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Tobacco Companies, Immune No More—California’s Removal of the Legal Barriers Preventing Plaintiffs from Recovering for Tobacco-Related Illness

Rodney R. Moy

Code Sections Affected
Civil Code § 1714.45 (amended).
SB 67 (Kopp); 1997 STAT. Ch. 570
AB 1603 (Bustamante); 1997 STAT. Ch. 1603

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When Rose Cipollone learned that she had lung cancer in 1981, she continued to smoke despite her doctor's warnings. In June of 1982, Rose’s cancer progressed and she required radical surgery; one of her lungs was removed. Unfortunately, the loss of her lung was not enough to convince Rose to quit smoking. She continued smoking, this time secretly. Throughout Rose’s ordeal, the tobacco companies publicly maintained that nicotine, the main intoxicant in cigarettes, was not addictive.

One year later, Rose’s cancer was diagnosed as terminal. Her fatal prognosis prompted Rose and her husband, Antonio Cipollone, to file a suit based on violation of express warranty and fraud in federal district court against the tobacco company which manufactured the brand of cigarettes that Rose smoked. Years later, Antonio’s case reached the United States Supreme Court. Even though Rose and Antonio had both passed away, their son continued the suit which resulted in a landmark victory allowing smokers harmed by their prolonged use of cigarettes to recover for claims based on fraud and misrepresentation.

I. INTRODUCTION

According to the American Medical Association, smoking kills more Americans each year than alcohol, cocaine, crack, heroin, homicide, suicide, car accidents, fires, and AIDS combined. Some illnesses which are purportedly caused by smoking include lung, larynx, mouth, esophagus, and bladder cancer; chronic ob-
structive pulmonary disease; coronary heart disease; and stroke.\textsuperscript{11} Despite the overwhelming evidence of health hazards caused by smoking, people continue to smoke, and the tobacco industry continues to reap huge profits.\textsuperscript{12}

During the 1950's, the tobacco industry did not acknowledge that cigarettes may have been harmful to a smoker's health. In fact, they positively claimed that cigarette smoking had no adverse effect on those who smoked.\textsuperscript{13} While there is evidence that the tobacco industry knew of the harmful effects of smoking as early as 1900 and did not disclose this fact to the general public,\textsuperscript{14} the real debate revolves around whether nicotine, the main intoxicant in cigarettes, is addictive.\textsuperscript{15} Even though the Food and Drug Administration (FDA) has classified nicotine as an addictive drug,\textsuperscript{16} the major tobacco companies still maintain that nicotine is not addictive.\textsuperscript{17} The tobacco companies maintain this stance despite evidence that they knew of the addictive qualities of nicotine as early as 1969.\textsuperscript{18} As a result of the government's classification of nicotine as addictive and the tobacco industry's systematic denial that nicotine is addictive, the general public has become more skeptical as to the motives and activities of the tobacco industry.\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{11} \textit{See} Elizabeth A. Frohlich, \textit{Note, Statutes Aiding States’ Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm?}, 21 AM. J.L. & MED. 445, 446 (1995) (listing the illnesses most commonly associated with smoking and adding that cigarette smoking may also be responsible for infertility and peptic ulcer disease).
  \item \textsuperscript{12} \textit{See} Leichtman, \textit{supra} note 10, at 729 (characterizing cigarettes as “one of the most profitable consumer products ever sold, despite damaging health research, smoking restrictions and decreasing consumption by North Americans”).
  \item \textsuperscript{13} \textit{See} Schemmel, \textit{supra} note 1, at 657 (detailing an advertisement with spokesperson Arthur Godfrey which stated that a medical specialist examined smokers and “report[ed] he ha[d] observed no adverse effects whatever on the noses, the throat, the sinuses, the ears, or other organs from smoking Chesterfields”).
  \item \textsuperscript{14} \textit{See} Jeff I. Richards, \textit{Clearing the Air About Cigarettes: Will Advertiser’s Rights Go Up in Smoke?}, 19 PAC. L.J. 1, 5 (1987) (claiming that by the early 1900s, research turned up evidence showing that there might be a correlation between smoking and illness).
  \item \textsuperscript{15} \textit{See} Nicotine Attack: Cigarette Regulation Is Formally Proposed; Industry Sues to Halt It, WALL ST. J., Aug. 11, 1995, at A1 [hereinafter Nicotine Attack] (reporting that the Food and Drug Administration has declared cigarettes a drug and the tobacco industry has repeatedly stated that it doesn’t regard cigarettes as addictive).
  \item \textsuperscript{16} \textit{See} Frohlich, \textit{supra} note 11, at 446-47 n.11 (chronicling the FDA’s classification of nicotine as addictive).
  \item \textsuperscript{17} \textit{Nicotine Attack, supra} note 15, at A1.
  \item \textsuperscript{18} \textit{See} 141 Cong. Rec. H7470-02, H7471 (1995) (describing the congressional testimony of Rep. Henry Waxman (D-Calif.) who claimed that “as early as 1969, the board of directors of Philip Morris was briefed by its researchers on the addictive nature of nicotine”); \textit{see also} John Schwartz, \textit{Documents Point to Manipulation of Nicotine In Low-Tar Cigarettes}, WASH. POST, Aug. 1, 1995, at A12 (publishing a May 1974 memo from tobacco company scientists which stated that they manipulated tar and nicotine parameters of cigarettes in order to produce “optimal cigarette acceptability”); \textit{Firm Adds Nicotine to Cigarettes, Brief Says; Smoking: Sealed Documents Contradict Philip Morris Testimony Before Congress. But the Tobacco Company Calls the Accusations ‘Preposterous,’ ” L.A. TIMES, Jan. 16, 1996, at 14 (purporting to quote Philip Morris employee manuals and other documents saying the company “extracts nicotine from tobacco that it throws away and then adds this new nicotine to other tobacco batches”).
Responding to the public outcry against the tobacco industry, the California Legislature has enacted two bills which speak to various plaintiffs' concerns over the immunities which have been enjoyed by tobacco companies under California Civil Code section 1714.45. Chapter 25 affirms the right of public entity plaintiffs to sue for medical expense reimbursement for illnesses caused by smoking, enabling Attorney General Dan Lungren to join the other states which have already filed suit against the tobacco companies for medical expense reimbursement. Chapter 570 removes common law barriers against individual plaintiffs' lawsuits by removing tobacco from the illustrative list of "common consumer products" and by positively stating that "this section does not exempt tobacco products from liability actions."

