

The Smoking War and the Role of Tort Law

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Introduction

In the forty years between the first edition of Fleming on Torts and the completion of the ninth edition, products liability law has come of age. In country after country, the number of product liability cases has grown enormously. The quantity of academic writing about product liability has exploded. The law now provides compensation for injuries in ways that would have astounded torts scholars in the 1950s. Doctrinally, "strict liability" for product injuries is said to have taken over center stage, at least in the United States.

Yet, the world's most dangerous consumer product has so far remained essentially untouched. Cigarettes cause millions of deaths every year, including more than 400,000 in the U.S. But, the tobacco industry has yet to pay a single penny in tort damages to any individual smoker (or a smoker's heirs) because of the inherently lethal nature of cigarettes. Why is this so? Is this about to change, with the announcement in 1997 that tobacco companies in the U.S. are suddenly willing to put more than \$350 billion on the table in order to put some of their litigation fears behind them? Would it be desirable for tort law to play a strong ongoing role with respect to cigarettes?

I. The Cigarette Stories

Think of the career of a smoker as having a series of stages. Visualize a path with forks along the way. At the beginning of the path lies the "initiation" stage. Head down the path, and you become "a smoker." Everywhere along the path, there is the possibility of getting off. You do so by entering

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the "cessation" stage. Some who leave the path, rejoin it later. If you settle in along the path, you enter the "possibility of harm" stage. At that stage you might harm yourself or others. This might pull you off the path. Otherwise, you eventually come to the end of the path at the end of your life.

For decades the tobacco industry has told a simple story about these stages: Younger people see other people smoking – perhaps their friends, their siblings, their fellow workers, or their parents – and many of them give it a try. Some don't like it, but others do. The latter pass through the initiation stage and become smokers. Later, some decide they no longer enjoy it and quit. The rest remain lifelong smokers. To be sure, some carelessly dispose of their lighted cigarettes and the matches or lighters they use. But with enough reminders, we can hope to keep the number of carelessly set fires to a minimum, thereby limiting the amount of harm incurred by both smokers and others.

For a long time now, hardly anyone outside the tobacco industry has believed this story. Yet, the public seemed of shrug it off: what could you expect the tobacco companies to say – that they were aggressively marketing the most lethal product in the world?

Some years ago, anti-smoking activists in the public health field in both the U.S. and elsewhere began to engage in activities designed to demonize the cigarette companies, their chief executives, and others who act at their behest. These activists tell a very different story: The marketing arms of the tobacco industry prey on vulnerable children, seducing millions into taking up a vile habit. Before long, nearly every smoker wants to quit. But a majority just cannot. They try and try, but they are hooked. Some briefly stop smoking, only to be enticed back. Eventually, more than half of these addicts die of tobacco-related diseases. On top of that, each year they also kill tens of thousands of loved ones and strangers who are forced to inhale their smoke.

What is perhaps most remarkable about this story is that, at least among elites in the U.S., it very quickly has become the culturally dominant narrative. The cigarette companies and their minions, all of a sudden, are decidedly the bad guys.

It is understandable, if not admirable, that the tobacco industry would stand by its story as long as it could. Not only is it psychologically difficult and a questionable business practice to go around admitting that your product kills when used as directed, but also there are the legal risks.

II. The Legal Landscape

A. Are Cigarettes Defective Products?

In the U.S., it was in 1964 that the Surgeon General first issued his famous report linking smoking to disease and death. This was the very time that U.S. tort law embraced strict liability for defective products, as reflected in the publication of Section 402A of the Restatement (Second) of Torts.

The first thing to try to understand is why cigarettes per se have not been viewed as defective products for tort law purposes even though they kill so many people. This result seems odd to some people, who wonder whether Berkeley's Law Dean William Prosser, then Chief Reporter for the Restatement (Second), wasn't mistakenly shortsighted when he included in his comments to Section 402A the statement: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful"¹ Yet, it isn't just this bald assertion that stands in the way.

It turns out that, in the products liability area generally, tort law judges across America have been unwilling to hold manufacturers liable on the ground that their product is simply too dangerous. It is true that American product liability law in most jurisdictions employs the so-called "risk/benefit" test in deciding whether a product is defective or not.² And it is quite easy to see that, if asked, an American jury might well conclude that the risks of cigarettes outweigh their benefits, notwithstanding Prosser's assertion.

But, as the forthcoming Restatement (Third) makes clear, the risk/benefit doctrine, in the end, has been essentially restricted to cases involving design alternatives and has not been applied to products per se.³ Only the New Jersey Supreme Court started seriously down this road — by allowing liability to be imposed on the manufacturer of a one meter deep, above-ground, backyard swimming pool solely on the basis that people were being hurt when diving headfirst into such pools.⁴ Yet, not only did that Court go no further, but also its approach in the swimming pool case was later rejected by the New Jersey legislature.⁵ California's Supreme Court once pointedly left open the question of whether a product might not be found defective even when no alternative design is feasible because the product's "norm is danger,"⁶ but it never embraced that outcome.

