likely to create." *Lartigue*, 317 F.2d at 24 (quoting James, *Strict Liability of Manufacturers*, 24 TENN. L. REV. 923, 925 (1957)). The basic holding in *Lartigue* is "cigarette smokers who started smoking before the great cancer-smoking debate cannot rely on tobacco companies' 'warranty' that their cigarettes had no carcinogenic element; the manufacturer is not an insurer against the unknowable." *Id.* at 21.

124. 304 F.2d 70 (5th Cir. 1962), *question certified on rehearing*, 154 So. 2d 169 (Fla. 1963), *rev'd and remanded*, 325 F.2d 673 (5th Cir. 1963), *rev'd and remanded on rehearing*, 391 F.2d 97 (5th Cir. 1968), *rev'd per curiam*, 409 F.2d 1166 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 911 (1970).

125. *Green*, 154 So. 2d 169, 171 (Fla. 1963).

126. *Green*, 391 F.2d 97, 99 (5th Cir. 1968).

127. *Id.* at 102.

128. *Id.*

129. 295 F.2d 292 (3d Cir. 1961), *aff'd on rehearing*, 350 F.2d 479 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966), *modified*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

130. *Pritchard*, 295 F.2d at 296.

131. See Garner, *supra* note 14, at 1427 (noting that ostensibly the case might have been won on an implied warranty theory; curiously, the case was pursued on express warranty and negligence theories before being voluntarily discontinued).

132. *Id.* at 1425.

133. E.g., *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984) (noted in Blodgett, *Standing to Sue, Sick Smokers Get the Green Light*, A.B.A. J., Dec. 1984, at 40). At the time of this writing, there are about 40 cigarette cases pending nationally. Letter from R.A. Daynard, Co-chairman, Tobacco Products Liability Project and Editor of *Tobacco Products Liability Reporter* (Oct. 9, 1985) (mass mailing, soliciting subscriptions to the reporter). See generally Brody, *Recovery Against Tobacco Companies*, TRIAL, Nov. 1985, at 49.

cancer or other serious personal injury.¹³⁴ The asbestos cases provide some precedent.¹³⁵ Other types of cases which provide precedent are drugs,¹³⁶ pesticides and herbicides,¹³⁷ intrauterine contraceptive devices,¹³⁸ and various other products.¹³⁹

While a warranty theory is subject to numerous defenses, many courts make the warranty theory more attractive by limiting such defenses where personal injury is involved.¹⁴⁰ A warranty action does not require a showing of a "defective condition unreasonably dangerous" as in strict products liability. Furthermore, a warranty theory often provides for a longer statute of limitations than tort once the harm becomes apparent.¹⁴¹ Therefore, a warranty claim can be much more than mere "petition padding."

C. *A Three-Category Analysis of Foreseeability*

All product liability theories require that the product defect cause

134. See, e.g., Case Comment, *The Duty to Warn Within the Implied Warranty of Merchantability*: Reid v. Eckerd's Drugs, Inc., 41 OHIO ST. L.J. 747 *passim* (1980) (failure to warn constitutes breach).

135. E.g., Hardy v. Johns-Manville Sales, 681 F.2d 334, 341-44 (5th Cir. 1982); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1087, 1091 (5th Cir. 1973), *cert. denied*, 419 U.S. 934 (1974); cf. Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183, 191-92 (S.D. Ga. 1982) (warranty claim dismissed for lack of privity); Large v. Bucyrus-Erie Co., 524 F. Supp. 285, 285-86 (E.D. Va. 1981), *aff'd*, 707 F.2d 94 (4th Cir. 1983) (where quarry machine operator established respiratory disease and hearing loss from a two week exposure period, action barred since not filed within two years of time injury evident).

136. E.g., Goodman v. Mead Johnson & Co., 534 F.2d 566, 568-71 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (cancer death due to thrombophlebitis; action not barred by statute of limitation until two years after discovery or knowledge of injury); Annot., 2 A.L.R. 4th 1091 (1980) (discussion of diethylstilbestrol (DES) cases).

137. See Annot., 12 A.L.R. 4th 463 (1982) (discussing product liability for fertilizers, insecticides, pesticides, fungicides, weed killers and application articles).

138. See Hawkinson v. A.H. Robins Co., 595 F. Supp. 1290, 1312-14 (D. Colo. 1984) (Dalkon Shield cases consolidated, some plaintiffs' actions on implied warranty theory dismissed for failure to give seller timely notice of the breach).

139. E.g., Klein v. Council of Chem. Ass'ns, 587 F. Supp. 213, 225 (E.D. Pa. 1984) (warranty action dismissed due to lack of a finding of a "product," where a printing industry worker alleged his bladder cancer was due to exposure to certain chemicals). See generally Locke, *Sales: Implied Warranty of Fitness for Particular Purpose*, 27 AM. JUR. P.O.F.2d 243, 269-72 (1981) (article cites a long list of products which have been recognized under warranty); Locke, *Sales: Implied Warranty of Merchantability*, 26 AM. JUR. P.O.F.2d 1, 32-34 (1981) (provides cites to cases supporting long list of products).

140. If not an anachronism in a period of strict liability, it is said that an action based on an implied warranty concept "carries far too much luggage in the way of undesirable complications, and is more trouble than it is worth." The "luggage" referred to is the legal issue of damage limitations, privity, disclaimers, and notice of breach. While there is no disclaimer (warning) defense with smokeless, the other obstacles should be considered by jurisdiction. W. PROSSER & W. KEETON, *supra* note 83, §§ 97-98; see B. CLARK & C. SMITH, *THE LAW OF PRODUCT WARRANTIES*, ¶¶ 7.07(7), 20.08(1).

141. B. CLARK & C. SMITH *supra* note 140, at ¶ 7.07(7).

the injury.¹⁴² In over 700 reported federal cases, a failure to warn has been argued to be a defect.¹⁴³ However, a strong difference of opinion exists over whether knowledge or foreseeability of the risk should be required to impose strict liability upon a manufacturer.¹⁴⁴ Asserting what he believes to be the generally accepted view, Professor Keeton takes the position¹⁴⁵ that:

[A] claimant who seeks recovery on this basis must . . . prove that the manufacturer-defendant was negligent. There will be no liability without a showing that the defendant designer knew or should have known in the exercise of ordinary care of the risk or hazard about which he failed to warn. Moreover, there will be no liability unless [the] manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public. Although this ground of recovery is sometimes referred to as strict liability, it is really nothing more than a ground of negligence liability described as the sale of a product in a defective condition, subject, however, only to the defenses and other limitations on liability applicable to strict liability rather than negligence.¹⁴⁶

This position is frequently rationalized by the often-repeated phrase that "strict liability is not absolute liability."¹⁴⁷ Keeton explains that "it would be extending strict liability too far to require a manufacturer to bear the costs of accidents to a few who were victimized by an unknowable risk of a good product that was a boon to humanity—such as when penicillin was first marketed."¹⁴⁸ Arguably, strict liability is a "dubious social policy" which impedes the development of products.¹⁴⁹

142. W. PROSSER & W. KEETON, *supra* note 83, § 97. See generally J. ALLEE, *PRODUCT LIABILITY* (1984) (providing analysis of the comparative advantages and disadvantages of a suit based in breach of warranty, as compared with strict liability); Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 *DRAKE L. REV.* 317, 320-29 (1978).