II. LEGAL BACKGROUND

Even though smokers have been suing tobacco companies since the 1950's, until recently no plaintiff has been awarded monetary damages. Generally, three reasons explain why plaintiffs' lawsuits have failed so miserably. First, there is a public perception that smoking is a choice and that the smoker should be responsible for the risks associated with that choice. Second, the tobacco industry has maintained a hard-line litigation strategy by fighting every lawsuit, no matter how expensive, and never settling out of court. Third, many states have incorporated

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20. See CAL. CIV. CODE § 1714.45(a)(1) (West Supp. 1997) (codifying the common law rule that a manufacturer shall not be liable if the product is inherently unsafe and is a common consumer product such as tobacco).

21. Id. § 1714.45(d) (added by Chapter 25).


23. CAL. CIV. CODE § 1714.45(a)(2) (amended by Chapter 570).

24. Id. § 1714.45(b) (added by Chapter 570).


26. See Schemmel, supra note 1, at 666 (indicating that as of 1994, the tobacco industry held a perfect record against all legal challenges); see also Suein L. Hwang, Former Smoker is Awarded $2 Million in Suit Over Illness Blamed on Filter, WALL ST. J., Sept. 5, 1995, at B6 (discussing a 1995 case which resulted in a $2 million judgment against the manufacturer of Kent Cigarettes). But see City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1140 (N.D. Cal. 1997) (holding that a state common law claim brought by a public entity for medical expense reimbursement is not barred by California Civil Code § 1714.45).

27. See Schemmel, supra note 1, at 666 (surmising that plaintiffs have failed against the tobacco companies due in part to juries' hostility toward plaintiffs who blamed others for the consequences of their own decision to smoke).

28. See Mark Curriden, Litigants Talk Tobacco, A.B.A. J., June 1997, at 20 (disclosing the contents of a memo marked "internal and confidential" and signed by the lead lawyer for a major cigarette company which details the industry's litigation strategy to "fight all lawsuits").
various immunities into their product liability statutes in an effort to protect the economy while still looking out for the consumers' best interests.

A. The Basis for Product Liability: section 402A of the Restatement Second of Torts and Comment i

Due to technological advances over the past hundred years, by the early 1960s it had become clear that negligence and breach of warranty theories were no longer feasible as means of recovery for defective products. Negligence theories were too difficult for plaintiffs to prove in a products liability action since they needed to show some kind of negligent conduct on the part of the manufacturer which may have occurred years before the plaintiff's injury. Similarly the privity requirement in contract law made warranty theory limited in scope because defective products were sold through chains of distribution that did not necessarily involve the manufacturer. Consequently, strict products liability evolved as the preferred way to hold sellers and manufacturers responsible for product-related injuries, including those injuries caused by cigarettes.

Section 402A of the Restatement (Second) of Torts reinforced common law decisions which had been finding in favor of plaintiffs by using a strict product liability theory. However, when plaintiffs with tobacco-related illness began suing tobacco companies, they were blocked by the tobacco industry defense that comment i prevented recovery. Comment i was included in section 402A to exempt tobacco and other products that "cannot possibly be made entirely safe for all consumption" from applications of section 402A unless there is some

29. See, e.g., Richards v. Owens-Illinois, Inc., 14 Cal. 4th 985, 998-99, 928 P.2d 1181, 1183, 60 Cal. Rptr. 2d 103, 111 (1997) (analyzing the abbreviated legislative history of California Civil Code § 1714.45 and finding that the immunity granted to tobacco companies was "intended only to prevent withdrawal of the enumerated products from the market, against the wishes of society").


31. See id. at 1110 (indicating that negligence theories were replaced in lieu of strict liability theories because negligence was difficult to prove in many cases).

32. Schemmel, supra note 1, at 664.

33. Id.

34. This section reads: Special Liability of Seller of Product for Physical Harm to User or Consumer (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule . . . applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. RESTATEMENT (SECOND) OF Torts § 402A (1965).

35. See Rabin, supra note 25, at 864 (postulating that "comment i sounded the death knell for the first wave of tobacco litigation").
manufacturing defect in the product itself which makes it more harmful than the average consumer expects it to be. In interpreting comment i, the California Supreme Court held that “a manufacturer or seller breaches no legal duty to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers.” Since section 1714.45 of the California Civil Code expressly states that it is derived from comment i of section 402A, a tobacco supplier, according to California law, simply commits no tort against knowing and voluntary smokers by making cigarettes available for their use.

