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SMOKING-CANCER CASES: THE PLAINTIFF'S REMEDIES

The recently published Surgeon General's Report¹ has created a common awareness in this country that cigarettes pose a grave health hazard to smokers.² This awareness has not, however, produced the reduction in smoking hoped for by those who endorsed the report,³ perhaps because of the fundamental factors that cause people to smoke: cigarette smoking is a habit⁴ often motivated by social and psychological factors.⁵ In an apparent effort to counteract the effects of the Surgeon General's Report, the cigarette industry is actively engaged in creating a demand for its product through extensive advertising campaigns, attempting to induce old smokers to continue and nonsmokers to begin. Thus, seventy million Americans, who presumably are aware of the risk they incur by smoking, nevertheless, for reasons possibly unknown to them, continue to smoke.⁶

This comment examines remedies available to plaintiffs in smoking-cancer cases. The form of action a plaintiff will choose is predictably controlled by the evidence he can present. Where proof is meager but the forum willing, he may bring a strict liability action for breach of implied warranty, either at common law or under the Uniform Commercial Code. In this area policy considerations dominate. In other cases there may be certain facts on which to base an action for breach of express warranty or negligence. Finally, an examination is made of the effects on a plaintiff's case of the Federal Cigarette Labeling and Advertising Act.⁷

I. IMPLIED WARRANTY—CASE LAW

In 1963 the Court of Appeals for the Fifth Circuit decided two smoking-cancer cases, *Lartigue v. R.J. Reynolds Tobacco Co.*,⁸ based on Louisiana law, and *Green v. American Tobacco Co.*,⁹ decided under Florida law.¹⁰ Both

¹ Advisory Committee to the Surgeon General of the Public Health Service, U.S. Dep't of Health, Education and Welfare, *Smoking and Health* (1964) [hereinafter cited as the Surgeon General's Report].

² *Id.* at 31-39.

³ Despite the work of state and local health and education associations which have instituted smoking education programs in order to alert people to the dangers of smoking, cigarette sales continue to soar. U.S. Code Cong. & Ad. News 1677 (1965).

⁴ Surgeon General's Report, *supra* note 1, at 351.

⁵ *Id.* at 40. The drive to use tobacco is psychogenic in nature, and the sudden removal of cigarettes from the market would present the problem of finding a substitute to satisfy the psychological needs of over 70 million smokers. *Id.* at 355.

⁶ For the view that advertising often causes people to buy things they do not want, see Greyser, *Businessman Re: Advertising: "Yes, But . . ."*, 40 *Harv. Bus. Rev.*, May-June 1962, p. 20. See generally Quinn, *Ethics, Advertising and Responsibility* (1963).

⁷ 79 Stat. 282 (1965), 15 U.S.C.A. §§ 1331-39 (Supp. 1966).

⁸ 317 F.2d 19 (5th Cir. 1963).

⁹ 325 F.2d 673 (5th Cir. 1963).

¹⁰ It is important to note the history of these two cases. In 1962 the Court of Appeals for the Fifth Circuit held that defendant was *not* liable for harm caused by unknowable defects in his product. *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962). In 1963, the Fifth Circuit, applying Louisiana law and relying on its decision

cases were breach of warranty actions for wrongful death caused by lung cancer, which the decedents had allegedly developed by smoking defendants' cigarettes.¹¹

In both instances, the Fifth Circuit held that a manufacturer of products sold to the public for consumption impliedly warrants that they are reasonably fit and wholesome for the purposes for which they are sold.¹² In *Lartigue*, however, the warranty was held not to extend to unknowable defects¹³ in the manufactured product,¹⁴ whereas in *Green* the court held the warranty did so extend.¹⁵ Recovery was ultimately denied in both cases on findings that cigarettes are reasonably fit and, therefore, that no warranty was breached. Thus, in order for a plaintiff to prevail against a cigarette manufacturer, a court must find that (1) an implied warranty extends to unknowable defects and (2) this warranty is breached when plaintiff's smoking results in cancer.