143. LEXIS, Feb. 15, 1985, Genfed library, Dist file.

144. See *infra* notes 145-56, 205 and accompanying text; see also W. PROSSER & W. KEETON, *supra* note 83, § 99 nn.20-21; RESTATEMENT (SECOND) OF TORTS § 402A comment i (1977) (excuses liability for allergic reaction of plaintiff unless he/she was a member of a large foreseeable class).

145. Keeton has changed his position on this issue. Compare Keeton, *Product Liability—Inadequacy of Information*, 48 *TEX. L. REV.* 398, 404 (1970) (knowledge unimportant) with Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 *MO. L. REV.* 579, 586-87 (1980) (negligence required). See generally Brodeur, *Annals of Law (Asbestos-Part I)*, *THE NEW YORKER*, June 10, 1985, at 49, 96-100 (Keeton's inconsistency on this issue was noted by the Fifth Circuit Court when Keeton unsuccessfully advocated a state-of-the-art defense in the famous asbestos case, *Borel v. Fibreboard*).

146. W. PROSSER & W. KEETON, *supra* note 83, § 99 (citation omitted).

147. *E.g.*, *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, —, 402 N.E.2d 194, 196-200 (1980).

148. W. PROSSER & W. KEETON, *supra* note 83, § 99.

149. See Note, *Is There a Distinction Between Strict Liability and Negligence in Failure to Warn Actions?*, 15 *SUFFOLK U.L. REV.* 983, 992 n.48 (1981) (citing Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 516 (1961) (strict liability impedes development

A good summary of the reasoning of the opposing view can be found in two student articles,¹⁵⁰ one of which also provides good documentation of the conflicting case law.¹⁵¹ Under this view, the product without a warning is evaluated for defectiveness regardless of whether the manufacturer had known of the defect.¹⁵² Therefore, if a manufacturer would be negligent in failing to warn of the danger had he known of it, then strict liability may be imposed.¹⁵³ Advocates of this view believe that to hold otherwise "effectively emasculate[s] the distinction between strict liability and negligence."¹⁵⁴ Hence, the controversy concerns the element of fault, which is a concept having no place in pure strict liability law.¹⁵⁵ Under strict liability, if the product is by its nature defective, the focus should then shift to the sole consideration of whether the consumer should fail to recover because of a defense of informed consent or assumed risk.¹⁵⁶

Whether the smokeless industry should be held liable for the ordinary use of smokeless can be broken down into three inquiries discussed below under the headings of negligence, strict liability, and absolute liability. The negligence inquiry considers the reasonableness of the manufacturers' conduct in producing and selling the product without a warning.¹⁵⁷ Strict liability considers whether the product is unreasonably dangerous without a warning or is otherwise defective, thus creating an unreasonable danger.¹⁵⁸ Absolute liability theory considers whether

of products); Connolly, *The Liability of a Manufacturer for Unknowable Hazards Inherent in His Product*, 32 INS. COUNS. J. 303, 307 (1965) (if the risk itself is unknown, it is incorrect to suggest the seller is in a position to spread that risk); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 947-48 (1957) (because strict liability may force manufacturer to price product out of market by requiring a single group to bear risk, it is a "dubious social policy").

150. Comment, *Strict Products Liability: The Irrelevance of Foreseeability and Related Negligence Concepts*, 14 TULSA L.J. 338, 356-59 (1978); Note, *supra* note 149.

151. *E.g.*, Note, *supra* note 149, at 983 n.4, 997 n.68, 998-1002 nn.75-90.

152. *Id.* at 1000-01 (discussing *Little v. PPG Indus.*, 19 Wash. App. 812, 821-22, 579 P.2d 940, 947 (1978), *modified*, 92 Wash. 2d 118, 594 P.2d 911 (1979), and numerous supporting cases).

153. *Id.* at 999; *see also* K. ROSS & B. WRUBEL, *supra* note 97, at 56-57.

154. *See, e.g.*, Note, *supra* note 149, at 1000 *passim* (fault is a negligence concept and is irrelevant in strict liability actions).

155. Comment, *supra* note 150, at 343-45.

A supplier in strict liability should not be viewed as fulfilling or breaching a duty to the plaintiff vis-à-vis the presence or absence of warnings. Rather, a warning may serve to remove liability from the supplier by conveying such information as will make a user or consumer fully and subjectively cognizant of the danger involved. The question then becomes whether the plaintiff's conduct amounted to assumption of risk.

Id. at 395.

156. *Id.*

157. *See infra* notes 160-73 and accompanying text.

158. *See infra* notes 174-221 and accompanying text.

smokeless products are unreasonably dangerous even when a full disclosure of the risk is given.¹⁵⁹ It can be argued that as a matter of social policy, some products are so lacking in social value or utility that they should be required to "pay their own way" irrespective of presumptions of consumer assumption of risk.

1. Negligence

There are over seventy reported federal negligent "failure to warn" cases involving cancer.¹⁶⁰ The elements of an action for negligent failure to warn are set out in Restatement section 388¹⁶¹ and require a finding that the supplier knew or should have known that the product was dangerous for its intended use.¹⁶² Since the supplier is held to the most current knowledge available regarding its product,¹⁶³ the smokeless industry is indeed hard pressed to deny such knowledge. Hence, where the defect complained of is failure to warn, the plaintiff is not as disadvantaged as in many cases where the defendant controls the evidence needed to prove the negligence or defect.

At this point it is appropriate to note that part of the novelty of a smokeless action will be the manner in which the court copes with the issue of whether, as a matter of law, there is a duty to warn of a "scientific controversy."¹⁶⁴ The no duty to warn of a controversy argument is in effect an effort to confuse the separate issues of (1) causation¹⁶⁵ and

159. See *infra* notes 222-53 and accompanying text.

160. LEXIS, Feb. 15, 1985, Genfed library, Dist file.

161. RESTATEMENT (SECOND) OF TORTS § 388 (1977) states as follows:

Chattel Known to be Dangerous for Intended Use

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Id.

162. *Id.*

163. *E.g.*, *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87, 91 (2d Cir. 1980) (drug manufacturer held to the continuous duty of keeping abreast of current state of knowledge of its product); see *W. PROSSER & W. KEETON, supra* note 83, § 96 (seller held to state of the art in sense of scientific knowledge and technological information available).

164. See *supra* note 11.

165. Assertion that the lack of a warning was not the proximate cause of the plaintiff's injury can be a successful defense in a failure to warn case. However, many courts hold that the absence of

(2) the reasonableness of the manufacturer's conduct in the circumstances¹⁶⁶ or the existence of a product defect.¹⁶⁷ Therefore, it would be improper to permit such argument as an affirmative defense per se.