B. Federal Cigarette Labeling and Advertising Act

As public concern grew over the health hazards posed by cigarette smoking, the United States' Congress responded by enacting the Federal Cigarette Labeling and Advertising Act of 1965. The Act established the familiar “Surgeon General Warnings” which appear on every carton of cigarettes and in every piece of advertising. The Legislature stated the statute’s purpose as two-fold: (1) To adequately inform the public that cigarette smoking may be hazardous to health, and (2) to protect the national economy from the burden imposed by diverse, non-uniform, and confusing cigarette labeling and advertising regulations.

Just four years after it had been enacted, the Federal Cigarette Labeling and Advertising Act was amended by the Public Health Cigarette Smoking Act of 1969, to include more stringent Surgeon General warnings and controversial preemption language which provided fuel for nearly 25 years of debate. The controversial provision states that “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any

38. CAL. CT. CODE § 1714.45(a)(2) (West Supp. 1997); see Richards, 14 Cal. 4th at 999, 928 P.2d at 1190, 60 Cal. Rptr. 2d at 112.
39. Richards, 14 Cal. 4th at 1000, 928 P.2d at 1191, 60 Cal. Rptr. 2d at 113.
42. Id. at § 1331 (as articulated in Cipollone v. Liggett Group, Inc., 505 U.S. 504, 514 (1992)).
43. See Public Health Cigarette Smoking Act of 1969 § 2, 15 U.S.C.A. § 1333 (West 1982) (making warnings more forceful than they had been under the previous Act); id. at § 2, 15 U.S.C.A. § 1334 (West 1982) (setting forth the controversial “State law” preemption language); see also Hernandez, Jr & Parker, supra note 40, at 4 (indicating that the preemption language was unclear as to what extent Congress intended to preempt state tort claims).
cigarettes the packages of which are labeled in conformity with the provisions of
this chapter." While the Act's express language clearly prevents the states from
imposing additional or inconsistent labeling requirements on cigarette manufac-
turers, by broadening the preemption to include "State law," Congress had left
unclear whether all state tort claims against cigarette manufacturers were preempted
as well.\footnote{45}

Although warning labels were originally designed to hold the cigarette
manufacturers accountable by forcing them to warn the public of the dangers posed
by cigarette smoking, they instead were used by the tobacco industry to insulate
themselves from lawsuits filed by cancer victims and their families.\footnote{46} By using the
preemption language set forth in section 2 of the Public Health Cigarette Smoking
Act of 1969,\footnote{47} the tobacco companies successfully argued that their compliance
with the warning requirements shielded them from liability under state law claims.\footnote{48}
Ultimately, however, the cigarette manufacturer's preemption argument failed when
the United States Supreme Court settled the debate in Cipollone v. Liggett Group,
Inc.\footnote{49}

C. Federal Preemption and the Cipollone Decision

The Supremacy Clause of the United States Constitution states, in pertinent
part, that "[t]his Constitution, and the Laws of the United States which shall be
made in Pursuance thereof . . . shall be the supreme Law of the Land; and the
Judges in every State shall be bound thereby."\footnote{50} This clause is the basis for the
Preemption Doctrine which asserts the rule that federal law controls over any state,
municipal, or local law or regulation that occupies the field or conflicts with federal
law.\footnote{51} When a court interprets legislation to discern whether state law is preempted
by federal law, the judge must determine "whether the scheme of federal regulation
is so comprehensive that it is reasonable to infer that Congress left no room for state
regulation."\footnote{52}

\footnote{44} 15 U.S.C.A. § 1334(b) (West 1982).
\footnote{45} Hernandez, Jr. & Parker, supra note 40, at 3-4.
\footnote{46} See Leichtman, supra note 10, at 732 (describing how the warning labels were intended to be a sword
against cigarette manufacturers but have instead become a shield against lawsuits).
that petitioner's state law claims were preempted by the federal statute and recognizing that other courts have agreed
with that analysis).
\footnote{49} See Cipollone, 505 U.S. at 519-20 (holding that state laws pertaining to cautionary warnings are
preempted while general state law damages actions are not).
\footnote{50} U.S. CONST. art. VI, § 1, cl. 2.
\footnote{51} Hernandez, Jr. & Parker, supra note 40, at 1-2.
\footnote{52} Id. at 2.
Federal preemption was the main issue in Rose Cipollone’s case by the time it found its way to the United States Supreme Court. From the time the Cigarette Act was passed, plaintiffs have argued that their state law claims should not be preempted, pointing to the legislative history of the Cigarette Act which made reference to the continuing viability of state common law remedies. Adding further ammunition, plaintiffs reasoned that Congress would have expressly prohibited all state common law claims if that was their intent.

In responding to plaintiffs’ arguments, cigarette manufacturers also pointed to comments in the legislative history supporting their contention that all state law claims should be preempted if they comply with the strictures of the Cigarette Act. Representative Moss, for example, criticized the Preemption Section of the Cigarette Act as an “absolute preemption . . . written into [the] legislation [which] weakens rather than strengthens governmental safeguards aimed at protecting the public health.” It follows, contend cigarette manufacturers, that Representative Moss’ concern would have been unfounded had the Cigarette Act not afforded them an “absolute preemption.”

