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Products Liability - Will Plaintiffs Finally Prevail in Claims against the Tobacco Industry

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PRODUCTS LIABILITY—WILL PLAINTIFFS FINALLY PREVAIL IN CLAIMS AGAINST THE TOBACCO INDUSTRY?

_Cipollone v. Liggett Group, Inc. (1990)_

I. INTRODUCTION

For thirty-five years, hundreds of law suits have been brought against tobacco companies by those who have developed cancer from smoking.¹ No plaintiff has ever been successful in obtaining a settlement or damage award.² By reversing the first verdict in the nation that ordered a cigarette manufacturer to pay damages, _Cipollone v. Liggett Group, Inc._³ seems to fit neatly into this string of tobacco industry victories. Nonetheless, in light of several of the court's holdings, the question arises whether the Third Circuit has simply reinforced the virtual immunity enjoyed by manufacturers or rather provided plaintiffs with the necessary legal bases for future recoveries.⁴

II. DISCUSSION

Rose Cipollone smoked between one and two packs of cigarettes per day continuously from 1942 until 1982.⁵ Even after that she smoked secretly until being diagnosed with terminal lung cancer in 1983.⁶ More

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² Garner, _Cigarette Dependency and Civil Liability: A Modest Proposal_, 53 S. CAL. L. REV. 1423, 1423-24 (1980); see also Note, _The Effect of Cipollone: Has the Tobacco Industry Lost Its Impenetrable Shield?,_ 23 GA. L. REV. 763, 764 (1989) [hereinafter Note, _The Effect of Cipollone_]. Several reasons have been advanced to explain the shield against liability: 1) public policy against smokers, 2) tenacious defense work by tobacco industry counsel, 3) the high costs of cigarette litigation and 4) the inability to find a legal theory that would hold cigarette companies liable. Id. Concerning the public policy against smoking, it is interesting to note that the damages awarded in _Cipollone v. Liggett Group, Inc._, 683 F. Supp. 1487 (D.N.J. 1988), went to Mr. Cipollone, a non-smoker, rather than to his wife's estate. Note, _Tobacco Suits Today: Are Cigarette Plaintiffs Just Blowing Smoke?,_ 23 U. RICH. L. REV. 257, 277-78 (1989) [hereinafter Note, _Tobacco Suits Today_]. The unyielding defense work by tobacco industry attorneys is reflected by victories in decade long suits such as _Green v. American Tobacco_, 304 F.2d 70 (5th Cir. 1962), _cert. denied_, 377 U.S. 943 (1964) and _Pritchard v. Liggett & Myers Tobacco Co._, 295 F.2d 292 (3d Cir. 1961). The high costs associated with cigarette litigation can be attributed to the huge expense of discovery, as well as the many appeals and retrials necessary in pursuit of victory. Edell, _supra_ note 1, at 91.

³ 893 F.2d 541 (3d Cir. 1990).


⁵ _Cipollone_, 893 F.2d at 541.

⁶ Id.

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specifically, Mrs. Cipollone smoked Chesterfield brand cigarettes until 1955 and then the L & M brand until 1968.\(^7\) Both brands were manufactured by the defendant, Liggett Group, Inc.\(^8\) In 1968, Mrs. Cipollone began to smoke cigarettes manufactured by a second defendant, Philip Morris, Inc.\(^9\) She smoked Virginia Slims from 1968 until sometime in the early 1970s when she switched to the Parliament brand.\(^10\) Finally, in 1974, Mrs. Cipollone began to smoke the True brand, manufactured by the third defendant, Lorillard, Inc.\(^11\)

On August 1, 1983, Mr. and Mrs. Cipollone filed suit in United States District Court for the District of New Jersey against Liggett, Philip Morris and Lorillard.\(^12\) Mrs. Cipollone died in October 1984, before the trial began.\(^13\) After her death, Mrs. Cipollone's husband filed an amended complaint suing the three defendants, both on his own behalf and in his capacity as executor of his wife's estate.\(^14\) Among the claims asserted in Mr. Cipollone's complaint were: 1) a failure to warn claim alleging that the defendants failed to warn adequately of the harmful effects of smoking; 2) a breach of express warranty claim alleging that

\(^7\) Id. at 548-50.
\(^8\) Id.
\(^9\) Id. at 551.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id. at 552. There were several opinions by the courts in Cipollone. This Casebrief deals only with: 1) the Third Circuit's interlocutory ruling on the preemptive effects of the Federal Labeling Act, Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986); 2) the district court's denial of the defendant's motion for judgment n.o.v., Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988); 3) the district court's grant of judgment on the pleadings to Philip Morris and Lorillard with respect to the failure to warn and express warranty claims, Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487 (D.N.J. 1988); and 4) the Third Circuit's subsequent reversal of the jury verdict, Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990).
\(^14\) The amended complaint included damages claims against each defendant based on the following theories of liability:

1. Strict liability in tort (and negligence) on the theory that the defendants failed to warn adequately (or negligently failed to warn adequately) of the health effects of smoking ("the failure to warn claim");
2. Strict liability in tort on the theory that the defendants marketed defectively designed cigarettes rather than alternatively designed, safer cigarettes ("the design defect claim");
3. Strict liability in tort on the theory that the health risks of the defendants' cigarettes exceed their social utility ("the generic risk-utility claim");
4. Breach of express warranty regarding the health effects of smoking ("the express warranty claim");
5. Fraud and misrepresentation in the advertising and promotion of cigarettes from 1940 to 1983 ("the fraudulent misrepresentation claim");
6. Conspiracy to defraud the public regarding the health effects of smoking ("the conspiracy to defraud claim").