In addition to negligent failure to warn, a manufacturer of smokeless might be held to be negligent for other conduct,¹⁶⁸ such as the failure to determine the dangerous propensities of its product,¹⁶⁹ its unreasonable method of advertising,¹⁷⁰ and the failure to substitute the dangerous contents of its products with safer ones.¹⁷¹ In general, a virtue of the negligence-based product liability theory is that punitive awards are less legally problematic, and juries may tend to grant larger awards.¹⁷² This is particularly true when defective marketing is complained of since it is an action which antecedes products liability. Defective marketing is an action steeped in the tort concepts of fraud, deception by nondisclosure, and wanton disregard for safety.¹⁷³

2. Strict Liability

There are numerous strict products liability cases involving cancer.¹⁷⁴ The primary authority is the Restatement section 402A and its

a warning gives rise to a presumption that had one been given, it would have been read and heeded. K. ROSS & B. WRUBEL, *supra* note 97, at 57-62.

Proof of actual causation is a major problem for individual plaintiffs in toxic tort suits. Causation is a question of fact, and circumstantial evidence of expert testimony and statistical proof may carry the burden. See R. RHEINGOLD, N. LANDAU & M. CANAVAN, *TOXIC TORTS* 31-33 (1977); see also *infra* note 259.

166. "[T]he defendant is required to exercise the care of a reasonable person under the circumstances." W. PROSSER & W. KEETON, *supra* note 83, § 96 (when a duty to warn arises); see also *RESTATEMENT (SECOND) OF TORTS* §§ 388(b), 402A comment i (1977).

167. See *infra* text accompanying notes 192-95.

168. See W. PROSSER & W. KEETON, *supra* note 83, § 96 (noting negligence may be found over as broad an area as the whole preparing and selling area).

169. *Id.*

170. See *supra* notes 70-79 and accompanying text.

171. A good argument can be made that smokeless could be made much safer. Various chews used around the world have been shown to pose significantly less risk. See *supra* note 42 and accompanying text.

172. See RESEARCH GROUP, INC., *PRODUCT LIABILITY: LEGAL STUDY* 116-17 nn.6-9 (1984); J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES LAW AND PRACTICE* § 6.02 (1981 & Supp. 1985).

173. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1329 (1976) (citing five forms of marketing misbehavior warranting punitive damages).

174. A seminal case is *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1974). See also *Bolen v. Redman Homes*, Nos. 83-1467, 83-1821, 83-1867, 84-1019, slip op. (5th Cir. Dec. 20, 1984); *Halphen v. Johns-Manville Sales*, 737 F.2d 462 (5th Cir. 1984); *Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984); *Jackson v. Johns-Manville Sales*, 727 F.2d 506 (5th Cir. 1984), *reh'g granted*, (July 2, 1984); *Austin v. Unarco Indus.*, 705 F.2d 1 (1st Cir.), *cert. denied*, 463 U.S. 1247 (1983); *Needham v. White Laboratories Inc.*, 639 F.2d 394 (7th Cir. 1981); "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D. N.Y. 1984), *enforcing* 506 F. Supp. 762 (E.D. N.Y.), *rev'd*, 635 F.2d 987 (2d Cir. 1980); *Klein v. Council of Chem. Ass'ns*, 587 F. Supp. 213 (E.D. Pa. 1984); *Johnston v. United States*, 568 F. Supp. 351 (D. Kan. 1983); *Neal v. Carey Can. Mines*, 548 F. Supp.

comments.¹⁷⁵ Section 402A requires a finding that the product was in a "defective condition unreasonably dangerous."¹⁷⁶ There is considerable commentary available explaining how failure to warn qualifies as a defective condition, especially with regard to drug cases.¹⁷⁷ In addition to several failure to warn theories,¹⁷⁸ smokeless may reasonably be considered defective by its designed chemical composition¹⁷⁹ or by virtue of the

357 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481 (3d Cir. 1985); Related Asbestos Cases, 543 F. Supp. 1142 (N.D. Cal. 1982); *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183 (S.D. Ga. 1982); *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978).

175. RESTATEMENT (SECOND) OF TORTS § 402(A) (1977) which states as follows:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(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 is 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.

Id. Section 402A does not preclude proof of negligence; it provides an additional and concurrent basis for recovery. *Id.* comment a.

176. See *id.* comment g (explaining defective condition); *id.* comment i (explaining unreasonably dangerous). Several jurisdictions, such as California, have abandoned the modifying language "unreasonably dangerous." See Colley, *Products Liability Litigation: Proof of Defects*, TRIAL, Nov. 1981, at 72 n.4; Comment, *Elimination of "Unreasonably Dangerous" from § 402A—The Price of Consumer Safety?*, 14 DUQ. L. REV. 25 (1975).

177. E.g., Bressler, *The Warning Claim in an Arizona Products Liability Action: Limitations on the Duty to Warn*, 25 ARIZ. L. REV. 395 (1983); Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, DEF. L.J., Sept. 1982, at 267 (a very comprehensive review); Swartz, *The Concepts of "Defective Condition" and "Unreasonably Dangerous" in Products Liability Law*, 66 MARQ. L. REV. 280 (1983); Comment, *Strict Liability and the Tortious Failure to Warn*, 11 N. KY. L. REV. 409 (1984).

Commentaries on drug cases in particular include Atkinson, *Pharmaceutical Litigation: Promoting Product Safety*, TRIAL, Nov. 1981, at 50, 50 ("injuries and deaths due to adverse drug exposure mount as the pharmaceutical industry enjoys access to a dependent market while operating with only a fraction of the responsibility enforced upon other product manufacturers . . ."); McClellan, Tate & Eaton, *Strict Liability for Prescription Drug Injuries: The Improper Marketing Theory*, 26 ST. LOUIS U.L.J. 1 (1981) (provides thorough discussion of historical evolutions and common law goals in light of the industry regulation); Shandell, *Failure to Warn—A Drug Manufacturer's Liability*, 14 TRIAL L. Q. 5 (1982) (summarizes holdings of major cases); Comment, *The Failure to Warn Defect: Strict Liability of the Prescription Drug Manufacturer in California*, 17 U.S.F.L. REV. 743 (1983) (§ 402A rejected as standard for design defect cases in California, but used in failure to warn cases).

178. Possible theories include failure to warn of the following: (1) cancer and other health risks, (2) additive nature, (3) methods of use to reduce risk, and also failure to make post-sale disclosures to public.

179. Although beyond the scope of this Comment, a traditional defective design theory of recovery may be a viable action for smokeless since studies of chews used throughout the world indicate that chews or dip with less tobacco or none are safer for consumers. See, e.g., *supra* note 42. This of course raises questions as to the integrity of the "product." Is "product" constituted by the tobacco itself or its function as a chew or dip? It is difficult to believe that the chemical composition cannot be made less carcinogenic without destroying the product's utility.

chosen advertising methods.¹⁸⁰

As previously explained, foreseeability and negligence concepts are still required in many strict liability suits based on the defect of failure to warn.¹⁸¹ However, when a manufacturer markets a product without an adequate warning, a reseller is subject to liability without proof of negligence for having resold the product without a warning.¹⁸² In other words, a convenience store may be held strictly liable for reselling smokeless upon proof that the wholesaler tobacco company was negligent in failing to warn.