Prior to the Cipollone decision, courts had the power to determine whether state law was impliedly preempted by federal statutes which also contained express preemption language. In other words, even if the express language of a federal statute discussed preemption only in terms of a narrow issue, a court could hold that Congress intended to occupy the entire field addressed by the statute, thus impliedly preempting all state law claims. The Supreme Court limited the lower courts’ use

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53. See supra notes 1-9 and accompanying text.
54. See Cipollone, 505 U.S. at 508 (presenting the issue as whether the Cigarette Act preempted petitioner’s common-law claims against the cigarette manufacturers).
55. Hernandez, Jr. & Parker, supra note 40, at 5; see id. at n.41 (citing Federal Cigarette Labeling and Advertising Act: Hearings on H.R. 643 Before the House Comm. on Interstate and Foreign Commerce, 91st Cong. 1st Sess. 554, 579 (1969), which quotes Representative Watson who states that “[n]owhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability action against a tobacco company”).
56. See Hernandez, Jr. & Parker, supra note 40, at 5 (noting that Congress did not expressly prohibit state tort actions and would have had it so intended).
57. Id. at 6; see Marc Z. Edell & Harriet Dinegar Milks, The Cipollone Decision: Providing Guidelines for Federal Preemption of Product Liability Claims, N.J. Law., at 37, 38 (1993) (discussing the cigarette manufacturers’ argument in Cipollone that they should be immunized from liability under any state or common law claim based on their compliance with the Act’s labeling requirement).
59. See id. (analyzing the minority statement of Representative Moss).
61. See Edell & Milks, supra note 57, at 38 (recognizing that courts had the power to determine the scope of implied preemption by looking at the statutory language or legislative history).
62. See, e.g., Papas v. Upjohn Co., 926 F.2d 1019, 1026 (11th Cir. 1991) (holding that the Federal Insecticide, Fungicide and Rodenticide Act impliedly preempted tort claims alleging inadequate labeling even though the Eleventh Circuit Court did not determine whether those claims were addressed by the statute’s preemption section), vacated, 505 U.S. 1215 (1992).
of implied preemption in *Cipollone v. Liggett Group, Inc.* by recognizing a long standing "presumption against preemption." In doing so, the Court took a close look at the Cigarette Act’s preemption language and found no express preemption of all state tort claims, only those based on inadequate warnings in advertising and promotion. The result was that the Cipollones’ claims based on express warranty, intentional fraud and misrepresentation, and conspiracy were not preempted by the Cigarette Act.

What the *Cipollone* Court had effectively done was establish a framework for a new type of preemption analysis. First, a court will look at preemption language within the statute itself. If Congress crafted express preemption language, that section will be the scope of preemption. Courts will only look at implied pre-emption principles if the scope of preemption was not expressly defined by the statute in any way. Justice Stevens emphasized that when the scope of preemption is defined by statute, there is no justification for a court to consider implied pre-emption. Therefore, since the Cigarette Act did have preemption language which only preempted claims based on inadequate warnings in advertising and promotion, it was improper for the lower court to even inquire into the issue of implied pre-emption.

**D. California Tort Liability Reform Package of 1987**

Despite the *Cipollone* decision and its potentially devastating impact on the tobacco industry, cigarette manufacturers continued to argue for immunity, focusing on the states rather than the federal legal arena. California, like most states, had incorporated language from the Restatement (Second) of Torts section 402A into...

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63. *Cipollone*, 505 U.S. at 518.
64. *Id.* at 531; *see* Edell & Milks, *supra* note 57, at 38 (discussing how the Court scrutinized the preemption language of the statute and found no express preemption of state tort actions except for those involving advertising and promotion).
65. *Cipollone*, 505 U.S. at 530.
67. *See id.* at 40 (interpreting *Cipollone* as saying that when a statute includes a preemption section, the scope of that preemption will be defined by the statutory language and not by implied preemption analysis).
68. *Id.*
69. *Id.*
70. *Cipollone*, 505 U.S. at 517.
71. *Id.*
72. *See* Schemmel, *supra* note 1, at 689 (concluding that *Cipollone* laid the groundwork for the next wave of plaintiffs but recognizing that manufacturers still have tremendous financial resources to fight lawsuits); *see also* Kathryn Ericson, *Tobacco Industry Tries to Avert More Lawsuits by States*, *WEST’S LEGAL NEWS*, Nov. 30, 1995, available in 1995 WL 907214 (stating that five cigarette manufacturers filed suit against the attorneys general of Texas and Massachusetts to try to prevent more states from seeking reimbursement of health care costs from the tobacco industry).
In general, the codification of section 402A into California Civil Code section 1714.45 helped society retain products which are inherently unsafe yet desired nonetheless. However, included in this codification is reference to comment i, relating to liability of commonly consumed products.

There is fierce debate as to whether section 1714.45's reference to comment i was intended to bestow cigarette manufacturers with an unqualified immunity or merely immunity under certain circumstances.

Section 1714.45 was the result of a hasty compromise between two parties, one wanting comprehensive changes in California tort law, the other wanting to maintain the status quo. Struck in 1987, the reform package eventually passed by the legislature was termed the "napkin deal" since it was hammered out by political adversaries on the white cloth napkin of a Capitol city restaurant.

At least one California Court of Appeal believed that "[i]t was commonly understood that the measure embodying section 1714.45, which enjoyed the active or at least tacit support of all these groups, would provide nearly complete immunity for manufacturers of the five enumerated products," tobacco being one of them. The California Supreme Court would not go as far as the Court of Appeal did in calling the tobacco companies' immunity "nearly complete," but it did recognize that the napkin deal was designed to prevent the enumerated products from being pulled off the market by "eliminating their suppliers' direct monetary exposure for harm caused by the products' normal consumption."