A. *Extent of the Warranty—Knowable v. Unknowable Defects*

The difference between *Green* and *Lartigue* as to how far the implied warranty extends can be explained by an examination of the methods by which the law of each state was divined. To determine Florida law, the Fifth Circuit in *Green* certified a question¹⁶ to the Florida Supreme Court, which responded that the warranty does extend to unknowable defects.¹⁷ In *Lartigue*, on the

in the 1962 *Green* case decided *Lartigue* and held defendant was not liable for harm caused by unknowable defects in his product. Meanwhile, a determination of Florida law by the Florida Supreme Court in effect reversed the 1962 holding of the Fifth Circuit in *Green*. *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963). Thus, the reliability of the *Lartigue* holding was opened to some doubt, although the decisions in both cases were based primarily on jurisdictional policies and holdings rather than on any general well-settled rule of law. However, the *Lartigue* rule may be considered vindicated by a later cigarette-cancer case similar on its facts to *Lartigue* and *Green*. See *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964). The court in *Ross* had both *Lartigue* and the final *Green* opinions before it and chose to follow the *Lartigue* ruling.

¹¹ The trial judge in *Lartigue* expressed his opinion that the jury did not believe plaintiff's evidence as to the causative effects between smoking and cancer.

¹² 317 F.2d at 37; 325 F.2d at 677.

¹³ The word "defect," as used in this comment, refers to the general condition of cigarettes that leads to cancer, rather than to any specific substance that causes the harm. A defective condition may arise, not only from harmful ingredients which are *uncharacteristic* of the product, but also from foreign objects, decay or deterioration. Restatement (Second), Torts § 402A, comment (h) (1965). Should it be presumed, then, that if whatever causes cancer is an element characteristic of tobacco, cigarettes causing cancer are not defective? See also 1 Frumer & Friedman, *Products Liability* § 16.03[4] (1960). "It is a difficult question as to what [is] warranted in some instances, particularly where the product is not defective *as such*, e.g., drugs with adverse side effects; cigarettes—cancer." *Id.* at 442.5.

¹⁴ 317 F.2d at 35.

¹⁵ 325 F.2d at 674-75.

¹⁶ This procedure is permitted by Fla. Stats. Ann. ch. 25.031 (1961), which provides that when a question of state law arises determinative of the issue and there are no clear controlling precedents in the decisions of the Florida Supreme Court, the federal court may present (certify) questions to the Florida Supreme Court for its determination thereon.

¹⁷ 154 So. 2d at 170.

other hand, the Fifth Circuit determined for itself that a Louisiana court would hold that the warranty does not so extend.

In reaching its decision in *Green*, the Florida court reasoned that, under Florida law, the question of a seller's actual or implied knowledge of defects is irrelevant to his liability in an implied warranty action and, *therefore*, the seller's warranty extends to unknowable defects.¹⁸ It is submitted that this conclusion does not necessarily follow: irrelevancy of actual knowledge means that it makes no difference that defendant did not know of the defect; irrelevancy of implied knowledge means that it makes no difference that defendant was not negligent.¹⁹ It does not follow from either (or both) of these that the warranty extends regardless of whether defendant, with any amount of skill, diligence or foresight, could have known of the defect.

The Florida court, then, seems to see little difference between a case involving a defect which is knowable but unknown,²⁰ and one which is scientifically unknowable. The court had previously dealt only with the former type—that which, although potentially discoverable, is either extraordinarily difficult to detect or detectable only at a prohibitive cost.²¹ Because such defects and the injuries resulting from them generally occur intermittently, Florida has been willing to place the risk that they will occur on the manufacturer, who is generally in a better position than the buyer to afford the expense.²² This reason for imposing strict liability is absent in *Green*. The defect, besides being unknowable, is inherent rather than intermittent and the injury it causes is widespread.