Why is that? The answer, I believe, is that our courts have decided that the judicial system is not the proper institution for second-guessing the market in these settings. If a product is legally made and sold, if people are aware of its dangers, and if they choose to buy it and use it anyway, then, if no safer alternative is available, it would be improper for the legal system to decide that this product's risks outweigh its benefits and is therefore "defective." Put differently, since a finding of "defect" means that the product should not have been sold, condemning products per se has seemed to smack too much of paternalism — at least, as with cigarettes, when the products' risks are aimed at the consumer or under the consumer's control.

1. Restatement of the Law (Second) of Torts, section 402A, comment i.

2. See, e.g., *Barker v. Lull Engineering Co., Inc.*, 20 Cal.3d 413 (1978).

3. Restatement of the Law (Third) of Torts: Products Liability, section 2(b).

4. *O'Brien v. Muskin* 94 N.J. 169 (1983).

5. For a discussion of the new statute and its impact in a cigarette context, see *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69 (1990).

6. See *Barker v. Lull*, note 2, *supra*, at fn. 10.

B. True Strict Liability for Cigarettes?

Because American tort law imposes liability only on those products that it is willing to condemn, this, of course, means that it has been decidedly unwilling to go even further and embrace what I call true strict liability. True strict liability would not require a judgment that cigarettes are unreasonably dangerous because it would reject the "defect" requirement. True strict liability would instead use tort law to force injury-causing products, including cigarettes, to internalize in their price the social costs they impose, including their costs to smokers. Would that have been a good idea?

I would like to suggest, first, that this is not a solution that smokers would want. It would mean, in effect, that all smokers would, in the price of the product, contribute to a fund from which those, who have the misfortune of getting injured or killed by the product, could claim. Suppose that would eventually be half of the long-term smokers. As a practical matter, as they buy cigarettes, smokers would be buying insurance against the risk they will fall into the unlucky fifty percent. But from the smokers' viewpoint, this would be extremely expensive insurance, given the huge transaction costs associated with tort law generally, costs that would almost certainly be associated with the application of true strict liability in this setting. Moreover, most of these victims already have some health insurance, some life insurance, and so forth. So, for a great proportion of smokers, strict liability would force them to purchase insurance to duplicate compensation they would obtain in any event.

What about the idea of using true strict liability in order to confront buyers of cigarettes with the full cost of this product? There is something to this argument. Behind it lies the notion that, if smokers realized in this vivid way how costly smoking was, on average and in the long run, then many would decide to spend their money elsewhere. Yet, it bears emphasizing that this is something we simply do not do in other areas of tort law. For example, we don't confront drinkers with the full costs of drinking, or drivers with the full costs of driving. We don't confront buyers of prescription medications with the full cost of their unavoidable side effects and so on. In short, accident costs are not now fully internalized through tort law. So, it would be a truly radical transformation of the law to do this for cigarettes, and it would not be principled to limit it to cigarettes.

Some may respond that, even if smokers may not want strict liability, society should insist on it on the ground that smokers are sponging on the rest of us by incurring such high health costs that the rest of us must pay for. But studies have shown this to be a simplistic analysis. In the bigger picture, it seems rather that smokers already more than pay their way for the health care and other costs they impose on others through a combination of the current excise taxes on cigarettes they pay plus all of the social security, public nursing home and other such costs they save us by dying

early.⁷ Moreover, picking out smokers to pay extra for health care is an undesirable form of discrimination in my view. We do not, for example, pick out in this way those people who engage in other dangerous recreational activities. If we look at the Consumer Products Safety Commission's list of the products that cause the most hospital visits in the U.S., things like bicycling, playing football, skiing, and so on stick out. But we don't ask those people to pay for the extra health care costs they impose on us. I'm particularly troubled about singling out smokers for this especially disfavored treatment now that they are viewed as social pariahs in many quarters.

One more argument for true strict liability is that this will force the companies to develop safer and less-addictive cigarettes. Theoretical economic models can be constructed that predict this result.⁸ In practice, however, my sense of the historic record is that this argument has it backwards. Most importantly, there already are very strong market incentives to develop safer cigarettes, if that were possible. To be sure, the existing companies may not have incentives to develop addiction-free cigarettes, but if cigarettes posed no significant health risks, it is not so clear how much of a problem their addictive qualities would be. Smoking, after all, is not like using other drugs. You can smoke and still work, raise a family, engage in politics and so on. Cigarettes don't make you engage in degenerate or violent behavior. If anything, they help calm people down.