Cipollone, 893 F.2d at 552.
the defendants breached an express warranty regarding the health effects of smoking; and 3) a risk-utility claim alleging liability based on the theory that the health risks of the defendants' cigarettes outweighed their social utility. The defendants moved for a judgment on the pleadings based on the preemptive effect of the Federal Cigarette Labeling and Advertising Act (the Labeling Act) which became effective January 1, 1966. The Labeling Act requires that warning labels be included on each package of cigarettes and in each advertisement of cigarettes for the purpose of adequately informing the public about any adverse health effects of smoking. The district court denied this motion but the Third Circuit granted an interlocutory appeal and held that, while the Labeling Act did not eradicate all of the state law claims, it did preempt claims arising from smoking after January 1, 1966 that are based upon a cigarette company's advertising or adequacy of warnings. Thus, on remand the district court granted judgment on the pleadings to Philip Morris and Lorillard with respect to the failure to warn and express warranty claims because Mrs. Cipollone did not smoke cigarettes manufactured by those defendants until after 1965. In addition, another pretrial ruling by the district court struck the plaintiff's risk-utility claim. The court held that such claims were barred by retroactive application of the New Jersey Products Liability Act which relieves manufacturers from liability where the harmful characteristics of

15. Id.
17. Cipollone, 893 F.2d at 552.
19. Cipollone, 893 F.2d at 552 (citing Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986), cert. denied, 484 U.S. 977 (1987)). The New Jersey Supreme Court recently declined to follow the Third Circuit's preemption ruling. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990). In Dewey, the plaintiff's husband smoked the defendant's cigarettes from 1942 until 1980. Id. As in Cipollone, one of the plaintiff's claims against the defendant alleged inadequacy of warning. Id. Unlike Cipollone, however, the court held that the Labeling Act does not preempt any of the plaintiff's state common-law tort claims that are based on the inadequacy of warnings. Id. at 94, 577 A.2d at 1254. In reaching this conclusion, the court conceded that its opinion was not only contrary to the Third Circuit's view, but was also contrary to the consensus among four other circuits: the First Circuit, Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987); the Fifth Circuit, Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989); the Sixth Circuit, Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 312 (6th Cir. 1988); and the Eleventh Circuit, Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987). Id. at 83-84, 577 A.2d at 1246. Thus, despite claiming adherence to the principle of "judicial comity," the court noted that it was not bound by the opinions of the lower federal courts. Id. at 80, 577 A.2d at 1244.
21. Cipollone, 893 F.2d at 553.
the product are "known to the ordinary consumer or user." Consequently, the case went to trial with an artificial time constraint imposed on the determination of causation and liability, and without consideration of the risk-utility claim.

Regarding the failure to warn claim against Liggett, the jury was instructed to consider only whether a pre-1966 failure to warn was the proximate cause of Mrs. Cipollone's smoking and death. Despite limiting consideration to the defendant's pre-1966 conduct, however, the district court allowed the jury to consider Mrs. Cipollone's post-1965 smoking based on the theory that it was relevant to the defendant's comparative fault defense. Under New Jersey's Comparative Fault Act, a plaintiff is barred from recovery when her negligence is greater than the

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22. Id.; see also N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987).
23. The case proceeded to trial on plaintiff's failure to warn, design defect, express warranty, fraudulent misrepresentation, and conspiracy claims, and on defendants' comparative fault and statute of limitations defenses. Cipollone, 893 F.2d at 553. "At the close of the plaintiff's proofs, the district court struck the design defect claim on the ground that plaintiff had failed to present sufficient evidence that defendants' failure to market an alternatively designed cigarette when it became feasible to do so in the mid-1970s was a proximate cause of Mrs. Cipollone's illness and death." Id. The ruling was not challenged on appeal to the Third Circuit. Id. Pursuant to the district court's and circuit court's rulings, jury deliberations were limited to the fraudulent misrepresentation claim against each defendant, the conspiracy to defraud claim against each defendant, the failure to warn claim against Liggett, and the express warranty claim against Liggett. Id. "The district court also took the defendants' statute of limitations defense from the jury by granting partial summary judgment for the plaintiff on this issue." Id. At the close of the trial the jury rejected the fraudulent misrepresentation claims and the conspiracy to defraud claims against all defendants. Id. at 553-54. These findings were not challenged by the plaintiff in the Third Circuit. Id. at 555. With respect to the determination of causation, the Third Circuit noted that it was not clear on what grounds Liggett's challenge rested. Id. at 560. First, Liggett may have been arguing that the plaintiff should have been required to prove causation separately for each claim. See id. The Third Circuit rejected this argument, holding that the plaintiff only had to prove that the totality of Liggett's wrongful behavior proximately caused Mrs. Cipollone's death. Id. at 560-61. Second, Liggett may have been arguing that Mrs. Cipollone's conduct would have caused her cancer anyway, and that, therefore, Liggett's conduct could not be considered a cause. See id. at 561. The court rejected this argument, holding that as long as Liggett's conduct was a "substantial factor" in bringing about the harm, it could be considered a cause of the harm. Id. Finally, Liggett may have been arguing that the plaintiff should have been required to prove that "but for" Liggett's conduct, the injury would not have occurred. See id. The court also rejected this argument, again holding that as long as Liggett's conduct was a "substantial factor" in bringing about the harm it could be considered a cause of the harm. Id. at 563. Thus, the Third Circuit upheld the "substantial factor" jury charge delivered by the district court. Therefore, it is likely that on retrial a jury will again find a causal connection between Liggett's conduct and Mrs. Cipollone's cancer.