There are numerous legal reasons for requiring a warning:¹⁸³ to notify of defects which cannot be eliminated during design or manufacture¹⁸⁴ or hazards which the 'state of the art' has yet to remove;¹⁸⁵ to notify of an otherwise flawless product's inherent dangers;¹⁸⁶ and to prevent use by unsuitable users.¹⁸⁷ The legal inquiry is similar regardless of which reason is proffered for a required warning. However, confusion over the concepts which differentiate negligent failure to warn from failure to warn as a defect in strict liability¹⁸⁸ still obfuscates the requisite elements of a strict liability suit.¹⁸⁹ It appears that those jurisdictions which adhere to a requirement of knowledge or foreseeable risk under section 402A¹⁹⁰ are in essence requiring a finding of a negligent breach of

180. See *supra* text accompanying notes 70-78.

181. "[T]here will be no liability unless [the] manufacturer failed to take precautions that a reasonable person would take in presenting the product to the public." W. PROSSER & W. KEETON, *supra* note 83, § 99; see *supra* notes 142-59 and accompanying text.

182. W. PROSSER & W. KEETON, *supra* note 83, § 99.

183. See Sales, *supra* note 177, at 276-88 (discussing types of risks that mandate a warning); Note, *supra* note 150, at 995.

184. E.g., Note, *supra* note 149, at 995 n.57.

185. E.g., *id.* at 995 n.60.

186. E.g., *id.* at 995 n.59.

187. E.g., *id.* at 995 n.58.

188. See Comment, *Strict Liability and the Tortious Failure to Warn*, 11 N.Ky. L.J. 409, 428-32 (1984) (discussing the pitfalls in devising jury instructions in failure to warn cases because of the mix of strict liability and negligence theory bases).

189. One writer discusses the *prima facie* case for strict liability for failure to warn under the anomalous heading of "When the Duty Arises," stating the action is comprised of five elements:

- (1) Existent risk of harm, inherent or arising from intended or reasonably anticipated use;
- (2) Risk in (1) actually known or reasonably foreseeable at time marketed;
- (3) Marketing defect of omission or inadequate warning/instructions/directions for avoiding hazard;
- (4) Marketing defect renders product unreasonably dangerous;
- (5) Marketing defect constitutes causative nexus in product user's injury.

See Sales, *supra* note 177, at 269.

190. RESTATEMENT (SECOND) OF TORTS § 402(A) comment j (1977); see Sales, *supra* note 177, at 288-92.

a duty to warn as a predicate to strict liability.¹⁹¹ Furthermore, the two basic tests used to determine when a lack of warning is a product defect under strict liability theory are inextricably caught up with the same considerations as to when a duty arises under negligence theory.

The two basic "defect" tests are the consumer-contemplation test¹⁹² and the risk-utility test.¹⁹³ Courts will ordinarily utilize only one of these two approaches.¹⁹⁴ The application of each, as used in determining whether a failure to warn constitutes a product defect, is summarized as follows:

The duty to warn has generally been perceived to arise when the risk or [sic] harm presented by a product exceeds the danger normally contemplated or anticipated by the ordinary consumer. As formulated in the Restatement, the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it. Underlying the duty to provide an adequate warning of the dangers associated with the product use is the rationale that the ultimate user of the product is entitled to all meaningful information of a product's characteristics necessary to make an informed choice whether the utility and need for the product outweighs the potential risk of harm attendant to its use. All products necessarily present some potential risk of harm either in their intended or reasonably foreseeable use or environment of use. It does not follow, however, that a product posing some risk of harm should not be marketed. Rather, the ultimate user is entitled to sufficient knowledge of the significant dangers to weigh the risk of harm against the need for the product.¹⁹⁵

Concern over the limitations of product liability is expressed in comments to the Restatement which state that smoking tobacco, whiskey, and butter are not "unreasonably dangerous" without a warning since the danger arises from: (1) over-consumption, (2) use over a long period of time, or (3) a potential of danger which is generally known and recog-

191. *Compare Sales, supra* note 177, at 288-92 (discussing foreseeability as predicate to duty to warn in strict liability) with W. PROSSER & W. KEETON, *supra* note 83, § 99 (negligence required).

192. *See Keeton, The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 MO. L. REV. 579, 588 (1980); *see also* RESTATEMENT (SECOND) OF TORTS § 402A comment i (1977) (explaining the meaning of "unreasonable danger").

193. Keeton, *supra* note 192, at 592. Other tests are also used. *See* W. PROSSER & W. KEETON, *supra* note 83, § 99.

194. *See* W. PROSSER & W. KEETON, *supra* note 83, § 99, at 698 & n.22 (citing several articles on these approaches to defining a defect). Some courts employ both tests concurrently. *E.g.*, *Welch v. Outboard Marine Corp.*, 481 F.2d 252 (5th Cir. 1973); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (1975), *overruled*, 584 S.W.2d 844 (Tex. 1979) & 665 S.W.2d 414 (Tex. 1984).

195. *Sales, supra* note 177, at 270-71 (footnotes omitted); *see id.* at 270 nn.9 & 11 (citing case law).

nized.¹⁹⁶ These caveats summarize nicely the typical objections encountered upon suggestion of the merits of a smokeless suit. This fear that liability for smokeless "opens the door too far" warrants comment.

First of all, smoking tobacco,¹⁹⁷ whiskey,¹⁹⁸ butter,¹⁹⁹ and other products may be distinguished from smokeless. The factual circumstances of any given product must be individually tested against the adopted tort theory.²⁰⁰ Secondly, it can be argued that smokeless does not fall within the reasoning of the comment's proffered three-part test.²⁰¹ Thirdly, it is arguable whether modern science and law would support the conclusions that even the stated examples (tobacco, whiskey, and butter) would properly fall within the three limitations.²⁰² Finally, these limitations are somewhat anachronistic in their failure to recognize the significance of latent harm²⁰³ and addiction.²⁰⁴

In addition to the "open door" argument, another common objec-

196. RESTATEMENT (SECOND) OF TORTS § 402(A) comments i, j (1977); see also Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 862-64.

197. Smoking tobacco can only be distinguished by the fact that the danger is well known, due largely to the government required warning label. See generally Public Health Cigarette Labeling and Advertising Act of 1969, 15 U.S.C. § 1333 (1982); Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92 § 4, 79 Stat. 282, 283 (1965).

198. Whiskey can be distinguished on three points: (1) the resultant harm from whiskey results from over-consumption (abuse); (2) while alcohol dependence does occur, a very high percentage of consumers are capable of use without resulting dependence; and (3) the resulting harm is not as latent, since the symptoms of alcohol abuse are more apparent and result concurrently with consumption. See *infra* note 240.

199. Butter is distinguished by a much higher utility and a more tenuous causal link to harm. Moderate consumption by otherwise healthy consumers may pose no danger.

200. While there is certainly merit to concerns that a particular conclusion (e.g., liability re smokeless) sets a bad precedent, a contrary conclusion (e.g., no liability re smokeless) should be supported by a rationale furthering a legal doctrine or principle involved. A jurisprudence based on conclusory linkage of one set of facts with another, without the benefit of an analysis of the linkage is likely to create more inconsistency and unreliability rather than less. In short, merely pointing to other products as a defensive argument is intellectual laziness.