The Fifth Circuit in *Lartigue* recognized the fact that no intermittent defect was involved and used that fact as a basis for holding that no warranty extends to unknowable defects. Thus, *Lartigue* stands for the proposition that if the risk inhering in the product is unknowable, there is no "foreseeable" harm and, therefore, no liability:²³ "The 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"²⁴ to which the law attaches liability.²⁵

¹⁸ *Ibid.*

¹⁹ Agreeably, proof of lack of due care is not a requisite to an action for breach of implied warranty. 1 Frumer & Friedman, *op. cit. supra* note 13, at 383; 1 Williston, *Sales* § 237 (rev. ed. 1948).

²⁰ E.g., Spoiled food in sealed containers, mice in coke bottles, etc. The Florida Supreme Court analogized this type of defect to the *Green* case. In such cases it has never been necessary for the plaintiff to prove that the manufacturer knew or could have known of the mouse or the spoilation of the food. Connolly, *The Liability of a Manufacturer for Unknowable Hazards Inherent in His Product*, 32 *Ins. Counsel J.* 303 (1965).

²¹ See *Carter v. Hector Supply Co.*, 128 So. 2d 390 (Fla. 1961); *Sencer v. Carl's Mkts.*, 45 So. 2d 671 (Fla. 1950).

²² *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). See also Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)* 69 *Yale L.J.* 1099 (1960).

²³ 317 F.2d at 35.

²⁴ *Id.* at 24, quoting James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 *Tenn. L. Rev.* 923, 925 (1957).

²⁵ "This is a heavy burden on a manufacturer, but it is a liability only for a defec-

B. *Breach of the Warranty—Standard of Safety*

Although *Green* and *Lartigue* disagreed as to whether a warranty extends to unknowable defects, they did agree on the standard of safety to be applied in determining whether a warranty has been breached. Under Louisiana law, a manufacturer impliedly warrants that his goods will be *reasonably* fit and wholesome for the purpose for which they were made.²⁶

Strict liability on the warranty of wholesomeness, without regard to negligence, "does not mean that goods are warranted to be foolproof or incapable of producing injury By and large, the standard of safety of the goods is the same under the warranty theory as under the negligence theory." [To impose strict liability,] the article sold must be unreasonably dangerous to the ordinary consumer, with the knowledge common to the community as to its characterization.²⁷

The jury in *Lartigue* applied this standard and, finding that cigarettes are reasonably safe, decided there was no breach of warranty.²⁸

The court of appeals adopted the *Lartigue* standard of reasonable safety in *Green*²⁹ despite the fact that the Florida Supreme Court had expressed the view that the fitness of a product should be determined by its *actual* safety.³⁰ The application of a standard of actual safety is a logical extension of the rule that a manufacturer is liable for unknowable defects. By eliminating a foreseeability test, that rule removes any basis for applying a standard of reasonable safety.

Judge Cameron, dissenting in *Green*, was probably correct when he stated that plaintiff should have had judgment on the basis of Florida law.³¹ Florida does not base its standard of safety on the law of negligence with its standard of reasonable care;³² instead, it is determined by the law of contracts and is founded in the contract of sale between the seller and the buyer.³³ Judge Cameron argued that the warranty implied by law in every sale the company made to the buyer was that the cigarettes he purchased would do him no harm.³⁴ Thus, he would disregard the *Lartigue*

tive condition not contemplated by the consumer, the harmful consequences of which, based on the state of human knowledge, are foreseeable." 317 F.2d at 24. The reasons for imposing such liability are justified by sound principles of public policy. See Prosser, *supra* note 22.

²⁶ 317 F.2d at 39.

²⁷ *Id.* at 37, quoting 2 Harper & James, *Law of Torts* 1584 (1961). See also Restatement (Second), *Torts* § 402A, comment (i) (1965): "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful. . . ."

²⁸ 317 F.2d at 39.

²⁹ Quoted in text accompanying note 27 *supra*. Compare 325 F.2d at 677.