State Attorney General Dan Lungren pointed to section 1714.45 and the two cases interpreting that statute when he concluded that he had no authority to join other states that were suing the tobacco companies for medical expense reimbursement. In response, Assembly Democrats criticized Lungren (a

73. See CAL. CIV. CODE § 1714.45 (West Supp. 1997) (incorporating restatement language); see also supra notes 30-39 (discussing the importance of RESTATEMENT (SECOND) OF TORTS § 402A as it relates to products liability).

74. CAL. CIV. CODE § 1714.45 (West Supp. 1997).

75. Id. § 1714.45(a)(2).


80. Id.

81. Richards, 14 Cal. 4th at 998-99, 928 P.2d at 1189, 60 Cal. Rptr. 2d at 111.

82. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1603, at 2 (Apr. 24, 1997) (detailing Lungren's interpretation of California Civil Code § 1714.45 which he believed prevented him from suing).
III. TOBACCO COMPANY LIABILITY TO PUBLIC ENTITIES

Many tobacco companies complain that smoking is an individual right, a choice that affects only the smoker and therefore should not be interfered with by government. The truth is that smoking is riddled with external costs. In 1993, the Centers for Disease Control estimated that smoking-related illness cost American taxpayers nearly $22 billion in public funds used to pay for medical treatment. Moreover, since alcohol and tobacco-related diseases affect low-income populations at a disproportionate rate, public hospitals are forced to foot the bill for those without medical insurance. As one Washington D.C. lawyer notes, "[i]n fulfilling its duty to treat all indigents on a nondiscriminatory basis, the State has assumed a crushing financial burden—a burden which in all equity and fairness should be borne by those whose lucrative enterprise is responsible for the harm."88

A. Florida's Medicaid Third-Party Liability Act

In 1994, Florida became the first state to pass legislation giving itself the power to sue cigarette companies for reimbursement of Medicaid costs paid by the State in the treatment of tobacco-related illness. The law seeks to assure that Medicaid will be the "payer of last resort for medically necessary goods and services furnished to Medicaid recipients." To achieve this goal, the Medicaid Third-Party

83. See id. (stating that the authors of the bill disagreed with Lungren's interpretation of section 1714.45 in that it only provided immunity from lawsuits against those who had voluntarily consumed the product, not from lawsuits by states seeking medical expense reimbursement); see Greg Lucas, California Sues Tobacco Industry, $1.3 Billion Sought to Cover Medi-Cal Costs to Smokers, S.F. CHRON., June 13, 1997, at A1 (reporting that Lungren, as a GOP gubernatorial hopeful, had been under increasing criticism from Democratic Legislators to file a lawsuit).
84. See Leichtman, supra note 10, at 745 (detailing the dangers of second-hand smoke to non-smokers and repeating the position of the Tobacco Institute which claims cigarette smoke is not harmful to anyone).
85. See Raymond E. Gangarosa et al., Suits By Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol, 22 FORDHAM URB. L.J. 81, 90 (1994) (listing some of the external costs as "imping[ing] on the operation of public hospitals, . . . eroding tax bases, distorting the health care needs of communities and inducing demand for competing infrastructures: police, courts, jails, prisons and welfare"); see Leichtman, supra note 10, at 744 (adding lost productivity and early morbidity as external costs).
86. See Frohlich, supra note 11, at 447 (reporting statistics showing that smoking-related illnesses cost Americans $50 billion in 1993, 43.3% of which was paid by public funds).
87. Gangarosa et al., supra note 85, at 82; see id. at 90 (describing public hospitals as "payers of last resort" when it comes to medical treatment).
The Tort Liability Act provides the state with a cause of action against a liable third party to recover the costs of providing Medicaid. In addition, the Act goes further by: (1) Providing that the state's cause of action is independent of any rights or causes of action that the Medicaid recipient may have; (2) granting the state an automatic subrogation of a recipient's right to sue upon receiving Medicaid assistance and an automatic assignment of the recipient's claims to the state; (3) enabling the state to bring a class action without going through the procedural requirement of identifying each member of the class; (4) liberalizing causation and damages rules by allowing them to be proven by statistical analysis; and (5) allowing principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of the risk, and all other affirmative defenses normally available to a liable third party to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources.

As a result of its broad changes to common law liability principles, the Act drew critics and supporters alike, making it one of the most controversial pieces of Florida legislation that year. Critics of the Act claim that the changes made to common law liability principles “unfairly tilt the judicial system against third-party defendants responsible for state Medicaid expenditures.” They further claim that a much more efficient way to hold responsible third parties liable would be to institute a tax. Proponents, on the other hand, downplay the changes to common law liability principles by arguing that the Act simply makes the judicial process more efficient. Even though the position of critics and proponents of the Act remains adversarial, both sides agree that the Act is very confusing and appears to have been a hasty piece of legislation passed without much consideration.