24. Id. at 556-57.
25. Id.
negligence of the person against whom recovery is sought.\textsuperscript{27} Thus, although the jury found Liggett strictly liable for failing to give adequate warnings, it awarded no damages to the plaintiff, concluding that Mrs. Cipollone was eighty percent responsible for her injuries.\textsuperscript{28}

With respect to the breach of express warranty claim against Liggett, the jury was instructed that New Jersey law did not require the plaintiff to show specific reliance upon the express warranty in order to prevail on the claim.\textsuperscript{29} Subsequently, the jury found that Liggett breached an express warranty made to consumers and awarded $400,000 in damages to Mr. Cipollone as compensation.\textsuperscript{30} After Liggett

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\item[27.] Id. The relevant statutory language states:
Contribution negligence shall not bar recovery in an action by any person . . . to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought . . . . Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

\item[29.] Id. Concerning the Comparative Fault Act's application to strict liability claims such as failure to warn, it has been held to apply if the plaintiff's conduct can be found to constitute contributory negligence. See Suter v. San Angelo Foundry and Machine Co., 81 N.J. 150, 164, 406 A.2d 140, 147 (1979). Part of Mr. Cipollone's claim of error consisted of an equity argument. Cipollone, 893 F.2d at 557. He argued that it was inequitable to require the jury to bar Mr. Cipollone's failure to warn claim in its entirety if it believed that Mrs. Cipollone was 80% responsible for her injury in light of her smoking from 1942 to 1983 even if it believed that Liggett's failure to warn was, for example, 67% responsible for Mrs. Cipollone's smoking from 1942 to 1966. Id.

\item[28.] Cipollone, 893 F.2d at 554.

\item[29.] Id. at 563. The district court gave the following instructions:
Plaintiff must prove . . . that Liggett, prior to 1966, made one or more of the statements claimed by the plaintiff and that such statements were affirmations of fact or promises by Liggett . . . [and] that such statements were part of the basis of the bargain between Liggett and consumers like Rose Cipollone . . . .

The law does not require plaintiff to show that Rose Cipollone specifically relied on Liggett's warranties.

\item[30.] Id. at 544-55. A sampling of Chesterfield advertising illustrates what led the jury to conclude that express warranties were created:
PLAY SAFE Smoke Chesterfield. NOSE, THROAT, and Accessory Organs not Adversely Affected by Smoking Chesterfields. First such report ever published about any cigarette. A responsible consulting organization has reported the results of a continuing study by a competent medical specialist and his staff on the effects of smoking Chesterfield cigarettes. A group of people from various walks of life was organized to smoke only Chesterfields. For six months this group of men and women smoked their normal amount of — 10 to 40 a day. 45% of the group have smoked Chesterfields continually from one to thirty years for an average of 10 years each. At the beginning and at the end of the six-months period each smoker was given a thorough examination, including x-ray pictures, by the medical specialist and his assistants. The examination covered the sinuses as well as the nose, ears, and throat. The medical specialist, after a thorough examination of every member of the group, stated: "It is my opinion that the ears,
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was denied judgment n.o.v. and each party was denied a new trial, both appealed to the Third Circuit.\textsuperscript{31}

The first issue the Third Circuit addressed was the plaintiff’s contention that the district court erred in allowing the jury to consider Mrs. Cipollone’s post-1965 conduct in determining her comparative fault, while barring consideration of the defendant’s post-1965 conduct.\textsuperscript{32} In assessing the merits of this contention, the Third Circuit relied on a New Jersey Supreme Court case, \textit{Ostrowski v. Azzara}.\textsuperscript{33} In \textit{Ostrowski}, the plaintiff had severe blood circulation problems stemming from diabetes, poor diet and cigarette smoking.\textsuperscript{34} She consulted a podiatrist, complaining of soreness in her left toe.\textsuperscript{35} After several visits, the podiatrist recommended that the toe nail be removed to alleviate the pain.\textsuperscript{36} After the operation, the plaintiff continued to smoke despite being told that smoking greatly increases blood circulation problems caused by diabetes and, therefore, is counterproductive to the success of the operation and healing process.\textsuperscript{37} After it became apparent that the blood flow to the toe was insufficient, the plaintiff had to have her left leg amputated above the knee.\textsuperscript{38}

The plaintiff sued the podiatrist, claiming the podiatrist was negligent in her decision to remove the toe nail, that the removal of the toe nail led to plaintiff’s subsequent complications, and that these complications were proximately caused by the podiatrist’s negligence.\textsuperscript{39} The podiatrist contended that the plaintiff was at fault, both before and after the operation, and that this conduct contributed to her injuries.\textsuperscript{40}

\textit{Nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-month period by smoking the cigarettes provided.}\textsuperscript{31} \textit{Id.} at 548. Chesterfield magazine advertisements during 1952 also proclaimed that their cigarettes contained “PURE, COSTLY MOISTENING proved by over 40 years of continuing use in U.S.A. tobacco products as \textit{entirely safe for use in the mouth} . . . .” \textit{Id.} at 548 n.1 (emphasis in original). Chesterfield also advertised on the radio with testimonials read by Arthur Godfrey during his show. \textit{Id.} at 549.

\textit{Nose, throat and accessory organs of all participating subjects examined by me were not adversely affected in the six-month period by smoking the cigarettes provided.}\textsuperscript{31} \textit{Id.} at 555.

\textit{There were additional issues addressed by the Third Circuit that are outside the scope of this Casebrief. The court upheld the district court’s ruling that the plaintiff’s intentional tort claims were preempted by the Labeling Act.}\textit{Id.} at 582. The court reversed the district court’s order denying prejudgment interest, reasoning that such interest was intended to be available in products liability cases. \textit{Id.} at 579. Finally, the court reversed the district court’s order granting plaintiff’s motion for summary judgment which had struck defendant’s affirmative defenses based on the statute of limitations.} \textit{Id.} at 581.