So why haven't safer cigarettes emerged? Maybe this is an impossible objective. But, in any event, I believe that the fear of tort liability may well have discouraged the existing companies from pursuing this goal. That is because the companies have good reason to fear that their very success in developing a safe cigarette would put them much more at risk of being held liable in the cases brought against them. Plaintiffs could then point to a design alternative. Of course, the dominant (although not exclusive) U.S. rule now appears to be that products are judged as of the time of distribution, rather than at the time of trial.⁹ Yet, once a safe cigarette were identified, plaintiffs would surely assert that the defendants knew, or should have known, about it earlier. Hence, it is arguable that, in this context, the development of a safer cigarette would have been furthered more by clear tort immunity than by existing tort law.

To be sure, true strict liability would force the companies to keep paying until they developed a safer cigarette, but even then one wonders what

7. See, e.g., Willard G. Manning, Emmett B. Keeler, Joseph P. Newhouse, Elizabeth M. Sloss, and Jeffrey Wasserman, "The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?" *Journal of the American Medical Association* 261, March 17, 1989; and Robert E. McCormick, Robert Tollison, and Richard E. Wagner, "Smoking, Insurance and Social Cost," *Regulation*, summer 1997.

8. See generally, Jon D. Hanson and Kyle D. Logue, "The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation," 107 *Yale Law Journal* (March 1998).

9. Restatement of the Law (Third) of Torts: Products Liability, section 2, comment a.

exactly this would achieve beyond the market incentives they already have. Perhaps the industry would devote any new resources to fighting claims (say, on causation grounds, where, for example, smokers who attempt to link cigarette use to heart disease face substantial difficulties because many of them would have suffered from coronary problems anyway). In any event, as with the idea of using true strict liability to force smokers to face the full costs of the product they buy, the use of true strict liability as a technology forcing strategy is simply not a role that product liability law has turned out to play. So, here too, a principled solution would not be limited to tobacco products. For example, by parallel reasoning, auto makers would be strictly liable for the consequences of all auto accidents on the ground that this would force them to make safer cars. But when this very proposal was made by Professor Howard Latin about 15 years ago, no one seemed to take it seriously.¹⁰

C. Liability for Failure to Warn?

1. Of the Diseases Caused By Smoking

If the tobacco industry was never really at risk of true strict liability for the costs of smoking, and if, as a practical matter, there has been no real prospect of liability for defective design defects, then what was the industry's worry?

Let's first go back to 1964 and the Surgeon General's report. Simply put, since there were millions of smokers out there in 1964, if the manufacturers right then admitted that smoking was very dangerous, how were they going to fend off the potential avalanche of lawsuits by those who would say "Why didn't you tell us? Had you done so, we never would have started smoking, or at least we would have quit long ago." These claims, essentially rooted in negligence, would immediately have ensnared the industry in a fight over who knew what and when. Although this is a fight which the tobacco companies might win, they must have realized, based upon what they knew they had in their files, that they risked a finding that they knew and should have warned earlier.¹¹ Without any industry admissions, plaintiff victims have found it daunting to prove in court both that smoking is dangerous and that the industry knew that was so before the victim did.¹²

By 1998, however, admitting that smoking causes disease and death is

10. Howard Latin, "Problem-Solving Behavior and Theories of Tort Liability," 73 *California Law Review* 677 (1985).

11. See generally, Stanton A. Glantz, John Slade, Lisa A. Bero, Peter Hanauer, and Deborah E. Barnes, *The Cigarette Papers* (University of California Press, 1996) and Richard Kluger, *Ashes to Ashes* (Alfred A. Knopf 1996).

12. For discussions of the U.S. cigarette litigation from the 1950s through the start of the 1990s, see Robert L. Rabin, "Institutional and Historical Perspectives on Tobacco Tort Liability" and Gary T. Schwartz, "Tobacco Liability in the Courts" in *Smoking Policy: Law Politics & Culture* (R. Rabin and S. Sugarman, eds., Oxford University Press 1993).

much less of a problem for the industry (and we have seen in recent months that some U.S. tobacco executives have finally, if perhaps grudgingly, accepted what just about everyone else has long believed). First, because governments have forced the companies to warn of some of the dangers of smoking for more than 30 years now, there are fewer and fewer smokers around who began before those warnings were placed on the packs and on advertisements. Second, in the U.S. at least, the Supreme Court decided in the Cipollone case that the Congressional statute requiring those warnings pre-empts tort claims based on a duty to warn.¹³ Third, research shows that just about everyone in the U.S. (including children) knows that smoking is very dangerous, regardless of what the official position of the industry has been. This is probably true around the world. Indeed, there is reason to believe that Americans over-estimate the risk that smoking will give you lung cancer.¹⁴

In other words, admitting today that smoking is deadly might not be a legal disaster after all, so long as the industry could re-tell its story like this: Everyone knows smoking is dangerous; but people choose to smoke because of the pleasure they get from it; they could stop, but they elect not to do so. If the only viable basis for a tort claim is the failure to warn of the diseases and death caused by smoking, cases brought today that rest on that theory would be very difficult to win.