201. The first two tests, overconsumption and use over time, are avoidable to a large extent since in effect the product itself tends to regulate consumption due to its addictive nature. These tests go to the concept of product abuse, for which the industry has provided no guidance. Presumably, as long as the product is consumed as intended, the industry view is that overconsumption is not possible as a practical matter. A good analogy would be the use of chewing gum—overconsumption is not a known danger. Finally, as already noted, the industry has denied the potential danger. Oral cancer in general is rare and the resulting harm is latent. Therefore, it would be erroneous to claim the danger is known and recognized.

202. See, e.g., *supra* note 133. In *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146 (D.N.J. 1984), Judge Sarokin ruled that the mandatory label on cigarettes does not pre-empt product liability.

203. While virtually all smokeless users experience numbing and skin abrasion, pain is seldom a symptom of oral cancer. When pain does occur, it usually is because of secondary infection of the tumor and because of invasion of adjacent structures. While diagnosis and treatment are easy in the early stages, many users delay attention for mouth lesions because they are so common. Jean, *Smokeless Tobacco Public Enemy No. 1*, Orlando Sentinel, July 7, 1985, at G7, col. 2. The survival

tion to the smokeless suit is the idea that presumably well-informed consumers assume the risks of smokeless consumption. While the presumption of a well-informed consumer may be factually incorrect, the assumed risk argument should be considered, *arguendo*, since warning labels and publicity of the facts are inevitable.

Even if consumers are well-informed of the health dangers, the assumed risk defense may be simply inappropriate in the tobacco products setting. It is absurd to presume that a typical tobacco consumer at one moment decided to commence use of smokeless on a daily basis for an indefinite number of years into the future. Initial use is experimental. Subsequent use is primarily the result of physiological impulse, not conscious decision-making. If there is a conscious decision-making process which can be equated with "assumed-risk", it is more properly characterized as some quantum of decisions resulting in a resignation to the habit.

In general, the most serious harm which results from tobacco usage results from multiple usage. Therefore, the assumed risk defense has validity only if each subsequent decision to use the product can be equated with the initial decision to "try" the product. It cannot be said that consumers consensually confront the danger in the same way each time the product is used. The immediacy of the danger changes over time as does the severity of the habit. Therefore, it is reasonable to conclude that the type of usage and risk inherent to tobacco products renders the assumed risk defense inapplicable.

In addition to section 402A, at least fifteen states have concurrently adopted section 402B.²⁰⁵ Section 402B provides strict liability recovery against a seller for public misrepresentation of a material fact concerning the character or quality of a chattel which was justifiably relied upon by a consumer.²⁰⁶ No showing of fault or negligence is required.²⁰⁷ This the-

rates are very low once the disease spreads to the neck nodes (one in seven survive over two years). See Smith, *supra* note 54, at 450.

Sean Marsee had no mouth sores or other warnings prior to the sore for which he sought medical assistance. His doctor diagnosed it on the spot as snuff-induced cancer. Interview with George Braly, attorney of Braly & Braly of Ada, Okla., in Ada, Okla. (Oct. 10, 1985).

204. See, e.g., Garner, *supra* note 14, at 1431-34 (tobacco addiction).

205. LAW AND ECON. CENTER, U. MIAMI, L&EC PRODUCTS LIABILITY AT A GLANCE-1982 (poster 1982).

206. RESTATEMENT (SECOND) OF TORTS § 402B (1977) reads as follows:

Misrepresentations by Seller of Chattels to Consumer

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or

ory, which arose from an early idea of strict liability for deceit,²⁰⁸ is essentially a warranty concept.²⁰⁹ Section 402B may better encompass the wrong since the tobacco industry has done more than merely fail to warn. Mere passive silence is distinguishable from what might be described as "active nondisclosure." First, the industry has made affirmative representations by actively denying the need for a warning. Secondly, active nondisclosure follows simply due to the peculiar nature of smokeless. It is natural for consumers to have a heightened expectation of warning since smokeless is consumed in an unusual manner and contains tobacco, which is generally known as a health risk. The lack of a warning implies a false safety. Still, the few cases interpreting section 402B²¹⁰ and the required elements of "misrepresentation"²¹¹ and "justifiable reliance"²¹² are serious obstacles.

Punitive damage awards in strict liability cases are a highly controversial subject,²¹³ especially in "mass product litigation" such as the Dalkon Shield.²¹⁴ The general trend appears to favor permitting such awards.²¹⁵ Regardless of whether knowledge must be shown to win a compensatory award in strict liability, it definitely must be shown to win punitive damages.²¹⁶ Since smokeless presents numerous egregious factors making punitives appear appropriate, the plaintiff is faced with the strategic choice of seeking a bifurcated judgment²¹⁷ or one based entirely

quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

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

Id.

207. *Id.*

208. *Id.* comment c.

209. [1] PROD. LIAB. REP. (CCH) ¶ 4042, at 4050.

210. The Products Liability Reporter annotates only 12 cases. See [1] PROD. LIAB. REP. (CCH) ¶ 4042, at 4050-51. A leading case not therein mentioned is *Crocker v. Winthrop Laboratory Div. of Sterling Drug, Inc.*, 514 S.W.2d 429 (Tex. 1974). See also *Griswold v. Lange Co.*, [1] PROD. LIAB. REP. (CCH) ¶ 7634 (D.C. Col. 1976).

211. *E.g.*, *Haynes v. American Motors Corp.*, 691 F.2d 1268 (8th Cir. 1982) (television ad on driving features of a Jeep were not misrepresentations).

212. *E.g.*, *id.* (no reliance on commercial causing Jeep accident); *Winkler v. American Safety Equip. Corp.*, 43 Colo. App. 241, 604 P.2d 693 (1979), *rev'd*, 640 P.2d 216 (1982) (no reliance on motorcycle helmet container statements).

213. *E.g.*, *RESEARCH GROUP, INC.*, *supra* note 172, at 117-19; J. GHIARDI & J. KIRCHER, *supra* note 172, at § 6.04-.05; see also K. REDDEN, PUNITIVE DAMAGES § 4(A)(2) (1980 & Supp. 1985) (providing excellent synopsis of all recent commentary and case law).

214. K. REDDEN, *supra* note 213, § 4.2(A)(2)(b) (Supp. 1985)

215. *Id.* § 4.2(A)(2) (noting tide turning towards allowance of punitive awards). *But cf.* *Page*, *supra* note 196, at 891 (tide against punitive awards in generic-risk cases).

216. *E.g.*, *RESEARCH GROUP, INC.*, *supra* note 172, at 116.

217. "Where the principal claim is based on strict liability in tort and there is an additional claim

on negligence.²¹⁸ Since knowledge should not be difficult to prove, negligence may be the preferable cause of action because an award of punitive damages would be less vulnerable on appeal.