31. \textit{Id.} at 549.

32. \textit{Id.} at 555.

33. \texti{111 N.J. 429, 545 A.2d 148 (1988).}

34. \textit{Id.} at 432-33, 545 A.2d at 149-50.

35. \textit{Id.}

36. \textit{Id.} at 434, 545 A.2d at 150.

37. \textit{Id.}

38. \textit{Id.} at 435-36, 545 A.2d at 150-51.

39. \textit{Id.}, 545 A.2d at 151.

40. \textit{Id.}
jury found that the podiatrist was negligent in removing the plaintiff’s toe nail but barred recovery because the plaintiff’s fault, based on both her conduct before and after surgery, was found to exceed the fifty percent threshold set by the Comparative Fault Act. The Supreme Court of New Jersey reversed, however, holding that once a legal wrong has occurred, the plaintiff’s conduct after that time bears on mitigation of damages, but not on the comparative fault calculation. The court separated the plaintiff’s conduct into distinct time periods that corresponded to the legal doctrines at issue. Thus, since the podiatrist’s negligence was in performing the toe surgery, the plaintiff’s behavior after treatment had begun, but before the toe surgery, was relevant to comparative fault, while the plaintiff’s post-surgery behavior was relevant only to mitigation of damages.

In Cipollone, the Third Circuit noted that its preemption decision imposed January 1, 1966 as an automatic cut-off date for imposition of liability. Thus, since Liggett’s allegedly tortious conduct was completed as of that date, the court concluded that it would be unfair and impermissible for the jury to consider Mrs. Cipollone’s comparative fault after that period. Relying on Ostrowski, the court held that Mrs. Cipollone’s behavior after January 1, 1966 could act to reduce her damages through imposition of the mitigation rule, but could not foreclose recovery by entering into the comparative fault calculation.

A second issue addressed by the Third Circuit was Liggett’s contention that the district court erred in failing to instruct the jury that Mrs. Cipollone’s non-reliance on Liggett’s safety advertisements would pre-
vent the plaintiff from recovering on his express warranty claim. Initially, the court examined the language of section 2-313 of the Uniform Commercial Code upon which the plaintiff’s claim was based. Pursuant to this statute, the district court had instructed the jury that “ordinarily a guarantee or promise in an advertisement or other description of the goods becomes part of the basis of the bargain if it would naturally induce the purchase of the product and no particular reliance by the buyer on such statement needs to be shown.” Liggett contended that the district court’s interpretation of “basis of the bargain” was flawed, arguing that the jury should have been told that Mrs. Cipollone’s non-reliance on the advertisements would preclude the advertisements from becoming part of the basis of the bargain, and, therefore, preclude the creation of an express warranty.

The Third Circuit noted a split of authority on whether reliance was required under section 2-313. The court recognized that the more common view is that reliance is required. This view states that making

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48. Id. at 563. For the relevant text of the jury charge, see supra note 29.
49. The pertinent part of section 2-313 states:
   (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.
      (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
50. Cipollone, 893 F.2d at 563.
51. Id. at 565. The district court noted that section 2-313(1)(a) is an adoption of the Uniform Sales Act section 12. Id. As such, the court reasoned that the omission of the word “reliance” from section 2-313(1)(a), while section 12 used that word, implied that reliance was no longer an element of express warranties. Id.
52. Id. at 563.
53. Id. at 564. Compare Winston Indus., Inc. v. Stuyvesant Ins. Co., 317 So. 2d 493 (Ala. Civ. App. 1975) (although never received warranty, purchaser permitted to sue for breach of express warranty) with Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1101 (11th Cir. 1983) (express warranty negated by absence of reliance). A review of the official comments to section 2-313, prior case law and scholarly commentary provided the court with the arguments advanced by both sides of the reliance debate. Cipollone, 893 F.2d at 564-69.
54. Cipollone, 893 F.2d at 564. Two U.C.C. comments to section 2-313 were set forth by the court as evidence that a reliance requirement was intended by the drafters of the U.C.C. at least to the extent that a seller should be permitted to rebut a presumption of reliance: 1) comment 3 states that “no particular reliance . . . need be shown . . . . Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof . . . .” and 2) comment 8 states that “all of the statements of the seller [become part of the basis of the bargain] unless good reason is shown to the contrary.” U.C.C. § 2-313 (1977). The court also cited its decision in Pritchard v. Liggett & Myers Tobacco Co., for the proposition that even though no particular reliance is necessary
the buyer's subjective state of mind completely irrelevant creates "the risk of draining the term 'basis of the bargain' of all meaning."\textsuperscript{55} For example, a totally objective analysis based on whether a statement "would naturally induce the purchase of the products" would permit a statement to become part of the basis of the bargain even if the buyer was unaware of the claims in the advertisements.\textsuperscript{56} The court concluded that "'[i]t strains the language [of section 2-313] to say that a statement is part of the 'basis' of the buyer's 'bargain,' when that buyer had no knowledge of the statement's existence.'"\textsuperscript{57}

The court reasoned, however, that "[r]equiring that the buyer rely on an advertisement, whether by imposing this burden initially on the buyer bringing suit, or by allowing the seller to rebut a presumption of reliance, puts a heavy burden on the buyer" that may not be justified.\textsuperscript{58} The rationale advanced for this view is that the purpose of the law of warranty is to determine what the seller has agreed to sell and that reliance is irrelevant to this purpose.\textsuperscript{59}

The court attempted to reconcile the opposing views of the reliance requirement with a formula that avoids the inequities brought about by adhering to either view exclusively. Thus, the court held:

\begin{quote}
[A] plaintiff effectuates the "basis of the bargain" requirement . . . by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise . . . .
\end{quote}

Once the buyer has become aware of the affirmation of fact or promise, the statements are presumed to be part of the "basis of the bargain" if the seller can take an affirmation out of the agreement by showing non-reliance. Cipollone, 893 F.2d at 566 (citing 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966)).