³⁰ 154 So. 2d at 173. Clearly, the Florida court would apply a "foolproof test" which the Fifth Circuit in *Lartigue* and *Green* expressly rejected. 317 F.2d at 37; 325 F.2d at 677.

³¹ *Id.* at 679 (dissenting opinion).

³² 154 So. 2d at 173; 325 F.2d at 680.

³³ *Ibid.*

³⁴ *Ibid.*

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standard of reasonable fitness which the majority adopted³⁵ and would apply the standard of actual safety.³⁶ It seems likely, then, that if a case were brought in a Florida state court against a cigarette manufacturer on facts similar to those of *Green*, the plaintiff would prevail.

II. IMPLIED WARRANTY—UNIFORM COMMERCIAL CODE

A court in a smoking-cancer suit brought on implied warranty under the Uniform Commercial Code would face the same problems posed in *Green* and *Lartigue*—extent and breach of warranty.³⁷ Comment 13 to section 2-314 implies that the warranty of merchantability does not extend to unknowable defects. In an action for breach of warranty, “evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken.”³⁸ If the draftsmen were willing to grant this concession to the careful manufacturer, it is reasonable to suppose that in a situation where no amount of care could determine the existence of unknowable defects, a stronger reason for relieving the manufacturer of liability.³⁹

As to breach of the warranty, merchantability is the general standard of fitness under the Code. Section 2-314 sets out a list of general standards to which goods must conform in order to be merchantable.⁴⁰ Applying the Code requirements to cigarettes, they must “pass without objection in the trade”⁴¹ and be “fit for the ordinary purposes for which such goods are used. . . .”⁴² Despite the fact that all cigarettes are probably harmful to health (*i.e.*, no one brand has been proved safe), cigarettes do pass on the retail market without consumer objection and may still be fit for the ordinary purposes

³⁵ *Ibid.*

³⁶ *Id.* at 681.

³⁷ See U.C.C. § 2-314, Comment 13.

³⁸ *Ibid.*

³⁹ Although the draftsmen would say that the warranty was not breached rather than that the warranty did not extend to unknowable defects, this is not important. What does matter is their desire to allow flexibility in applying doctrines of strict liability in determining cases against manufacturers for breach of implied warranty.

For a highly incisive discussion on the need for flexibility and imaginative thought in the clash between developing case law and the Code see Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 *W. Res. L. Rev.* 5 (1965).

⁴⁰ The relevant parts of U.C.C. § 2-314 are:

- (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.
- (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. . . .

⁴¹ U.C.C. § 2-314(2)(a).

⁴² U.C.C. § 2-314(2)(c).

for which they were intended. Unlike unwholesome food which is not fit for eating, unwholesome cigarettes are still fit for smoking, but they may be held unmerchantable because of the collateral injuries they cause. However, to conclude that liability automatically follows harm is an oversimplification that could lead to injustice.⁴³

There is nothing in section 2-314 requiring the standard of fitness to be actual safety unless that is the only way in which the goods can be made usable. This is not to say, however, that the Code precludes the courts from making actual safety the standard of fitness. Section 2-314 sets forth only the minimum standards of merchantability,⁴⁴ and case law may still set higher standards than those imposed by the Code.⁴⁵

III. IMPLIED WARRANTY—POLICY CONSIDERATIONS

Thus far, no cancer case has been ultimately decided in favor of a plaintiff, but it is certainly conceivable that a court with a liberal doctrine of strict liability⁴⁶ will be tempted to apply it to a smoking-cancer case. Cognizant of the widespread effects⁴⁷ of such an application, that court will be faced with a difficult policy decision. Since the doctrine of strict liability is based primarily on policy considerations,⁴⁸ these considerations should determine its limits.