The leading article on punitive damages in product liability suits was written by Professor David Owen,²¹⁹ whose approach has gained acceptance in the courts.²²⁰ One such court enumerated nine factors which should be considered in determining if there has been a flagrant indifference to the public safety justifying punitive damages and the extent of judicial control necessary to limit the risks of bankruptcy and excessive punishment.²²¹

3. Absolute Liability

Absolute liability, also known as ultra-strict, genuine, or pure strict liability, has been a product liability theory in search of the right product.²²² In a nutshell, existing strict product liability is distinguished from

of wanton disregard of the plaintiff's rights, it is a simple matter to allow the plaintiff to make a supplementary showing of aggravating conduct for the purpose of proving entitlement to punitive damages." *Drake v. Wham-O Mfg. Co.*, 373 F. Supp. 608, 611 (E.D. Wis. 1974); J. GHIARDI & J. KIRCHER, *supra* note 172, §§ 6.04, .19-.27 (additional showing for punitives in strict liability); see also J. GHIARDI & J. KIRCHER, *supra* note 172, § 12 (bifurcation of damages and issues by separate trials).

218. See, e.g., J. GHIARDI & J. KIRCHER, *supra* note 172, § 6.02.

219. Owen, *supra* note 173, at 1369.

220. E.g., *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981).

221. *Id.* The factors which should be considered are as follows:

- (1) the amount of the plaintiff's litigation expenses;
- (2) the seriousness of the hazard to the public;
- (3) the profitability of the marketing misconduct (increased by an appropriate multiple);
- (4) the attitude and conduct of the enterprise upon discovery of the misconduct;
- (5) the degree of the manufacturer's awareness of the hazard and of its excessiveness;
- (6) the number and level of employees involved in causing or covering up the marketing misconduct;
- (7) the duration of both the improper marketing behavior and its cover-up;
- (8) the financial condition of the enterprise and the probable effect thereon of a particular judgment; and
- (9) the total punishment the enterprise will probably receive from other sources.

Id.

222. See generally McClellan, *Strict Liability for Drug Induced Injuries: An Excursion Through the Maze of Products Liability, Negligence and Absolute Liability*, 25 WAYNE L. REV. 1, 19-21 (1978) (explaining conceptual distinctions among the theories and analysis with respect to social goals); Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 713-14 (1980) (arguing ultra-strict product liability is an embryonic idea with important potential as to manufacturer "cost internalization"); Page, *supra* note 196, at 853 (argues for equal liability treatment for all generic-risk products regardless if risk is knowable or avoidable); Schwartz, *Foreward: Understanding Products Liability*, 67 CALIF. L. REV. 435, 441-48, 488-93 (1979) (discussing application of genuine strict liability to products designed in such a way that their "norm is danger"); Spradley, *supra* note 102, at 379-411.

absolute liability by the former's requirement of a product "defect."²²³ No showing of a "defect" per se is required under absolute liability, and thus, it is said the theory makes the manufacturer an insurer of its product.²²⁴ Although instances noted below have been criticized as tantamount to strict liability, no product liability case has ever been explicitly based on the theory. Smokeless and smoking tobacco may be among the first products used to effectuate absolute product liability as a matter of law.

Absolute liability has been characterized as an economic theory which is little more than its mirror image: letting the loss lie where it falls.²²⁵ The theory is not such a radical idea, as evidenced by the fact that it has been widely embraced in conduct-based tort law. Harm resulting from ultra-hazardous activities such as blasting, crop dusting, or chemical transportation and storage are subject to absolute liability.²²⁶ Other good examples include the vicarious liability of employers,²²⁷ supplier liability,²²⁸ injured trespasser situations,²²⁹ and a variety of statutes which impose strict civil liability.²³⁰

Claims of absolute product liability have been fairly limited and generally only go so far as to assert that a holding comes close to absolute liability.²³¹ For example, commentators have noted that market-share theory in strict product liability approaches absolute liability since it relieves a plaintiff of showing breach of duty and causation.²³² The most common claim of absolute liability has resulted from cases holding that knowledge or foreseeability is not an element in failure to warn strict

223. *E.g.*, McClellan, *supra* note 222, at 21; Schwartz, *supra* note 222, at 441.

224. *E.g.*, Schwartz, *supra* note 222, at 441.

225. Fleming, *Is There A Future For Tort?*, 44 LA. L. REV. 1193, 1208 (1984) (in a perfect market, efficiency and transaction costs ignored, victim cost is the same).

226. RESTATEMENT (SECOND) OF TORTS §§ 519-520A (1977); W. PROSSER & W. KEETON, *supra* note 83, § 78.

227. W. PROSSER & W. KEETON, *supra* note 83, § 80.

228. *Id.* § 104.

229. *Id.* § 79; see Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

230. The best example being workman's compensation schemes. A less familiar example may be liability for pollution. *E.g.*, United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1119 (D. Minn. 1982) (absolute liability for clean-up under Superfund law).

231. "The fact is that many manufacturing defect cases do *approach* absolute liability. While design cases require a balancing of risk and utility, manufacturing defect cases do not." Spradley, *supra* note 102, at 388 (emphasis added).

232. See Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941, 960 (1985) (focusing on DES and asbestos as "generic" products); Note, *The Market Share Theory: Sindell's Contribution to Industry-Wide Liability*, 19 HOUS. L. REV. 107, 135-36 (1981); Note, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW. U.L. REV. 300, 323-26 (1981).

products liability actions.²³³ In particular, the famous asbestos case of *Beshada v. Johns-Manville Products Corp.*²³⁴ has provoked such widespread commentary on this point that it might be cited as the seminal case on the outer-limits of strict liability.²³⁵ In *Beshada*, the court held that the manufacturer's ignorance of the danger was not a defense.²³⁶ Other examples are cases where comparative or contributory negligence is held to be no defense in a strict liability suit.²³⁷ Finally, cases involving an undiscoverable defect, as in blood transfusion-hepatitis cases, invoke cries of absolute liability.²³⁸ However, none of these so-called extreme or absolute liability cases permitted recovery absent a finding of a product "defect" under current strict liability concepts.²³⁹ Presuming the defect with smokeless is a failure to warn, once a warning label is provided, nothing in the aforementioned cases would provide precedence for recovery.²⁴⁰

Since it appears that a form of absolute liability is required for liability despite a warning, the question becomes whether such a theory can be adduced in a manner consistent with current product liability law and

233. See *supra* text accompanying notes 142-56. There is a large quantity of commentary available on this hotly debated issue. An excellent source is Wade, *The Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 735 n.1 (1983) (Wade provides citations to the pertinent portions of 16 articles on the subject).

234. 90 N.J. 191, 447 A.2d 539 (1982).

235. See, e.g., Page, *supra* note 196, at 877-82; Placitella & Darnell, *Beshada v. Johns-Manville Products Corp.: Evolution or Revolution in Strict Products Liability?*, 51 FORDHAM L. REV. 801 (1983); Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 824-25 (1983); Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 901-05 (1983); Wade, *supra* note 233, at 738-39; Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983) (case comment on *Beshada*); Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 605-07 (1983); Birnbaum & Wrubel, *N.J. High Court Blazes New Path in Holding Manufacturer Liable*, NAT'L L.J., Jan. 24, 1983, at 24, col. 1; Platt & Platt, *Moving From Strict to "Absolute" Liability*, NAT'L L.J., Jan. 17, 1983, at 18, col. 3.

236. See Special Project, *supra* note 235, at 605-07, 626-27 (discussing "state-of-the-art" defense); see also Spradley, *supra* note 102, at 367-98, 433-37 (state of the art and failure to warn).