\textsuperscript{55} Cipollone, 893 F.2d at 566.
\textsuperscript{56} Id. at 566-67.
\textsuperscript{57} Id. at 567.
\textsuperscript{58} Id. (emphasis deleted). For commentary suggesting that reliance should not be a factor in an express warranty claim, see Coffey, Creating Express Warranties Under the U.C.C.: Basis of the Bargain—Don't Rely on It, 20 U.C.C. L.J. 115 (1987); Heckman, "Reliance" or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code, 38 Case W. Res. L. Rev. 1 (1987); Lewis, Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations, 47 Ohio St. L.J. 671, 691 (1986) (advocating strict "claim" liability where any representation made in advertising that is determined to be affirmation of fact or promise constitutes express warranty regardless of whether seen or heard); Shanker, The Seller's Contractual Obligation Under U.C.C. 2-313 to Tell the Truth, 38 Case W. Res. L. Rev. 40 (1987) (arguing Sale Act's "reliance" language was changed to Commercial Code's "basis of the bargain" language to remove reliance requirement).
\textsuperscript{59} Cipollone, 893 F.2d at 567 (citing U.C.C. section 2-313 official comment 4). The court also opined that the reliance requirement does not comport well with U.C.C. section 2-313 official comment 7 which states that language used after the closing of the deal becomes part of the warranty. Id. If a post-closing promise, which cannot be relied on, can create a warranty, it is difficult to see why a pre-closing promise can create a warranty only if relied upon. Id.
of the bargain" unless the defendant, by "clear affirmative proof," shows that the buyer knew that the affirmation of fact or promise was untrue . . . [and] did not believe the warranty . . .

Through this construction the court claimed to be remedying both the Liggett reliance theory, which failed to explain how reliance can be relevant to "what a seller agreed to sell," and the district court's purely objective theory, which failed to explain how an advertisement that a buyer never even saw becomes part of the "basis of the bargain."61

A third issue addressed by the Third Circuit was whether the New Jersey Products Liability Act (the Act) barred the plaintiff's risk-utility claim.62 Section 3(a)(2) of the Act includes a defense to design defect claims.63 Referred to as the consumer expectation test, it states that a manufacturer shall not be liable if "[t]he characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product."64 To the extent that it imposed "new rules," the Act purported to apply only to actions filed after 1987, the date of its enactment.65 To the extent that it codified existing common law, the Act was to apply retroactively.66 Thus, if the consumer expectation test was deemed a "new rule" the defense would not be available to the defendants in Cipollone.67

The Third Circuit agreed with the district court that section 3(a)(2) was to be applied retroactively because it found that the section "may have been a clarification of New Jersey law."68 Unlike the district court,

60. Id. at 567-68 (footnotes omitted).
61. Id. at 568.
62. Id. at 577. A risk-utility claim is essentially a design defect claim based on risk-utility analysis. For a discussion of risk-utility analysis, see infra notes 95-96 and accompanying text.
63. N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987). This defense was adopted from the Restatement (Second) of Torts § 402A comment i.
64. N.J. STAT. ANN. § 2A:58C-3(a)(2) (West 1987).
65. Cipollone, 893 F.2d at 577.
66. Id.
67. Id. at 577-78.
68. Id. at 578. The New Jersey Supreme Court has recently ruled upon the application of section 3(a)(2). Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990). In Dewey, the court held that section 3(a)(2) was a "new rule" and thus could not be applied retroactively to provide a defense for the defendant tobacco companies. Id. at 95, 577 A.2d at 1252. Interestingly, the Third Circuit attempted to predict the New Jersey Supreme Court's view of section 3(a)(2)'s application. Id. It appears that the Third Circuit has directed the district court to follow Dewey's ruling on section 3(a)(2)'s application. Id. If that is the case, then Mr. Cipollone's risk-utility claim could not only proceed against all three defendants, but would also be equally viable against all three defendants.
however, the Third Circuit did not deny the plaintiff’s claim as a matter of law; rather, it found that an issue of fact existed for the jury as to whether the inherently dangerous characteristics of cigarettes were known to the ordinary consumer before 1966.69 Therefore, the plaintiff was allowed to proceed on his risk-utility claim. Additionally, because the Labeling Act does not preempt design defect claims, the plaintiff could proceed against co-defendants Philip Morris and Lorillard as well as Liggett on this claim.70

III. Analysis

The *Cipollone* decision was hailed as a victory by both sides of the lawsuit.71 The tobacco company pointed to the restoration of its perfect record defending suits brought by smokers, while the plaintiff’s attorneys and tobacco industry opponents emphasized the greater possibility of recovery occasioned by the reinstatement of two of the plaintiff’s claims. Based on the Third Circuit’s holdings, however, it is ultimately the jury’s perception of Mrs. Cipollone’s knowledge and belief of the dangers of cigarette smoking prior to 1966 that will determine which side correctly claimed victory. For example, the comparative fault defense, the sole issue to be retried on the failure to warn claim, will only take into account Mrs. Cipollone’s pre-1966 conduct.72 This defense will involve an evaluation of whether Mrs. Cipollone “had a complete understanding and appreciation of the nature and extent of the health risks of cigarette smoking, and further [whether] her use of cigarettes was voluntary and unreasonable” prior to 1966.73 In addition, the success of the plaintiff’s express warranty claim will depend on Liggett’s ability to prove that Mrs. Cipollone disbelieved its pre-1966 advertisements.74 Finally, the plaintiff’s recovery on the generic risk-utility claim will depend on whether the defendants can successfully assert the consumer expectation defense.75 This will involve an inquiry into whether the inherently dangerous characteristics of cigarettes were known to the ordinary consumer or user prior to 1966.76