2. *About Addiction*

But that isn't the only warning that plaintiffs are claiming they were denied. More and more they are alleging that they should have been told that smoking is addictive. As we have seen from its story, the industry has long denied this. Unlike admitting that cigarettes can give you lung cancer, heart disease and like, admitting that the nicotine in cigarettes makes smoking addictive still looks very risky from a legal viewpoint.

For one thing, smokers who began before the warnings went on the packages can argue that they learned of the danger of cigarettes only after they were hooked. But even more important, those starting after 1964 can claim that they assumed they could always quit, not realizing that, in many cases, starting to smoke would turn into an involuntary lifetime commitment. This argument could be especially troublesome when put together with the findings that once you quit and are "clean" for several years, the health risks you face from having previously smoked decline sharply.

To be sure, even though there is no addiction warning on the package, the industry could argue in court that, despite its official line to the contrary, most people know that you can get hooked on smoking. Moreover, in the courtroom the tobacco companies can resist the addiction claim of an individual smoker with the argument that he or she could have quit — after

13. *Cipollone v. Liggett Group, Inc.* 505 U.S. 504 (1992).

14. See, W. Kip Viscusi, *Smoking: Making the Risky Decision*, (Oxford University Press 1992).

all millions of others have. And, indeed, individual juries so far still don't seem inclined to embrace the addiction theory.¹⁵ Yet, as more and more well-funded and experienced plaintiffs' lawyers get on board the anti-tobacco company litigation bandwagon, and as the cultural understanding of smoking in America increasingly becomes one in which the tobacco companies, rather than individual smokers, are primarily responsible for the harm smoking causes, the industry has good reason to be fearful.¹⁶

This is especially so once the reality begins to sink into the public consciousness that nearly all long-term smokers start smoking as children. Whatever they could be said to "know," who could maintain with a straight face that young teenagers make a mature judgment to become lifetime smokers? Any characterization of youth smoking as "voluntary" is now being put even more into question as the anti-smoking activists have been able to portray the tobacco companies as deliberately seducing children into becoming smokers with ads featuring the cartoon "Joe Camel" and other youth-oriented marketing measures.¹⁷

In short, even if the industry were to concede that cigarettes are somewhat addictive and then try to shift the debate from "whether" to "how much," there are some potentially very dangerous time bombs out there waiting to go off. But at the same time, to try to stonewall the addiction theory entirely is becoming less and less tenable.

D. Other Legal Assaults

Even if the cigarette makers could fight off individual lawsuits, or at least most of them, they are now under fire in the U.S. on other fronts. For one thing, several smoker class action cases have been brought against them. To be sure, it now looks as though a single national class action case won't get anywhere.¹⁸ Yet, there is the possibility of a series of state class action claims, each on behalf of hundreds of thousands of claimants (or more). Even if the judges were to dismiss these class actions as involving too many complications and too many individual proof problems, there remains the possibility of the consolidation of thousands of claims. Perhaps the most serious threat in all of these group lawsuits is the possibility, however small, that a single case could trigger billions of dollars in damages, especially in punitive damages, if the tide of public opinion turns sufficiently against the industry. Armed with recently disclosed documents, plaintiffs increasingly appear to be alleging fraud and other misconduct, where earlier complaints alleged only negligence.

In addition, the tobacco companies are now being bombarded by

15. See generally, Frank J. Vandall, "Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers," 52 Ohio St. L. J. 405 (1991).

16. See generally, Philip J. Hilts, *Smokescreen: The Truth Behind the Tobacco Industry Cover-up* (Addison-Wesley 1996).

17. *Mangini v. R.J. Reynolds*, 7 Cal.4th 1057 (1994).

18. *Costano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

lawsuits seeking to force them to reimburse others for the cost of health care provided to smokers. So far, the most aggressively fought of these cases are around 40 claims filed by the attorney generals of most of the states.¹⁹ At their core, most of these lawsuits seek to win back the money the states have spent for the smoking-related, medical expenses of indigent smokers.

Frankly, I have yet to see presented a coherent legal theory underlying these attorney general cases that would justify this remedy.²⁰ If the theory is "subrogation," then the state stands in the shoes of the smokers themselves, but the attorney generals argue that they should not have to prove individual causation, individual lack of warning and the like. Some complaints allege "unjust enrichment," but that legal theory, as conventionally understood, just doesn't fit the facts.²¹ It might well be that the industry violated state unfair business practices laws and consumer protection laws, perhaps even state antitrust laws. But it is hard to see why the repayment of millions or billions in indigent medical expenses is the right remedy. If nothing else, the state ought to have a remedy for those sorts of violations even if it never paid a penny for anyone's medical care. Yet, the attorney generals like pointing to those medical expenses because the conventional remedies for violating things like the consumer protection laws are likely to involve far smaller financial penalties.