237. See, e.g., Owen & Moore, *Comparative Negligence in a Maritime Products Liability Case: Lewis v. Timco, Inc.*, 43 LA. L. REV. 1543, 1547-48 (1983); Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 LA. L. REV. 1341, 1349-56 (1984).

238. See, e.g., Spradley, *supra* note 102, at 380-81; Comment, *supra* note 150, at 349-56. Both articles discuss *Cunningham v. MacNeal Memorial Hosp.*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969), *modified*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970) (blood impurity undetectable) and *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962) (generic risk of cigarettes).

239. See *supra* text accompanying notes 192-93.

240. History of the 1961 American Law Institute Council meetings on § 402A reveals that the element of defectiveness was retained in the Restatement despite protest, in order to insulate whiskey and tobacco manufacturers. See Page, *supra* note 196, at 861-62; see also *supra* note 196 and accompanying text.

without fully resorting to reasoning steeped in the endless debate over the significant social objectives of product liability tort law.²⁴¹ This Comment proffers a single discernment in arguing that an affirmative answer is possible.

Current tort theory recognizes two basic categories of products: "unavoidably unsafe" products and "unreasonably dangerous per se" products. If smokeless and cigarettes are recognized as special legal specimens falling between these categories, then absolute liability may be imposed with virtually no displacement of existing product liability law.

An "unreasonably dangerous per se" product is one for which no warning or instruction for use will justify its marketing.²⁴² Hence, a manufacturer would be subject to punitive damages for continuous marketing of such a product. A hypothetical example would be the preparation of poison to be sold for consumption.²⁴³ It may be that tobacco is "unreasonably dangerous per se", or at least such a characterization is more palatable to some than the below-described alternative, "unavoidably unsafe." However, a more accurate view recognizes that consumers actively seek the benefits of tobacco despite knowledge of the health risk.²⁴⁴ Libertarianism aside, it would be unwise for the common law to attempt to invoke virtual prohibition.

Comment k to the Restatement defines "unavoidably unsafe products" as those which are "quite incapable of being made safe for their

241. Goals include spreading-the-loss, deterrence, and satisfaction or consumer expectations. See Page, *supra* note 196, at 883 n.132 (citing Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 809-10 (1976) (discussing seven policy justifications)). Page concludes that incentives for improved safety and satisfying consumer expectations are goals warranting generic product liability. *Contra* McClellan, *supra* note 222, at 24 (reviewing debate with respect to failure to warn cases, concluding loss-spreading is primary goal). See generally Owen, *supra* note 222, at 704-14 (reconsidering six general policies).

242. See, e.g., Sales, *supra* note 177, at 271 (citing *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 657 (1st Cir. 1981); *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 892 (9th Cir. 1977); *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1273-74 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974)). The court in *Needham v. White Laboratories, Inc.*, 639 F.2d 394 (7th Cir. 1981) stated:

Once it is determined that the product is unavoidably unsafe and that the danger is warned against, it must be determined whether the product is so unsafe that marketing it at all is "unreasonably dangerous per se." In order to decide whether the product is unreasonably dangerous per se, a court must balance the utility of the product against its dangers.

Id. at 401.

243. This hypothetical is drawn from an analogy provided in *White*, *supra* note 121, 616 & n.122. *White* notes the production of cigarettes is conduct which amounts to intentional infliction of death as surely as the skidrow vendor who sold a well-labeled heating fuel to winos, knowing they would drink it for the alcohol content. *Id.* (discussing *Commonwealth v. Feinberg*, 211 Pa. Super. 100, 234 A.2d 913 (1967)).

244. See Schwartz, *supra* note 222, 491 & n.308.

intended and ordinary use.”²⁴⁵ When “properly prepared and marketed, and proper warning is given . . . [the seller] is not held to strict liability for unfortunate consequences attending their use.”²⁴⁶ The classic example is an experimental drug.²⁴⁷ Cigarettes have been referred to as a “generic-risk” or “norm is danger” product contemplated by comment k.²⁴⁸ However, this is debatable. As repeatedly stated throughout this Comment, even in strict liability, failure to warn is based on a reasonableness standard.²⁴⁹ A caveat to comment k continues in that vein. The comment immunity is only available if the manufacturer has “merely . . . undertaken to supply the public with an *apparently useful and desirable* product, attended with a known but apparently *reasonable* risk.”²⁵⁰ Clearly, tobacco is distinguishable from a vaccine in terms of usefulness, desirability, and reasonableness and thus deserves less protection. Comment k furthers the aforementioned risk-utility type of analysis.²⁵¹ Tobacco products are of high risk and low utility and therefore deserve little protection.

To summarize, it can be argued that a virtual prohibition via characterization as “unreasonably dangerous per se” simply goes too far in

245. RESTATEMENT (SECOND) OF TORTS § 402A comment k (1977) provides:

Unavoidably unsafe products.

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Id. (emphasis in original).

246. *Id.*

247. *Id.*

248. *E.g.*, Schwartz, *supra* note 222, at 491-92; *cf.* Comment, *supra* note 150, at 372-77 (discussing absurdity of assumed risk defense in cigarette case); *supra* note 240.

249. *See, e.g.*, *supra* text accompanying notes 146, 192-95.

250. RESTATEMENT (SECOND) OF TORTS § 402A Comment k (1977) (emphasis added).

251. *See supra* text accompanying note 195; Page, *supra* note 196, at 891; Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 IND. L. REV. 755, 767-68 (1977); *cf.* McClellan, *supra* note 222, at 33-36 (arguing for consumer contemplation/utility test).

light of current social norms. Civil immunity via characterization as "unavoidably unsafe" is also inappropriate since tobacco lacks redeeming utility and its habit-forming nature vitiates assumed-risk. Proper characterization lies somewhere between these basic categories. Therefore, smokeless and other tobacco products can reasonably be said to deserve treatment which would result in full compensatory liability. In general, however, once a warning is provided there should be no punitive liability exposure for the generic risks of tobacco products. As another commentator has written:

Prohibition of the manufacture of cigarettes, their sale or smoking is not proposed—it is proposed only that the cigarette manufacturing industry pay the inevitable, and thus intentional [one intends the consequences which are substantially certain to follow from his actions], cost of its present system of operations. If it cannot do that and survive, it has no basis on which to claim a right to stay.²⁵²

This approach acknowledges the lack of a "defect" as understood in current legalese, yet permits recovery, thus it is in effect absolute liability. However, absolute liability is certainly a more sensible policy than the great non sequitur which now prevails.

[W]hen a cigarette manufacturer, or any other manufacturer for that matter, markets an inherently dangerous product and thereafter expends tremendous sums of money and effort advertising and encouraging consumers to disregard the risk, the manufacturer should be held liable when its perilous invitation is accepted. To profit from knowingly enticing another to injure himself and thereafter to escape the cost of that injury is untenable.²⁵³

IV. THE INADEQUACY OF PRIVATE LITIGATION

To a large extent our system relies on civil actions, with the potential for punitive awards, to protect future consumers and to remedy victims of avoidable harm. In light of the general perception that our culture is overly litigious, it is notable that only now is the first smokeless case in process. Since the deadly dangers of smokeless have been known for decades, the timeliness of this first suit in itself raises questions as to the adequacy of our system. Even if mass-exposure toxic-tort suits are ultimately successful, smokeless demonstrates that the civil response to even widespread problems can be unacceptably laggard.