Strict liability in tort or for breach of warranty is based primarily on the notion that he who can best bear the loss for harm he has caused, no matter how innocently, should pay for that harm.⁴⁹ The rationale is that the cost of insurance against the risks of the enterprise may be spread among purchasers through higher consumer prices.⁵⁰ That rationale may be inap-

⁴³ Prosser, *The Implied Warranty of Merchantable Quality*, 27 Minn. L. Rev. 117 (1943); Woods, *Can Cigarettes Be Merchantable, Though They Cause Cancer?* 6 Ariz. L. Rev. 82 (1964).

⁴⁴ U.C.C. § 2-314(2) begins: "Goods to be merchantable must be *at least such as . . .*" (Emphasis added.) See also U.C.C. § 2-314, Comment 6.

⁴⁵ *Ibid.*

⁴⁶ The American Law Institute adopted a liberal rule of strict liability which was not limited to food products or products for intimate bodily use. Compare Restatement (Second), Torts § 402A (Tent. Draft No. 6, 1961), with Restatement (Second), Torts § 402A (1965). Section 402A now holds a seller of any product, which is defective and unreasonably dangerous to the user, strictly liable for physical harm caused to the user.

Law review articles discussing this liberal rule are abundant: Gillam, *Products Liability in a Nutshell*, 37 Ore. L. Rev. 119 (1958); James, *Products Liability*, 34 Texas L. Rev. 44 (1955); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 Texas L. Rev. 855 (1963); Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964); Prosser, *supra* note 22.

⁴⁷ Finding liability for scientifically unknowable defects may render drug manufacturers whose products subsequently prove to have harmful side effects liable for the unknowable harm caused. E.g., would courts hold the manufacturer of birth control pills liable if, after twenty years of continuous use, women developed unanticipated illnesses? Suppose the manufacturer had given assurances that there would be no harmful side effects?

⁴⁸ *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

⁴⁹ See Prosser, *supra* note 22. See also Note, 77 Harv. L. Rev. 318 (1963).

⁵⁰ *Ibid.*

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plicable to a smoking-cancer case because lung cancer is not an intermittent injury, the risk of which all enterprises encounter and against which they may insure themselves. The widespread harm caused by cigarette smoking may make it impossible for the cigarette manufacturers to spread these risks to smokers. The damages which cigarette manufacturers would have to pay cancer victims (and victims of any of the other diseases that have been found to be causally related to smoking)⁵¹ could destroy the cigarette industry.⁵²

Another reason for applying a theory of strict liability is to induce manufacturers to use the highest degree of care possible in the production of their goods.⁵³ Although proof of due care is generally irrelevant in a strict liability case,⁵⁴ nevertheless, if a manufacturer knows he will be held liable without fault he will, theoretically at least, take every precaution to ensure the safety of his product. But when no amount of care could have uncovered the defect in a product, then this rationale for strict liability also fails to sustain the application of the doctrine.

IV. EXPRESS WARRANTY

A plaintiff may have a stronger case for recovery if a manufacturer has advertised that his cigarettes are safe. In *Pritchard v. Liggett & Myers Tobacco Co.*,⁵⁵ the defendant advertised that, "Nose, Throat And Accessory Organs Not Adversely Affected By Smoking Chesterfields"; "Chesterfields Are As Pure As The Water You Drink And The Food You Eat."⁵⁶ Under both the applicable Sales Act⁵⁷ and the Code,⁵⁸ these statements may have raised express warranties. The question is still before a jury in *Pritchard*⁵⁹ and may well be answered in the affirmative. Undoubtedly, Liggett & Myers hoped to induce people to purchase Chesterfields by advertising that they were safe. It is, of course, questionable whether a buyer would have been justified in relying on such statements,⁶⁰ but one who suspected that cigarettes might be harmful and hoped to find a brand that was not harmful, might successfully argue that his reliance was reasonable. If this argument were accepted, it would then be necessary to show that plaintiff actually bought in reliance on the assertions expressed in the advertisements and that those cigarettes

⁵¹ See Surgeon General's Report, supra note 1, at 31-39.