91. Id. § 409.910(6) (West Supp. 1997).
92. Id. § 409.910(6)(a) (West Supp. 1997).
93. Id. § 409.910(6)(b),(c) (West Supp. 1997).
94. Id. § 409.910(9) (West Supp. 1997).
95. Id.
96. Id. § 409.910(1) (West Supp. 1997).
97. See Frohlich, supra note 11, at 452 (concluding that the controversy surrounding the Act was illustrated by the Florida Legislature's vote to repeal it merely 12 months after it was passed, and by the Governor's subsequent veto of the repeal).
98. Massey, supra note 88, at 591.
99. See Richard N. Pearson, The Florida Medicaid Third-Party Liability Act, 46 FLA. L. REV. 609, 631 (1994) (hypothesizing that if Florida had passed a tax increase in 1994 instead of the Act, it would have been collecting revenue all this time to offset the costs of treating those with tobacco-related illnesses and would not have to share the revenue with lawyers who must litigate under the Act).
100. See Massey, supra note 88, at 592 (describing the Florida Act as “streamlining” the process by which the state can hold responsible third parties liable and further contending that the Act does not change standards of conduct to which third parties are liable, nor does it alter the State's burden of proof).
101. See Pearson, supra note 99, at 611 (recognizing that the Act is very confusing, appears to be “last-minute, inadequately considered legislation,” and the causes of actions authorized by the statute are not clear).

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Before the enactment of Chapter 25, there was no California law directly addressing the issue of tobacco liability to public entities. Tobacco liability, in general, was controlled by California Civil Code section 1714.45 and a number of cases which construed that statute. California Civil Code section 1714.45, which was part of the comprehensive tort reform package of 1987, stated that a manufacturer or seller of a product was not liable in a products liability action if the product is inherently unsafe and ordinary consumers know that it is inherently unsafe. In the express language of the statute, tobacco was listed as one of the products immune from products liability claims. When prompted to file suit against the cigarette manufacturers for medical expense reimbursement, State Attorney General Dan Lungren concluded that the language of section 1714.45 prevented him from doing so. In addition, he relied on the rulings of two state court cases which had interpreted section 1714.45.

American Tobacco Co. v. Superior Court, a 1989 ruling out of the first District Court of Appeal, held section 1714.45's immunity for tobacco companies to be "automatic" and "nearly complete." Seven years later, the California Supreme Court interpreted section 1714.45 in Richards v. Owens Corning, Inc. The State's highest court did not rule on the correctness of the American Tobacco decision, but it did emphasize that section 1714.45 negated tobacco companies' liability to "knowing and voluntary smokers," meaning that the tobacco companies were not liable for the smoking-related illnesses of smokers who knew the dangers of...
smoking and voluntarily accepted the risk. Without a conclusive state ruling on whether section 1714.45 barred a public entity from suing the tobacco companies, Lungren felt his hands were tied.

C. Chapter 25

Chapter 25 does not seek to change existing law but rather to clarify it so that no question exists as to the viability of a state lawsuit to recover medical expenses from the tobacco industry. According to the Legislature, Civil Code section 1714.45 "does not apply to, and never applied to, an action brought by a public entity to recover the value of benefits provided to individuals injured by a tobacco-related illness." Unlike the Florida Act which changes common law rules of liability, Chapter 25 asserts that it does not "alter or amend existing California law." In addition to its assertion that it does not change California law, Chapter 25 specifically permits public entities to file lawsuits to recover health care costs caused by the tobacco industry's tortious behavior. Furthermore, even if the injured individual's claim is barred by section 1714.45, Chapter 25 disallows this fact as being used as a defense against public entities.

Chapter 25's major opponent, the Tobacco Institute, argues that the amendments to section 1714.45 were unnecessary in light of City and County of San Francisco v. Phillip Morris. This federal district court case involved a public entity suing the tobacco industry for medical expense reimbursement. Despite the fact that section 1714.45 was in full effect and the American Tobacco decision had already found tobacco companies to have a "nearly complete immunity," this federal court found that state law fraud and special duty claims are not barred by section 1714.45. If public entities can already sue under section 1714.45, questions the Tobacco Institute, why then is Chapter 25 necessary unless the

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112. Id. at 1000, 928 P.2d at 1190, 60 Cal. Rptr. 2d at 112.
113. See supra notes 82-83 and accompanying text (detailing Lungren's refusal to file suit against the tobacco companies for medical expense reimbursement).
114. CAL. CIV. CODE § 1714.45(d) (amended by Chapter 25).
115. Id.
117. CAL. CIV. CODE § 1714.45(e) (amended by Chapter 25).
118. Id. § 1714.45(d) (added by Chapter 25); see Dresslar, supra note 106, at 1 (estimating the state's tobacco-related Medi-Cal costs at $50 million per year).
119. CAL. CIV. CODE § 1714.45(d) (added by Chapter 25).
120. City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1130 (N.D. Cal. 1997); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1603, at 3 (May 22, 1997); see id. (indicating that the Tobacco Institute contends that Chapter 25 apparently "singles out...an unpopular industry and imposes special rules of liability").
121. City and County of San Francisco, 957 F. Supp. at 1134.
123. City and County of San Francisco, 957 F. Supp. at 1140.
Legislature is actually seeking to change existing law? While there is a trace of logic in this argument, it eventually fails because Chapter 25 itself states that it is declarative of existing law. More than likely, the Tobacco Institute’s real motive for this position is so that it can continue to argue for unqualified immunity.

D. Chapter 25’s Effect on California Welfare and Institutions Code Section 14124.71

California Welfare and Institutions Code section 14124.71 provides that the state or county may file an action against a third party for reimbursement of medical expenses when the third party is responsible for the injury to the person receiving medical assistance from the government agency. However, after the Richards decision, it is unclear whether a section 14124.71 action could be brought if section 1714.45 negates liability.