But the lack of a convincing legal theory may not matter. We are talking about a home-state prosecutor going before a home-state jury, and who knows what might happen. This perhaps explains why the industry has already settled these state claims in Mississippi, Florida, and Texas for large sums, and is trying to settle the Minnesota case during its trial, which is taking place as this is written.

Furthermore, having not long ago sworn to what now strike many people as preposterous statements in testimony before a Congressional Committee chaired by Congressman Waxman, individual tobacco company executives have grounds to worry about possible criminal prosecution. Newspapers lately report that several grand juries are actively looking into possibly bringing indictments.²²

19. See generally, Karen E. Meade, "Breaking Through the Tobacco Industry's Smoke Screen: State Lawsuits for Reimbursement of Medical Expenses," 17 *Journal of Legal Medicine* 113 (1996).

20. For one effort, see Raymond E. Gangarosa, Frank J. Vandall, and Brian Willis, "Suits By Public Hospitals to Recover Expenditures For the Treatment Of Disease, Injury and Disability Caused by Tobacco and Alcohol," 22 *Fordham Urban Law Journal* 81 (1994).

21. See Restatement of the Law of Restitution, section 1, comments a, b, and c.

22. For a discussion of potential criminal liability, see the remarks of Frank Tuerkheimer (University of Wisconsin) in Proceedings of the Conference on the So-Called Global Tobacco Settlement: Its Implications for Public Health and Public Policy, University of Wisconsin-Madison Law School, October 15-17, 1997 (Institute for Legal Studies, University of Wisconsin Law School 1997).

III. A Transition Strategy

In this state of affairs, it may well have dawned on the tobacco companies that they could very much use a transition strategy. They may have decided that they need to be able to make some admissions, but without getting clobbered into bankruptcy. They seem to be eager to put up a substantial amount of money if this can get the most serious of their legal problems behind them—especially if they can arrange to put that money up together, over time, and in a way that probably will permit them all to pass that financial obligation on in the price of cigarettes. And, most importantly, I believe, they need to try to gain public acceptance of a new story about the stages in a smoker's life that isn't the one being pushed by the anti-smoking groups.

Sure enough, as indicated earlier, during 1997 the tobacco industry in the U.S. said it would agree to a so-called "global settlement."²³ This is not a worldwide settlement by any means. "Global" here means to refer to the idea that many legal issues would be resolved and new public policy set in a variety of areas. This settlement, which all the parties say requires that legislation be enacted by the U.S. Congress, would foreclose future class actions and consolidated tort claims; it would resolve the state attorney general cases; and it would put an end to punitive damages for past conduct. Individual tort claims could be brought as before, although they would be subject annually to an individual and aggregate ceiling. If awards in any one year were greater than either ceiling, the excess would be carried over to be paid out in future years. Although analysts have reached different estimates as to the precise amount of money involved, the parties to the deal talk in roughly terms of \$350 billion. Perhaps this is better understood as something like \$12-15 billion a year for twenty-five years. Money not paid out to successful individual tort claimants would go for a variety of public health programs and to the states, in effect, to help pay for those tobacco-related indigent medical care costs, although there is no indication that the funds would have to be used in that way.

If this settlement were to go through, it is altogether unclear just how many individual tort claims would be successful in the future or how large a claim on the total fund they would be. Some predict that few, if any, individual tort judgments will be won. This view rests, in part, on what is speculated to be the reduced willingness of lawyers to take these cases once punitive damages are no longer available. And, in part, it is based on the assumption that in a one-by-one fight, the industry will continue to overwhelm its opponents, as it has in the past, forcing them to incur huge

23. For early accounts, see Barnaby J. Feder, "No Clear Outlook From Tobacco Settlement" *New York Times* August 3, 1997, at C3; Barry Meier, "Tobacco Lawyers' Papers Are Made Public" *New York Times*, August 7, 1997 at A4; and Barry Meier, "New Negotiations Reported On Tobacco Pact," *New York Times*, September 10, 1997 at A4.

expenses, knowing that they might still lose at trial. The other prediction is that, what with all the recent revelations about what the anti-smoking advocates characterize as severe industry misconduct, claimants will start winning cases, the public will learn of these results, other juries will fall into line, a standard set of winning evidence and arguments will be generated, and the successful claims will quickly exceed the annual ceiling proposed in the settlement (and this has produced calls to double or triple the dollar amount of the settlement). As this is being written, it is very difficult to have confidence in either of these scenarios.