⁵² The cigarette industry might be able to sustain high-priced judgments by raising the price of each package of cigarettes one or two cents. Several questions come to mind regarding this point. Should the industry be required to bear these expenses by raising money now to pay for harm which occurred before it had any way of preventing it? Should the industry be made to pay simply because it has a "deep-pocket"? Should the law, on the principle that extent of injury is so widespread and still unknown, determine that this is not the type of case for which it will allow recovery?

⁵³ Prosser, supra note 22. See also Note, 77 Harv. L. Rev. 318 (1963).

⁵⁴ Supra note 19.

⁵⁵ 350 F.2d 479 (3d Cir. 1965).

⁵⁶ Id. at 482. Furthermore, many of the advertisements contained assurances that the affirmations were based on extensive research and on the opinions of medical specialists. Ibid.

⁵⁷ Uniform Sales Act, Pa. Stat. tit. 69, § 121 (repealed).

⁵⁸ U.C.C. § 2-313.

⁵⁹ 350 F.2d at 486.

⁶⁰ See Uniform Sales Act § 12, Commissioners' Note.

caused his harm.⁶¹ In *Pritchard*, the plaintiff had been smoking Chesterfield cigarettes for ten years prior to the commencement of the advertising campaign in question, and for thirty years before contracting cancer.⁶² Those facts alone raise a strong inference that he would have continued to smoke with or without Liggett & Myers' affirmations. Thus, despite the false claims on the part of defendant, its conduct may not have been fatal to its case.⁶³

Some confusion arose in the court of appeals in *Pritchard* as to whether reliance was a necessary factor in a case for breach of express warranty. Under the Sales Act, in order for an express warranty to be created, it is necessary that the affirmations be such as would naturally tend to induce the buyer to purchase the goods and the buyer must purchase relying thereon.⁶⁴ Under the Code, the affirmations of fact must become part of the "basis of the bargain."⁶⁵ Despite this difference in language, the reliance qualification of the Sales Act probably applies under the Code as well.⁶⁶

V. NEGLIGENCE—FAILURE TO WARN

Whether the cancerous elements in cigarettes inhere in the materials used, or are a result of the manufacturing process employed, makers of cigarettes should not be held liable for negligence unless they knew or should have known of those harmful elements.⁶⁷ No duty to warn smokers of the possible results of smoking can be implied while the defect was unknowable, but after manufacturers obtained such knowledge it became

⁶¹ Restatement (Second), Torts § 402B, comments (f), (j) (1965).

⁶² 350 F.2d at 482.

⁶³ The weakness in defendant's case seems to be the fact that the advertisements were made over a long period of time—sporadically, between 1934 and 1953. See *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 nn.4-13 (3d Cir. 1961).

⁶⁴ Section 12 of the Sales Act defines express warranty as follows:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

⁶⁵ U.C.C. § 2-313:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) . . . [A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

⁶⁶ Under the Code the seller's assertions must be "part of the basis of the bargain." Thus, it would appear that seller's warranty should be known to the buyer and should have induced him, in part, at least, to purchase the goods. 350 F.2d at 492 n.7. But see Note, 38 Ind. L.J. 648, 650 (1963).

⁶⁷ *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950). See generally Levine, Statutory Liability: The Federal Hazardous Substances Labeling Act—Sword or Shield? 19 Food Drug Cosm. L.J. 412 (1964).

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reasonable to require compliance with the common law duty to warn users of dangers.⁶⁸

At some time before the Surgeon General's Report was published, cigarette manufacturers did know or should have known of the reports that cigarettes were probably the cause of or associated with many ailments.⁶⁹ Failure to warn during this period may have been negligent nonfeasance, but liability does not necessarily follow because it is necessary to determine the exact point in time the duty to warn arose.⁷⁰ Does notice of danger arise from the first report of some obscure statistician? Whom should the manufacturers have believed, and how many reports would have been adequate to rebut the claim that they were speculative? The latter question may now be moot, since the Surgeon General's Report left little room for doubt as to the hazards of cigarette smoking.