Poor relations between the medical and legal profession may be partly to blame. Many victims simply are not referred to lawyers. In

252. See White, *supra* note 121, at 618-19.

253. See Comment, *supra* note 150, at 372 & n.184.

any event, the failure of the legal and medical professions to unite in pursuing preemptory action from the courts reflects a real shortcoming in the system. Clearly, the threat of private suits is not always an adequate deterrent.

The smokeless suit also highlights other pervasive inadequacies of the traditional rules and methods of "private" or bipolar litigation. Difficulties in proving actual causation and the substantial costs of litigating mass exposure claims on a case-by-case basis make toxic-tort suits problematic and costly.²⁵⁴ Thus, such suits are unattractive to the "system's gatekeepers," the plaintiffs' attorneys.²⁵⁵ Inconsistent jury verdicts are not uncommon.²⁵⁶ Also, once the tide turns against a defendant, bankruptcy can become an issue²⁵⁷ which may result in lower settlements.²⁵⁸ Hence, victim compensation becomes too uncertain and incongruous in such cases.

Toxic-tort suits, such as smokeless, warrant the adoption of progressive legal theories as to causation, administration, and remedy. The cardinal requirement of causation is simply inoperative in toxic-tort suits and should be abandoned or grossly modified. The type of analysis suggested by a scholar from one of a number of divergent schools of thought may provide a starting point for such a departure.²⁵⁹ A recent commen-

254. See Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 887-905 (1984).

255. *Id.*

256. See, e.g., Cahan, *Jury Verdicts Differ in Dalkon Shield Cases*, 14 STUDENT LAW., Sept. 1985, at 7, 7.

257. See, e.g., Special Project, *supra* note 235, at 806-45 (asbestos).

258. For an account of the ordeal of one Dalkon Shield victim who reluctantly settled prior to A.H. Robbins' filing for bankruptcy, see Hargitai & Span, *My IUD Nightmare*, GLAMOUR, Oct. 1985, at 197.

259. See Note, *Tort Actions for Cancer: Deterrence, Compensation, and Environmental Carcinogenesis*, 90 YALE L.J. 840, 853-62 (1981).

Cancer victims should not be precluded from recovering for their injuries solely because carcinogenesis is described by a statistical correlation rather than by a cause-and-effect mechanism. Rather, the statistical correlation should be incorporated into the causation requirement so that the tort mechanism can effectively deter carcinogen production and prevent future cancer incidence. It is a statistical certainty that producers of carcinogens are increasing the incidence of cancer in the general population. The mere fact that the etiology of the injuries is complex should not shield those producers from legal responsibility.

Id. at 854-55; see Rosenberg, *supra* note 254, at 855-60 (advocating "public" rather than "private" law approach where liability imposed in proportion to the probability of causation assigned to the excess disease risk in the exposed population, regardless of absence of proof of individualized causal connection); see also Harley, *Proof of Causation in Environmental Litigation*, reprinted in ATLA, TOXIC TORTS 403, 403-10 (1977) (discussion of cases involving attempts to prove or disprove causation through the use of statistics, expert opinion, and other circumstantial evidence—exemplifies the problems with the traditional approach). See generally Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven Jr.*, 43 U. CHI. L. REV. 69, 69-108 (1975) (Calabresi adopts a

tator suggested one sensible approach to the problem as follows:

[C]ourts, applying traditional causation requirements, reject current scientific understanding of the etiology of cancer as proof of legal causation in tort suits for cancer, thereby preventing the tort mechanism from performing its deterrence function. The current limitations of the tort system could be overcome, however, by a shift in the burden of proof on the issue of proximate cause once a plaintiff has demonstrated a threshold exposure to a substance listed in a legislatively enacted catalog of carcinogens.²⁶⁰

The costly and inefficient administration of a bipolar lawsuit is similarly an anachronism in the toxic-tort arena. Progressive administration, such as society-based actions, more appropriately accommodates the needs of the multiple toxic-tort victims.²⁶¹ Finally, progressive remedial techniques include suggestions of damage scheduling and insurance fund judgments.²⁶²

V. CONCLUSION

Whether focusing on the conduct of those who manufacture and sell smokeless or on the product itself, the herein described view of the medical experts should convince plaintiffs' attorneys that smokeless is a proper target for a product liability suit. While the tobacco industry certainly represents a formidable opponent, as demonstrated by the smoking cases, this Comment has explained that in addition to a "defective design" theory, the plaintiff's attorney has available to him a potent arsenal of alternative recovery theories within the sphere of defective marketing alone. Failure to warn, whether based on warranty, negligence, or strict liability, is a theory of recovery backed by solid statutory and case law authority, even as applied to latent diseases such as cancer.

predominately utilitarian or economic approach, allocating the costs to the "cheapest cost avoider"; under this view proximate cause becomes largely irrelevant); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). Epstein's work is generalized as being based on common morality and liberty. It has prompted a wealth of additional scholarly work on the issue of causation. In particular, see Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979) (the so-called "radical function approach"); Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457 (1979) (claiming inconsistency in Epstein's theories and defending several economic legal theories).

On the general issue of approaching tort law with a mind set beyond that of traditional common law thought, see Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Gjerdingen, *The Coase Theorem and the Psychology of Common Law Thought*, 56 S. CAL. L. REV. 711 (1983); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

260. Note, *supra* note 259, at 862.

261. Rosenberg, *supra* note 254, at 859-60, 905-16 (discussing "public" tort law and class action theory in toxic-tort suits).

262. *Id.* at 916-29.

Smokeless may epitomize the notion of a product which is "unreasonably dangerous per se." The lack of compelling social utility and the addictive nature of smokeless may render it a product whose "unreasonably dangerous defective condition" cannot be neutralized by a warning. Short of such an extreme view, this Comment nevertheless provides a legal analysis, consistent with currently adopted theory, which would effectively provide for absolute liability despite the inevitable warning labels. Smokeless would be a good archetype of the product which should "pay its own way." The uninformed, the ignorant, and those stuck with a habit for which the consequences are latent should not be left prey to an industry which carelessly markets a product causing such grave harm. Even when warning labels are present, cognitive assumption of risk is largely an illusion where the circumstances involve: (1) the young; (2) the use of a habit-forming substance which is based at least in part on some cultural phenomenon; (3) a resultant harm which remains latent over time; and (4) pervasive advertising which encourages disregard of the warning.

Finally, it is important to recognize the inherent inadequacies of private tort law, especially with regard to toxic torts, which smokeless tends to highlight. A progressive approach to the issues of causation, administration, and remedy is suggested.

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Author's note: On February 27, 1986, President Reagan signed into law the Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252 (1986). *See supra* note 1.

APPENDIX

A Bibliography of Scientific Evidence Linking Smokeless to Cancer

The 55 sources listed below (in reverse chronological order) are a small sample of the scientific evidence available.

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