The proposed settlement would do a lot more than limit the tobacco industry's legal liability. It would, in addition, usher in a wide range of regulatory restrictions on tobacco products and their marketing—in many respects adopting the sorts of tobacco control measures that anti-smoking activists have favored. The settlement, I believe, would also put the industry in a position in which it could try to sell yet a new story about smoking to the American public.

In the new story, smoking is not for children. To make that story credible, the companies first will have to stop all promotions either aimed at, or generally reaching, children. This means abandoning outdoor advertising (mainly on billboards), eliminating tobacco product ads in magazines that a significant number of children read, discontinuing the sale or give-away of gear (clothes, backpacks and the like) with tobacco brands and logos on it, ending the sponsorship of sporting events that some youths admire (like auto racing), down scaling in-store advertising, and so on. Second, the companies will have to embrace strict controls on the sale of cigarettes to minors. Third, they will have to cooperate with other measures designed to reduce youth smoking—such as the funding of anti-smoking counter-ads, the posting of warnings about the addictive nature of cigarettes, and so on. And, indeed, the proposed settlement contains all of these features.

There is, of course, a great danger to the tobacco companies in this approach. It is possible that, even if children didn't smoke, people would take up smoking in droves once they turned 18, with the result that smoking rates of people in their mid-20s would not be much lower than they are today. But this is an unlikely scenario. If, under the new regulations, you don't start smoking before you turn 18, and you are the sort of person who would already have taken up smoking in the past, you probably will have other risky habits already in place when you turn 18. Besides, since you are now an adult, you have less need to take up smoking in order to pretend to the world that you are. I'm not saying that no one would start to smoke after reaching age 18, but only that such a scenario would probably lead to a radically diminished number of lifetime smokers.

Instead, I imagine that the tobacco companies will figure that, even without their old marketing practices and even with all the youth access controls in place, lots of children will still smoke—perhaps not at current rates, but still lots. Just look at how many young teens drink, despite the tough

legal controls on access that exist; or, if that isn't a good analogy because of all the beer, wine and spirits advertising that children see, think about how many American teens regularly smoke marijuana.

But in a world of tough access controls and sharply restricted advertising, it is much more difficult to blame the cigarette companies for children's smoking. Of course, in the story that the anti-smoking activists tell, the tobacco companies are still to blame. Indeed, they will remain at fault so long as they make their product available for sale. Put differently, the logic underlying the anti-smoking story is that "prohibition" is the most desirable public policy-if it only could be successful. After all, if many children still smoke and if nearly all adults are regretful that they ever started, then the real goal has to be to get rid of cigarettes altogether. The objections to the prohibition solution are not principled, but only practical: (1) how to deal with those millions smokers who are currently addicted, and (2) how to deal with the huge black market in cigarettes that almost surely would be created, just as we see with so-called "illegal" drugs.

In the tobacco companies' story, however, prohibition is inappropriate in principle. Their new story, as I see it, would go like this: While there are some adults who are truly addicted and can't quit, most adults smoke because they enjoy it, and they probably could quit if they wanted to. So long as we are careful that other people aren't involuntarily assaulted by too much second-hand smoke, people who enjoy smoking should be allowed to do so. If a number of years might be cut off the end of their lives, this is a risk they should be allowed to take. It is regrettable that some children still smoke, but dealing further with that is the responsibility of parents, schools and doctors. We've done what we can.

If this story is accepted and the proportion of adults in the U.S. who smokes settles down at, say, 15 or so percent instead of around 25 percent today, and if no new companies enter the cigarette market because advertising will be so restricted, and if the tobacco companies save a lot of money because they all have to cut back so much on their advertising, then, even if a lot of money has to be paid out in a structured annual way as part of the global settlement, the tobacco companies can probably continue to keep the price of cigarettes within bounds and still make very substantial profits-which, I assume, remains their main objective.

Having conceded all those regulations aimed at youth smoking and having agreed to pay out what seems to most people as a startlingly large sum of money, the tobacco industry has put the anti-smoking, public-health community in something of a quandary, a quandary that has caused division in the ranks. One side basically favors the settlement, pointing to the industry's acceptance of so many controls that it previously has successfully fought tooth and nail. To be sure, the supporters of the deal now generally concede that some of its details need tightening up a bit. But that isn't the crux of the problem, because it now appears that if any comprehensive measure is to get through Congress and not be vetoed by President Clinton, it will have to be made tougher in various ways.