It is still necessary, however, to determine whether failure to warn was the proximate cause of plaintiff's harm.⁷¹ Would the warning have come before plaintiff contracted the disease? Would plaintiff have quit smoking if he had been warned of the dangers to which his habit might lead? In any event, the cigarette industry should not be relieved from liability when harm which it could in fact have prevented was caused by its failure to do so.

VI. FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

One of the results of the Surgeon General's Report was the enactment of the Federal Cigarette Labeling and Advertising Act which went into effect on January 1, 1966.⁷² Its purpose was to ". . . establish a comprehensive federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health. . . ."⁷³ Specifically, it required the cigarette manufacturers to display this warning conspicuously on every package of cigarettes sold in this country: "Caution: Cigarette Smoking May Be Hazardous To Your Health."⁷⁴ Under its commerce clause

⁶⁸ See Annot., 76 A.L.R.2d 9, 16 (1961). See also Restatement (Second), Torts §§ 388, 394 (1965). For a leading law review article dealing with warnings, see Dillard & Hart, *Products Liability: Directions for Use and the Duty to Warn*, 41 Va. L. Rev. 145 (1955).

⁶⁹ From 1939 to 1963 there had been 29 retrospective studies of lung cancer, and between 1950 and 1960 several notable organizations issued statements based on accumulated evidence expressing concern over the cigarette-health hazard. Early in 1954 the Tobacco Industry Research Committee was established by the cigarette industry to conduct a grants-in-aid program, collect information, and issue reports. Surgeon General's Report, *supra* note 1, at 6-7.

⁷⁰ The decision as to when the seller should warn may be determined either by a subjective or an objective test. If the jurisdiction requires the seller to have actual knowledge of danger the test is a subjective one; if constructive knowledge is required, the test is objective. Annot.

⁷¹ *Id.* at 66.

⁷² 79 Stat. 282 (1965), 15 U.S.C.A. §§ 1331-39 (Supp. 1966).

⁷³ 79 Stat. 282 (1965), 15 U.S.C.A. § 1331 (Supp. 1966). The act falls far short of carrying out its stipulated purposes and the program set out is hardly comprehensive. The act merely requires a particular warning label to be placed on each package of cigarettes sold in this country and suspends any further federal action until 1969.

⁷⁴ 79 Stat. 282 (1965), 15 U.S.C.A. § 1333 (Supp. 1966). It is interesting to note the

power,⁷⁵ Congress prohibited the states and the Federal Trade Commission from requiring any other label.⁷⁶

Congress declared that this warning adequately informs the public.⁷⁷ In fact, however, the warning does nothing for the public, either because people already know of the harmful effects of smoking and are still not deterred, or because the warning is not conspicuously displayed. The public may not know of the variety and severity of the harm cigarettes cause, but the warning label does nothing to educate them of those facts.

Although the statute requires the warning to be conspicuous, its placement on one side panel, with nothing outstanding to call one's attention to it, complies neither in law nor in fact. "Conspicuous" is defined in section 1-201(10) of the Code, where the test is whether attention can reasonably be expected to be called to that which is meant to be noticed. That is, should a reasonable person, against whom the warning is to operate, notice it? It seems reasonable to suppose that most people would not see the cigarette warning except by mere chance or by looking for it.

Instead of protecting the public, the act has probably been a "boon" to the cigarette manufacturers. First, it establishes a national uniform label⁷⁸ which is convenient and economical to the cigarette manufacturers since it is conceivable that each state could require a warning different from that of the rest of the states.⁷⁹ Second, and more important from a legal standpoint, is the fact that the cigarette manufacturers' common law duty to warn has probably been performed, and this may effectively relieve them of liability for later harm which cigarettes may cause.