As previously discussed, the California Supreme Court in Richards construed section 1714.45 “to negate liability to voluntary users of tobacco for the mere manufacture or sale of these products.” Although Welfare and Institutions Code section 14124.71 creates a state cause of action, if the individual is injured by voluntarily using tobacco, the tobacco company might successfully argue that the immunity they have against suits by the voluntary smoker should be imputed onto the state. Understandably, the Richards decision left unclear whether an affirmative defense used pursuant to section 1714.45 would negate liability in an action brought under section 14124.71.

In order to clear this ambiguity, the California Legislature made specific reference to section 14124.71 in Chapter 25. According to Chapter 25, if a public entity brings an action under section 14124.71, the affirmative defense afforded by section 1714.45 to individuals who voluntarily smoke cannot be used as an affirmative defense against the public entities.

124. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1603, at 3 (May 22, 1997).
125. CAL. CIV. CODE § 1714.45(c) (West Supp. 1997).
126. CAL. WELF. & INST. CODE § 14124.71(a) (West 1991).
128. Id.
129. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1603, at 5-6 (Apr. 24, 1997).
130. Id.
131. CAL. CIV. CODE § 1714.45(d) (amended by Chapter 25).
132. Id.
E. Retroactivity and Legislative Intent

An early challenge to Florida’s Medicaid Third-Party Liability Act dealt with the issue of retroactivity. The tobacco industry argued that its due process rights had been violated because the statute went into effect retroactively without giving them proper notice. California sought to circumvent similar challenges by stating within Chapter 25 that it is merely a clarification of existing law rather than an amendment to it. Since deference is given to legislative intent, an enactment which merely clarifies or declares the original legislative intent does not raise issues of retroactivity.

The only way to completely avoid the retroactivity issue would be for Attorney General Dan Lungren to sue only for future damages. However, since Chapter 25 states that it is merely declaratory of a law that was passed in 1987, he would probably be heavily criticized for not trying to recover past damages as well. At least one California Court of Appeal has held that “an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; ... it simply states the law as it was all the time, and no question of retroactive application is involved.” Since “clarifying” is purportedly what Chapter 25 aims to accomplish, it should survive challenges to retroactivity.

IV. TOBACCO COMPANY LIABILITY TO PRIVATE INDIVIDUALS

The tobacco industry has enjoyed an unprecedented history of success as defendants in injury suits brought by consumers of their products. In an industry manufacturing consumer products that have proven to be extremely dangerous when

134. See Frohlich, supra note 11, at 455 (noting the tobacco industry’s challenge to the Florida Act based on the theory that “a retroactive application of the Florida Act would violate the due process guarantees of the United States Constitution by creating new duties without fair notice and an opportunity for the manufacturers to change their conduct”).
135. Id.
136. CAL. CIV. CODE § 1714.45(c) (West Supp. 1997).
137. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1603, at 4-5 (Apr. 24, 1997) (discussing the retroactivity issues that arise when the Legislature states that its provisions are merely declaratory of existing law).
139. Id.
141. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1603, at 4-5 (Apr. 24, 1997).
142. See Schemmel, supra note 1, at 666 (describing the tobacco companies’ record against plaintiffs as “perfect”).

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consumed, this history of success is more than a little unusual. Prior to the Cipollone decision in 1992, there had been no significant victory for a plaintiff in a personal injury action against a tobacco company. Today, their history of success in the courtroom seems almost certain to change.

A. A New Wave of Class Action Lawsuits

Because of the tobacco industry’s vast monetary resources and its willingness to litigate every lawsuit and not settle, injured individuals have begun to band together and file class action lawsuits. Since class action makes the financial burden of bringing a lawsuit easier to deal with for individuals, plaintiffs are not so worried about litigating against the seemingly endless financial power of tobacco companies. The most notable class action was certified in the Eastern District of Louisiana on February 17, 1995.

The prime assertion by plaintiffs’ attorneys in the Louisiana class action suit is that nicotine is an addictive drug and tobacco companies have long hidden that fact from the public. Riding on the wave of this new “class action trend,” on June 11, 1997, a San Diego law firm filed California’s first class action against tobacco companies. The suit, captioned Brown v. The American Tobacco Co., Inc., is suing for funds to help smokers quit and to monitor smokers for tobacco-related illness which may develop in the future. With the passage of Chapter 570, however, smokers may no longer need to use class action suits to file claims against tobacco companies.

143. See Frohlich, supra note 11, at 446 (listing a number of illnesses caused by smoking cigarettes).
144. See Schemmel, supra note 1, at 664 (indicating that courts base liability for harmful products, like cigarettes, on strict liability concepts); see also Riley, supra note 30, at 1110 (discussing the emergence of product liability to hold manufacturers of dangerous products responsible for the harms caused by their products).
146. Schemmel, supra note 1, at 666.
147. See infra notes 160-68 and accompanying text (analyzing Chapter 570’s impact on the current state of tobacco litigation in California).
148. See, e.g., Geyelin, supra note 19, at B1 (reporting the recent certification of a class action lawsuit against tobacco companies in New Orleans); Class Action Seeks Funds to Help and Monitor Smokers, S.F. DAILY J., June 11, 1997, at 7 (discussing the recent filing of a class action lawsuit against the tobacco companies in California).
149. See Curriden, supra note 28, at 20 (noting the tobacco industry’s willingness to fight all lawsuits no matter what the cost so that individual plaintiffs would never win their lawsuits).
150. See Geyelin, supra note 19, at B1 (calling the New Orleans class action suit “a landmark case”); Bill Voelker, Tobacco Class Action OK’d, NEW ORLEANS TIMES-PICAYUNE, Feb. 18, 1995, at A1 (noting the date of the judge’s certification).
152. Class Action Seeks Funds to Help and Monitor Smokers, supra note 148, at 7.
153. Id.
154. See infra notes 159-67 and accompanying text (describing the impact Chapter 570 will have on individual tort claims against the tobacco industry).
B. Tobacco Liability to Private Individuals Before Chapter 570