But many in the anti-smoking movement are calling for a rejection of any sort of settlement. They argue that if the tobacco companies are for it, the public health community must be against it. They can't stomach the idea of a deal that makes both sides better off. Sensing that the tide of public opinion is now of their side, they are unwilling to embrace a deal that would do anything for the tobacco companies. To bolster their resolve, many of the anti-smoking forces are taking the position that a non-negotiable principle is that none of the legal rights of smokers to sue may be sacrificed—a position that would clearly break the deal. They argue that, instead, the Congress should unilaterally impose tough regulatory controls on the tobacco industry and sharply raise the federal excise tax on cigarettes in hopes of financially discouraging teenagers from starting to smoke.

This might be the right strategy—if it succeeds and if it perpetuates the view that the "bad guys" are the tobacco companies, while at the same time denying the industry the ability to sell its new story to the public. But it is also a dangerous strategy for the anti-smoking groups. For one thing, many of the very same lawyers, who have earned the praise of the anti-smoking activists for what they have done to bring secret industry documents to light, and who have been counted on to carry the litigation torch into the future, are now excoriated for getting in bed with the devil. Perhaps the public health leaders believe there is an endless supply of plaintiff lawyers ready to step into key roles if those who negotiated the settlement are discredited. But this is not obvious to me.

In any event, a greater risk, I believe, is how the public health hard line will finally play with the public as they think about its treatment of smokers. Remember that under anti-smoking activist version of the smoking story, adult smokers are to be pitied. They were duped and they are stuck. Their right to sue must not be sacrificed. They are the people we are trying to prevent today's youths from becoming. All of those ideas fit together.

And, yet, look at the implications of the sharp increase in excise taxes that the anti-smoking groups are united behind. As an aside, I note that whereas some want to use the proceeds of this tax increase to pay for smoking-related medical expenses, President Clinton seems to want to use the money for new policy initiatives unrelated to smoking, like child care. His approach, of course, exposes the government to the risk of winding up in the position currently faced by high taxing governments elsewhere. They need a high level of continued smoking in order to balance their budgets.

But regardless of how the excise tax is used, think about those addicted smokers. For a two-pack-a-day smokers, a \$2 per pack price increase (which is the minimum that many anti-smoking activists are calling for) comes to \$120 a month. Even a \$1 per pack tax increase imposes genuine new costs on those who smoke even one pack a day. For the many moderate and low income smokers out there, where in their personal budget is this new money going to come from? Think about elderly smokers living on welfare or social security. Do they just eat less? Think about welfare mothers and minimum wage workers who smoke. Do they just feed their children less? To be sure,

a sharp price increase may cause some of them to quit smoking. But in the story told by the anti-smoking groups, it surely follows that the most addicted are least likely to do so.

Maybe some addicted smokers will be able to cope with a sharp price increase by switching to cheaper brands, or by cutting down a bit, or by smoking their cigarettes more carefully by inhaling more deeply and making sure they smoke down to the end of the cigarette. But more and more smokers have already made these adjustments. For them, a big new tax is a new agony—for the very people on whose behalf the anti-smokers say they are resisting the settlement.

Of course, many other Americans—unlike the anti-smoking activists—don't pretend to have much sympathy for smokers. More and more of them are vociferous about wanting the air wherever they go to be completely free from cigarette smoke. Indeed, as more adults from higher income classes don't smoke, they make up a potent block of voters who would be happy to have someone else pay the taxes that government needs. They might be expected to be especially supportive of cigarette taxes that promised to help curtail youth smoking.

But even selfish, non-smokers are likely to go only so far. We have perhaps seen a bit of this already in the early reaction in California to a new law that bans smoking in bars. I don't deny that such a ban can provide health benefits for employees in those bars. Moreover, the more we restrict where people can smoke, the more people are likely to figure out how to quit. Furthermore, many people would like there to be more "no smoking" bars that they could go to. Nevertheless, not only are bar owners and smokers up in arms about this new smoking ban, but also I sense that, so far at least, they have public sentiment on their side. In other words, whereas there is strong support for smoking controls in workplaces and public places generally, I sense that most people feel that bars are places where smoking should be allowed (at least if this is the way the owner wants to run the business). In an extraordinary move reflecting that sentiment, the California Assembly voted to repeal this new law almost as soon as it went into effect and the negative public reaction was reported in the press (although, as this is written, there is no indication that the California Senate will soon lend its needed support). Similar empathy for smokers is reflected in the laws of about half of the states that forbid employers from refusing to hire smokers.²⁴

To be sure, making smokers pay money is different from telling them that they can't smoke in bars and can't get a job. And certainly many other nations have had no qualms about imposing on smokers cigarette taxes that are much higher than the U.S. would have even with a \$2 a pack increase—although the culturally accepted cigarette story in many of those countries is that smoking is something the people do by choice.

24. See Stephen D. Sugarman, "Disparate Treatment of Smokers in Employment and Insurance" in *Smoking Policy*, supra note 12.