Alternatively, it is possible that the warning may serve as a disclaimer of liability under the Code, even though section 2-316(2) of the Code requires the mention of "merchantability" to disclaim the implied warranty of merchantability. Realistically, it is difficult to see how this requirement

differences between the requirements of the Federal Cigarette Labeling and Advertising Act (FCLAA), and the Federal Hazardous Substances Labeling Act (FHSLA), 74 Stat. 372, 15 U.S.C. §§ 1261-73 (1964), in order to realize how little the former aids the consumer. The FHSLA requires a description of the hazard; the FCLAA mentions only that there is a hazard. The FHSLA requires the signal word to be spelled out in large capitals—DANGER, WARNING, CAUTION; the FCLAA makes no mention of the size of type to be used.

⁷⁵ U.S. Const. art. I, § 8.

⁷⁶ U.S. Code Cong. & Ad. News, 1675 (1965). The Federal Trade Commission is empowered by Article 5 of the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. § 45(a)(6) (1964), to take steps to protect the public from false or misleading advertising (including labeling) of products that may endanger human health or safety. The FTC was prepared to issue an order requiring warnings in advertising and labeling that mention not merely *that* cigarettes are hazardous, but also *how* they may be hazardous. 29 Fed. Reg. 530 (1964). Note that the legislation forbidding this action by the FTC merely provided that the warning state that cigarettes *may be* hazardous to health.

⁷⁷ Assuming the warning label would be noticed, it is questionable that it is an adequate warning of the dangers of cigarette smoking. An adequate warning should alert persons to the dangers being warned against. Dillard & Hart, *supra* note 68, at 160.

⁷⁸ 79 Stat. 282 (1965), 15 U.S.C.A. § 1334 (Supp. 1966).

⁷⁹ See *McDermott v. Wisconsin*, 228 U.S. 115, 131-32 (1913).

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could apply to consumer purchases, since the word "merchantability" is probably meaningless to most consumers.⁸⁰

It is more reasonable to suppose that a warning, written in terms he can understand, will have a greater impact on the consumer, providing him with a clearer awareness that he is taking upon himself the risk of harm at the same time that the manufacturer is disclaiming responsibility for any harm.⁸¹ Perhaps such a warning may be made to fall within section 2-316(3)(a) as ". . . other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . . ."

Having been warned of danger and proceeded in the face of it, a plaintiff will probably have no basis for maintaining an action under the Code. Defendant may argue that, because of the general nature of the product and because the plaintiff smoked the cigarettes aware of the health hazard, no implied warranty as to their safety was ever given. Alternatively, the defendant may assume there was a warranty but argue that because plaintiff knew of the danger prior to his use of the product, the breach of warranty was not a proximate cause of the injury.

VII. CONCLUSION

The legal issues raised by the smoking-cancer controversy do not resolve themselves satisfactorily, mainly because they are inextricably woven into a social and economic pattern which cannot be ignored. The size and strength of the cigarette industry, the unknown scope of the damages, and a general public attitude that smoking is inherently wrong may, in the final analysis, resolve the controversy in favor of the manufacturers. If cigarettes prove to cause more intolerable harm, then appropriate action should be taken by Congress. Such action, however, must have a broad base of public support in order that a habit so deeply engrained in a large portion of the population can be extinguished.

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⁸⁰ See Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 B.C. Ind. & Com. L. Rev. 285 (1963).

⁸¹ Although disclaimers of implied warranties are generally disfavored by the law, the warning may nevertheless be regarded as such:

. . . [T]he rationale of assumption of risk supports recognition of disclaimers only when the buyer is aware of the risks he assumes, the product is not essential to a basic standard of living, and the commodity would not be produced or sold if disclaimers were not recognized. However rare a consumer sales transaction which fulfilled these conditions, a disclaimer of warranty would on this theory be possible.

Note, 77 Harv. L. Rev. 318, 332 (1963).

⁸² Section 2-715(2)(b) of the Code requires the breach of warranty to be the proximate cause of plaintiff's injury in order for him to collect damages.