It is submitted that the growing negative perception of the tobacco industry that has manifested itself in the decline of cigarette sales may

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69. *Cipollone*, 893 F.2d at 578. The court stated that the 1987 endorsement of comment i by the New Jersey legislature does not necessarily mean that the ordinary consumer must have known about the harms of smoking in, for example, 1958. *Id.* at 578 n.45.
70. *Id.* at 578 n.46.
72. *Cipollone*, 893 F.2d at 559 n.12.
73. *Id.* at 556 n.6.
74. *Id.* at 570.
75. *Id.* at 578.
76. *Id.*
be the harbinger of the first verdict in history against a cigarette manufacturer.\textsuperscript{77} Today, juries are more likely to decide these cases in favor of the plaintiff than they were in the early days of tobacco litigation.\textsuperscript{78} The Third Circuit has fueled this tendency by limiting the jury's inquiry to Mrs. Cipollone's pre-1966 conduct on all of the claims. A closer examination of each of the claims already discussed illustrates how this limitation is likely to result in a victory for the plaintiff. Following this examination, a discussion of the prospects for future plaintiffs in tobacco litigation is undertaken.

A. The Failure to Warn Claim

The Third Circuit noted that there was no way of knowing how much of the eighty percent fault ascribed to Mrs. Cipollone was based on her pre-1966 smoking and how much was based on her post-1965 smoking.\textsuperscript{79} The plaintiff's counsel has contended, however, that almost all of the eighty percent stemmed from Mrs. Cipollone's post-1965 smoking and, as a result, is outside of the comparative fault calculation.\textsuperscript{80} Several factors support this assertion.

As a general rule, when the plaintiff's conduct is knowing and voluntary, the Comparative Fault Act will apply.\textsuperscript{81} Thus, on retrial, the inquiry will be whether Mrs. Cipollone had knowledge and appreciation of the risks of cigarette smoking and, if so, whether she voluntarily proceeded to encounter those risks.\textsuperscript{82} The Third Circuit's limitation of this inquiry to the pre-1966 period will help resolve these close questions in favor of the plaintiff.

Today, it seems incredible that anyone would not be aware of the significant health risks linked to cigarette smoking.\textsuperscript{83} But from the

\textsuperscript{77} It is the opinion of one commentator that "[c]igarette smoking is now considered by many people to border on asocial behavior." Edell, supra note 1, at 92. Because of the decline in cigarette sales, manufacturers have turned to developing specific brands of cigarettes targeted to a particular consumer group. Quinn, \textit{Don't Aim That Pack at Us}, \textit{Time}, Jan. 29, 1990, at 60. Because minorities have been the target, however, more negative publicity has followed. \textit{Id.}

\textsuperscript{78} Edell, supra note 1, at 92. In addition, larger law firms with greater resources are undertaking tobacco litigation for plaintiffs and national cooperation among lawyers has been established. \textit{Id.}

\textsuperscript{79} Cipollone, 893 F.2d at 559.

\textsuperscript{80} Telephone interview with Marc Z. Edell, plaintiff's attorney (Jan. 21, 1990). Mr. Edell stated that, in his opinion, the jury without question perceived Mrs. Cipollone to be at fault because of her post-1965 smoking. \textit{Id.}

\textsuperscript{81} V. \textsc{Schwartz}, \textsc{Comparative Negligence} 208 (1986).

\textsuperscript{82} Cipollone, 893 F.2d at 556 n.6; see V. \textsc{Schwartz}, supra note 81, at 206-07. Note, \textit{Plaintiff's Conduct as a Defense to Claims Against Cigarette Manufacturers}, 99 \textsc{Harv. L. Rev.} 809, 815 (1986) (only voluntary activity will support plaintiff-conduct defense); Edell, supra note 1, at 102 ("The touchstone . . . is whether the plaintiff voluntarily . . . proceeded to encounter a known danger.") (emphasis in original).

\textsuperscript{83} See Edell, supra note 1, at 102.
1930s and 40s, until at least 1965, the notion was not only credible but probable, according to some commentators. Before the first Surgeon General's Report on smoking and the public debate that followed, there were numerous conflicting studies on the health hazards of smoking in general and the link between smoking and lung cancer in particular. Indeed, the tobacco companies' primary defenses in early cases centered around the lack of concrete knowledge linking cigarette smoking to cancer. It would be a strangely inequitable result if cigarette manufacturers escaped liability based on a lack of knowledge prior to 1966 while subsequently succeeding in arguing that smokers encountered a known risk during the same period. This logically suggests that tobacco companies may be unable to meet the burden of proving that a plaintiff's decision to confront the risks of smoking was a knowing one prior to 1966.