What I see lurking, then, is the danger that the anti-smoking forces will squander the great gains they have made in turning public opinion against the tobacco companies. That could open up the door to public acceptance of the industry's own new story that smoking is a voluntary adult activity.

Put generally, anti-smoking activists have to be very careful about how they tell their story. And I have great doubts that they will successfully sell a story in which smokers are addicted victims, with a right to sue for money, and yet in the meantime they have to pay out a lot more to support their habit. There is just too much inconsistency there. This is not like imposing high costs on heroin addicts, by making their drug illegal. For one thing, the addiction story is not at risk there. For another, people pushing policies that result in higher heroin prices are not generally seeking public empathy for those addicts, and they certainly are not seeking to keep heroin user tort claims alive.

In sum, in the U.S. we might now be at a critical moment in the smoking war. In this war, as in other wars, there comes a time when the best thing becomes, not to keep trying to bomb the other side into oblivion, but rather to declare victory and let the other side surrender and make peace. Maybe that time is not yet upon us. Perhaps the enemy is not yet sufficiently weakened. Maybe the anti-smoking forces have not yet tasted enough victory, and it is psychologically necessary for them to do so.

But the U.S. anti-smoking forces at least need to think more clearly about what a reasonable victory would be. How low can teen and adult smoking rates plausibly get? Does victory have to include keeping open all the theoretical tort rights of smokers? Must victory also include sharply higher cigarette prices? Otherwise, holding out for total victory may mean having to take responsibility for too many civilian casualties. As John Fleming would have counseled, moderation is usually a virtue.

Fleming would also have sought to draw on the lessons of other countries. On the tort side, there is little to learn. Until recently, there was essentially no litigation elsewhere, although now a few lawsuits have been filed that are modeled on the U.S. cases.²⁵ But in terms of tobacco control policy generally, many other countries are more aggressive than is the U.S. As I noted earlier, many other nations already have much higher cigarette tax rates. Youth access and advertising controls are also much tougher in many other countries. Yet, none has achieved, through those policies, anything like the low level of smoking to which U.S. anti-smoking activists aspire. This is not to say that these measures count for nothing. But, rather, it is to emphasize that more is at work here.

What I find most striking in the international comparisons is the gender differences from place to place. In the U.S. now, men and women smoke at about the same rate. In some countries, for example, Japan, there is a huge

25. See generally, the remarks of Eric LeGresley (Non-Smokers' Rights Association, Canada) and Geraint Howells (University of Sheffield, U.K.) in Proceedings of the Conference on the So-Called Global Tobacco Settlement, *supra* note 22.

gender imbalance. This tells me that culture is very powerful. We also know that within the U.S., African-American teenage females smoke at extremely low rates as compared to white teens of either sex (even adjusting for family income). There has to be a cultural explanation for that, although no one seems yet to know precisely what it is.

So, if I were working on tobacco control, I would focus most on the cultural angle. Perhaps the best hope to marginalize youth smoking is to make it seem abnormal. Maybe if you go about on your daily rounds and you don't much see people smoking (except those who are miserably huddled around the doorways to buildings where they work), and you don't see billboards with people smoking, and you don't see cigarettes on display when you shop, and you don't see people smoking in films, then you begin to see smoking as odd. To be sure, if you want to rebel against society, this may make smoking even more attractive. But for most youths, there will be much less of an adult world that you could sense you would fit into by smoking. Just possibly, these changes could be far more important than high taxes or tort rights in convincing children to avoid the initiation stage and never get on the smoking path.

After all, there has been a great reduction in smoking rates by adults in the U.S. in the past 30 years, and for those millions of former smokers who got off the smoking path, it has had nothing to do with tort rights and little or nothing to do with high taxes. For most middle class and professional class adults in the U.S., smoking has simply become no longer "cool." This is partly, I believe, a result of scientific rationality — a sensible response to the enormous risks of smoking by people who don't want to be thought of by their friends and work colleagues as stupid for doing such a dangerous thing. It is, as well, I believe, a result of a general cultural shift to an emphasis on fitness and health. It should not be surprising that in California, where healthy diets, working out, outdoor sports activities and the like are very fashionable, smoking rates are decidedly lower than the U.S. average.

This is all by way of saying that we in the field of tort law need to be modest about how much social change our special province — the common law — can be expected to achieve. If smoking rates are to come down to, say, 10 percent of the adult population, it is unlikely that tort law will have played the primary role. As John Fleming taught me, the future for tort law, if anything, lies elsewhere.²⁶

26. See, e.g., John G. Fleming, "Is There a Future for Tort?," 58 *Australian Law Journal* 131 (March, 1984), also appearing as John G. Fleming, "Is There a Future for Tort?" 44 *Louisiana Law Review* 1193 (1984) (in honor of Professor Wex Malone).