As discussed above, California Civil Code section 1714.45 affords tobacco companies immunity from suits by “voluntary and knowing smokers.” This provision came about as a result of the Comprehensive Tort Reform Package of 1987. Before that, the tobacco industry had no real immunity from suits by injured consumers, only to the extent that they could argue plaintiff’s assumed a known risk. When a California Court of Appeals interpreted section 1714.45, it found this code provision to be “poorly drafted” and held that it granted tobacco companies an unconditional immunity.

C. Chapter 570

Chapter 570 amends section 1714.45 by deleting “tobacco” from the illustrative list of common consumer products which are immune from products liability for normal use. In addition, Chapter 570 specifies that the immunity which is afforded to providers of sugar, castor oil, alcohol, and butter will no longer be extended to the tobacco industry. In other words, cigarette manufacturers will no longer be immune from product liability actions. The intent of Chapter 570’s authors is to restore products liability actions (as they pertain to the tobacco industry) to the way they were prior to the Comprehensive Tort Reform Package of 1987.

Chapter 570’s authors and other supporters believe the return of products liability principles to pre-“napkin deal” days to be necessary in light of “new evidence... showing tobacco companies may have deliberately manipulated the level of nicotine... in tobacco products so as to create and sustain addiction in smokers.” Supporters also point to the tobacco industry’s alleged concealment of information which confirms the harmful effects of tobacco use. One Chapter 570

156. See supra notes 72-83 and accompanying text (discussing the Comprehensive Tort Reform Package of 1987).
157. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1603, at 3-4 (June 19, 1997).
159. Compare CAL. CIV. CODE § 1714.45(a)(2) (West Supp. 1997) (listing tobacco as one of the commonly consumed consumer products that is considered “inherently dangerous”), with CAL. CIV. CODE § 1714.45(a)(2) (amended by Chapter 570) (removing “tobacco” from the illustrative list of inherently dangerous consumer products).
160. CAL. CIV. CODE § 1714.45(b) (amended by Chapter 570).
161. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1603, at 3-4 (June 19, 1997).
162. Id. at 4.
163. Id.; see supra note 18 and accompanying text (chronicling the fact that the tobacco industry knew that cigarettes were harmful to health yet actively concealed that fact from the public).
supporter and key participant in the Tort Liability Reform Package of 1987, the California Medical Association, claims that this amendment is necessary because legislators of the original provision never intended for California courts to interpret such a broad immunity into section 1714.45.\footnote{164}

Critics of Chapter 570 include not only the Tobacco Institute, but the California Chamber of Commerce which forwards a very convincing argument.\footnote{165} In a short public statement, the Chamber wrote: "We do not believe that individuals should be able to engage in inherently dangerous activities and then sue someone for the harm which results from that activity. The current law requires that individuals accept responsibility for the known consequences of their actions which we believe to be sound policy."\footnote{166}

The Chamber of Commerce’s argument is much more persuasive and commonsensical than the authors’ response, which states that elimination of the immunity is justified since they are leaving affirmative defenses, such as assumption of the risk, intact.\footnote{167} Therefore, argue the authors, let juries decide what percentage tobacco companies should be held responsible rather than grant them a “no-questions-asked” immunity. While in theory the authors’ argument is a good one, the authors fail to recognize the practical effect of the statute. When jurors are deciding between a ninety year-old “victim” of lung cancer who had been smoking since she was fourteen years-old and a tobacco industry representative, the tobacco industry appears much less sympathetic. Since jurors are allowed a great deal of subjectivity when apportioning fault in an assumption of the risk situation, there is the real danger that emotion will rule over reason; an unsound policy to forward.

VI. CONCLUSION

While Chapter 25 is needed at this time to clean up some of the confusion surrounding tobacco company immunity to public entities, Chapter 570 appears overzealous in allowing all injury cases to be litigated. At some point, smokers need to take responsibility for their own actions. It is dangerous to encourage a public policy which would allow an individual to choose to participate in an activity which he knows is harmful, and then come back, when injured, and sue the manufacturer of the product which enabled him to participate in the dangerous activity. Even though Chapter 570 preserves the assumption of the risk defense, the last thing cigarette manufacturers are going to want to do is stand up in front of a jury and compete for the court’s sympathy with a lone injured smoker. Even if the tobacco company lawyers proved without question that the smoker completely assumed the risk, a jury may still come in with verdicts against the tobacco company. In

\footnote{164. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1603, at 4 (June 19, 1997).}
\footnote{165. Id. at 3.}
\footnote{166. Id. at 4.}
\footnote{167. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 67, at 2.}

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addition, the potential for court backlog and frivolous lawsuits indicates that Chapter 570 is probably ill-conceived.

On the eve of California’s tobacco liability package, multi-state negotiators reached a historic settlement with tobacco companies for an estimated $300 billion. Even though tobacco companies wanted complete legal protection from private suits as a condition of the multi-billion dollar settlement, state attorneys general held their ground and did not agree to usurp private individuals’ causes of action. Only time will tell how long the tobacco industry can survive this latest legal assault.