Additionally, establishing that the plaintiff voluntarily confronted the danger has become a more substantial hurdle for tobacco companies than it was in the past. The current consensus of the medical community is that smoking is addictive, and that addiction makes the plaintiff's decision to continue smoking less voluntary. Thus, if the Cipollone court accepts this medical conclusion, it will be harder for manufacturers to successfully assert comparative fault as a defense. Once again, the Third Circuit's decision to limit the jury's inquiry to pre-1966 conduct bolsters the plaintiff's position. Because warnings were not required prior to 1966, and assuming a court would conclude knowledge of addiction was at least as debatable as knowledge of risks during that period, it seems a pre-1966 addiction theory may act to rebut the voluntariness aspect of the comparative fault defense.

B. The Breach of Express Warranty Claim

The Third Circuit could have followed the majority view of section 2-313 urged by Liggett and required the plaintiff to prove reliance upon the defendant's express warranties. Instead the court chose a compromise embodied by shifting presumptions and burdens of proof:

[I]n the context of advertisements claimed to be warranties, a plaintiff buyer must first prove that she saw the advertisements. This raises a (rebuttable) presumption of belief, which in turn raises an irrebuttable presumption of reliance. Next, a defendant seller may rebut the presumption of reliance, but only by proving that the plaintiff disbelieved the advertisement. Successfully proving disbelief creates a new rebuttable presump-

84. Id.; see also Garner, supra note 2, at 1429; Note, The Effect of Cipollone, supra note 2, at 766-67 ("manufacturers could not have known that their products might cause cancer").
85. See Note, The Effect of Cipollone, supra note 2, at 766-67.
86. See Note, supra note 82, at 815; see also Edell, supra note 1, at 103.
This interpretation of section 2-313 will favor the plaintiff because of the relative burdens of proof imposed and because of the factors affecting whether or not the plaintiff believed the defendant's advertisements prior to 1966. Concerning the plaintiff's burden, the court noted that "the awareness question is not problematic" because "[t]here is ample evidence from which a jury could conclude that Mrs. Cipollone saw, read, or heard" Liggett's advertisements. This raises the rebuttable presumption of belief which in turn raises the presumption of reliance. The defendant's burden, on the other hand, does seem problematic. "Because the only potential warranties at issue . . . are Liggett's pre-1966 advertisements, in order to find no warranties the jury must find that Mrs. Cipollone disbelieved Liggett's pre-1966 advertisements." This inquiry, the court noted, is "distinct from . . . whether she should have disbelieved the advertisements."

The difficulty in meeting this burden is threefold. First, the defendant must establish that Mrs. Cipollone subjectively disbelieved the advertisements. In contrast, an objective analysis would allow the defendant an opportunity to prove the plaintiff should have disbelieved the advertisements based on a reasonable person standard. An attempt to prove what a person disbelieved without reference to what others would disbelieve makes the task more difficult. Thus, requiring the cigarette company to prove subjective disbelief makes its burden considerably heavier than if proof of objective disbelief were allowed.

Second, the same lack of concrete knowledge as to the dangers of cigarette smoking prior to 1966 that will help defeat the comparative fault defense will also make it more difficult for Liggett to prove that Mrs. Cipollone did not believe its advertisements prior to 1966. Because Mrs. Cipollone was not confronted with label warnings or the Surgeon General's Report prior to 1966, it is less likely she would disbelieve the defendant's proclamations of safety during that period. Further, although Mrs. Cipollone was warned by family members about the hazards of cigarette smoking, these warnings do not seem to go far toward proving disbelief in light of the onslaught of advertising that proclaimed cigarettes were safe.

Third, the combination of advertising practices and physiological addiction affects the extent to which a person believes that cigarette

87. Cipollone, 893 F.2d at 569 n.34 (citations omitted).
88. Id. at 569.
89. Id. at 570.
90. Id. (emphasis added).
91. For a sample of Liggett's advertising, see supra note 30.
92. Cipollone, 893 F.2d at 569.
smoking is the cause of cancer. It follows that the less one believes cigarettes cause cancer, the more likely it is that the person will believe advertisements proclaiming that cigarettes are safe. In essence, a smoker wants to believe cigarettes are not a health hazard and will therefore look for justifications for this belief — justifications such as advertisements claiming cigarettes are safe. This combination further hinders the tobacco company's ability to prove disbelief as a defense to the express warranty claim.

C. The Risk-Utility Claim

In asserting a design defect claim, the risk-utility analysis is one method of determining if a design is defective. Basically, the risk-utility analysis weighs the risks of a product against its social utility to determine if the product is unreasonably dangerous and should be deemed defective. As a corollary, even if a product's social utility outweights its risks, it may still be deemed defective if an alternative safer design is feasible. If the inquiry ended here in tobacco litigation cases a plaintiff's victory would be assured. Although certain benefits can be attributed to the tobacco industry, few argue that they outweigh the massive...
death and destruction wrought by cigarette smoking.\(^{97}\) Limitations on recovery for design defects exist, however. One such limitation, the consumer expectation defense, shifts the analysis away from weighing risks and benefits and focuses on consumer knowledge.\(^{98}\)

In holding that the consumer expectation defense could be asserted to refute the plaintiff’s risk-utility claim, the Third Circuit has again directed the jury’s inquiry to Mrs. Cipollone’s pre-1966 knowledge of the hazards of cigarette smoking.\(^{99}\) The court phrased the question as whether the “inherently dangerous characteristics of cigarettes were known to the ordinary consumer prior to 1966.”\(^{100}\) Thus, although the court concluded that the risk-utility claim could proceed against Lorillard and Philip Morris because that claim escaped preemption,\(^{101}\) as a practical matter both companies can successfully assert the consumer expectation defense. Mrs. Cipollone did not smoke either company’s cigarettes until after 1968. It is inevitable that a jury would conclude that ordinary consumer knowledge existed by 1968 as a result of the requirements imposed by the Labeling Act on January 1, 1966 and the public health debates that followed.

Liggett’s successful use of the defense, however, is not as clear. First, similar to the “knowledge” aspect of the comparative fault defense,\(^{102}\) it is arguable whether consumers knew of the inherently dan-
dangerous characteristics of cigarettes prior to 1966. Many of the same arguments advanced to dilute comparative fault during that period can be asserted to refute consumer knowledge. As the court noted, merely because “the New Jersey legislature endorsed [the consumer expectation defense] in 1987, it does not mean that the ordinary consumer must have known about the harms of smoking in, for example, 1958.” Second, unlike many risk-utility jurisdictions that have considered risk-utility's application in tobacco cases, the Third Circuit did not bar the claim as a matter of law. Instead, the jury will assess the merits of the risk-utility claim and the consumer expectation defense. Ultimately, this may favor Mr. Cipollone in light of the negative perception presently burdening tobacco companies and the increased sensitivity to the plaintiff's plight demonstrated by juries.

D. Tobacco Litigation After Cipollone

As illustrated by the foregoing analysis of the claims to be retried in Cipollone, there is a strong likelihood that the first verdict in history rendered against a cigarette manufacturer will soon be forthcoming. The question remains, however, whether future plaintiffs will be able to take advantage of the Cipollone precedent. In light of the scope of the Third Circuit's holdings and several other factors, the prospects for future plaintiffs are not as bright as some commentators suggest.

First, the preemption issue litigated prior to the jury verdict at the district court level, and so vital to the Third Circuit's analysis, will have a great impact on future cigarette liability cases. In addition, those jurisdictions that employ a risk-utility analysis to design defect claims, but which retain a consumer expectation defense, in effect assure that defendants will be victorious on those claims arising after 1966. Thus, to recover under the above theories, the plaintiff must have begun smoking well before the enactment of the Labeling Act.

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103. Cipollone, 893 F.2d at 578 n.45.
105. For a discussion of the negative perception of tobacco companies, see supra notes 77-78 and accompanying text.
107. To date, the First, Fifth, Sixth and Eleventh Circuits have followed the lead of the Third Circuit in holding that the Labeling Act preempts certain state law claims. For citations of the consensus among the circuits, see supra note 19. See also Note, supra note 94, at 1054. At least one state's highest court, however, has refused to follow the consensus reached by the circuit courts. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990). For a discussion of Dewey, see supra note 19.
108. See supra note 19 and accompanying text.
109. See supra note 101 and accompanying text.
The ideal plaintiff, therefore, is one who began smoking in the 1940s and 1950s at an early age. The result is a dwindling pool of potential plaintiffs that will eventually lead to a virtual halt of tobacco litigation.

Second, it must be noted that Cipollone was decided applying New Jersey law, with its particular nuances relevant to each theory of recovery. The outcome of future cases, even within the Third Circuit, will depend on the applicable products liability laws. For example, the laws of certain jurisdictions may place the burden of proving reliance on plaintiffs suing on an express warranty theory. Similarly, some jurisdictions have held as a matter of law that plaintiffs are not entitled to a risk-utility jury instruction on design defect claims involving cigarettes, while others require that a plaintiff establish that a product was defective according to the consumer expectation test before the court will undertake a risk-utility analysis.

Finally, future plaintiffs may be precluded from any benefit of the Cipollone decision because of prohibitive litigation costs. Despite the fact that larger firms are undertaking the task of representing plaintiffs and that an information network is being established among attorneys, the fact remains that counsel’s cash outlays may exceed jury verdicts. Additionally, the long length of tobacco litigation trials escalates costs and may wear down even the most willing plaintiffs. Through skillful use of the appeals process, tobacco company attorneys are adept at waging prolonged battles. The result is that many plaintiffs may be unable to prevail despite the favorable climate for their claims.

IV. CONCLUSION

The decision in Cipollone v. Liggett Group, Inc. was hailed as a victory by both the plaintiff and the tobacco industry. In a sense both sides correctly claimed victory. In a narrow context, the Third Circuit did

110. See Note, supra note 94, at 1054.
111. Id.
112. The Third Circuit applied Pennsylvania law in assessing the viability of a risk-utility claim in Miller v. Brown & Williamson Tobacco Corp., 856 F.2d 184 (3d Cir. 1988). Although the court found that Pennsylvania law warranted dismissal of the claim, this is not a strong indication that Pennsylvania and New Jersey law differ with respect to the applicability of risk-utility analysis because in Miller the plaintiff’s spouse began smoking no earlier than 1973. See 16 Prod. Safety & Liab. Rep. (BNA) 817 (Aug. 26, 1988). Thus, like defendants Lorillard and Philip Morris in Cipollone, the defendant tobacco company in Miller was protected by the fact that label warnings contributed to ordinary consumer knowledge after 1965. Id.
113. See Note, supra note 94, at 1040.
115. At the district level alone, it is estimated that plaintiff’s attorneys in Cipollone spent $500,000 in cash outlays to secure a $400,000 jury verdict. Note, supra note 94, at 1057. This, of course, is exclusive of time expenses which were estimated at $2 million. Id.
forge a path for the plaintiff to follow toward victory on retrial. By limiting the jury’s inquiry to Mrs. Cipollone’s pre-1966 knowledge and belief of the dangers of cigarette smoking, the court facilitated the first successful lawsuit in history against a tobacco company. In the wider context of future tobacco litigation, however, the decision will not usher in a significant number of verdicts on behalf of plaintiffs. It is best to view Cipollone as the case that made possible the first verdict ever against a cigarette company—a moral victory perhaps, but not one that sounds the death knell for the tobacco industry.

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