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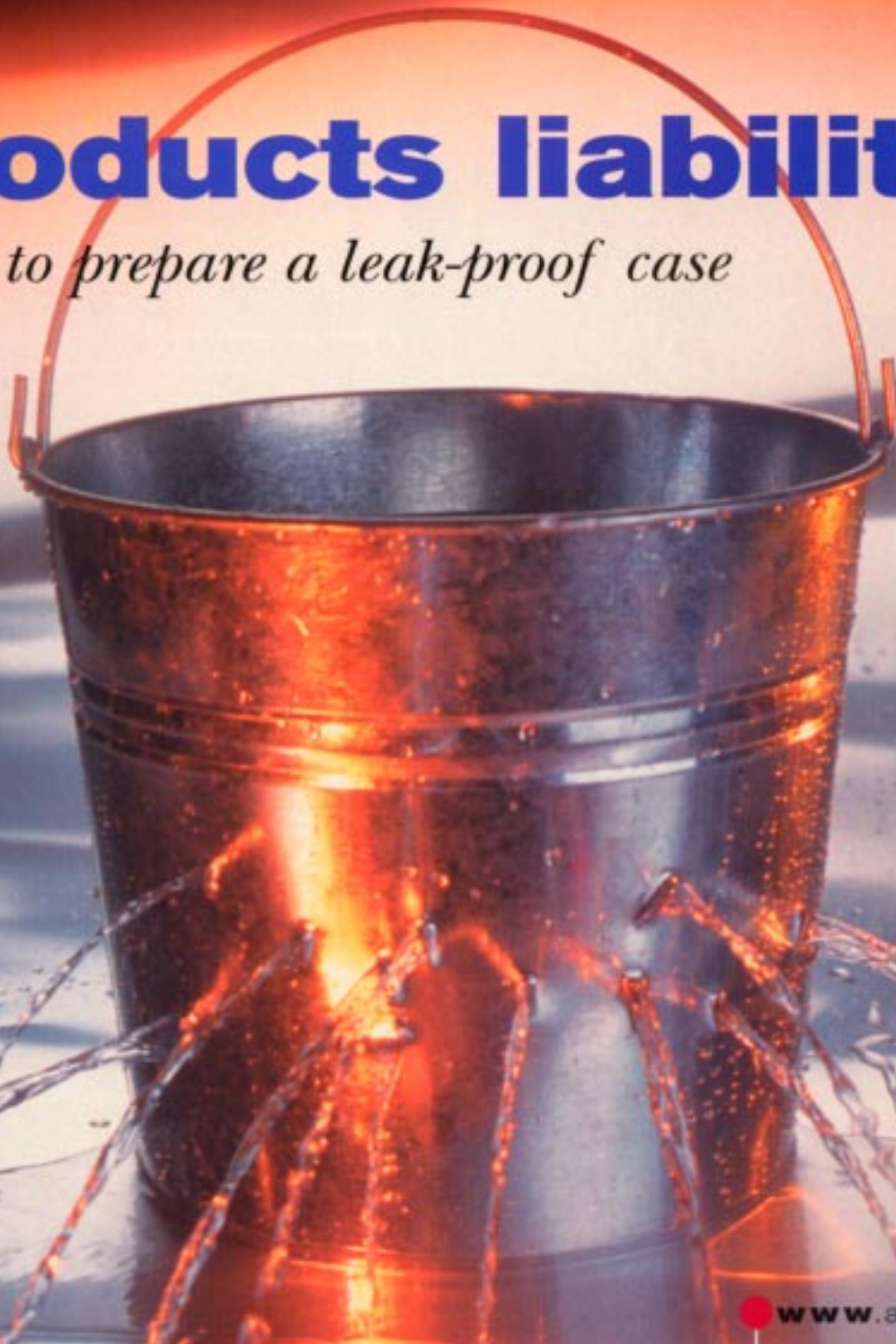
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Products liability

How to prepare a leak-proof case



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Elements of the cigarette-fire case

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The notion of a fire-safe cigarette has been smoldering for years in tobacco industry documents and government publications, but this alternate design has been slow to reach the market. Is it that the tobacco industry can't manufacture the less hazardous cigarettes, or that it won't?

Over the last decade, lawsuits and the media have brought to the public's attention the health dangers of cigarette smoking, as well as the tobacco industry's vulnerability to the pressures of litigation. Yet the industry has rarely been called to account for the tendency of discarded or abandoned cigarettes to cause fires that lead to injuries, deaths, and property damage.

Ongoing legislative efforts to regulate cigarettes' ignition propensity, public access to tobacco industry documents via the Internet,¹ and the marketing of cigarettes that are designed to burn more slowly have produced a wide array of information plaintiffs can use to recover for injuries and damages.

Although there are many scenarios for cigarette fires, the typical one occurs when a smoker falls asleep and a lit cigarette falls onto bedding or upholstered furniture. The cigarette may become wedged in a crevice or between cushions or bedding, the fabric smolders, and soon the bedding or furniture ignites, followed quickly by a total conflagration.

Often these fires occur in the early morning hours while potential victims are asleep. It is not uncommon for the smoker to be elderly, intoxicated, or extremely fatigued and therefore unaware of the fire. The resulting damage is often devastating.

Is a products liability case viable? Which plaintiffs have a reasonable chance of success? When determining the viability of a claim, consider the availability of adequate evidence. You may strongly suspect a smoldering cigarette, but because fire is likely to destroy the cigarette, there may be inadequate scientific bases for a reliable cause-and-origin conclusion. For the same reason, you may not be able to identify the cigarette manufacturer. Therefore, you should focus on the fundamental principles of case selection early:

- Evaluate the client's status in relation to the cigarette and the fire. All else being equal, smokers make less sympathetic plaintiffs.

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■ Measure the strength of the investigating fire department's cause-and-origin findings and your experts' ability to concur with and bolster those findings.

■ Identify the cigarette manufacturer through analysis of any filter debris and testimony from the smoker's relatives, acquaintances, coworkers, and neighborhood retailers regarding his or her preferred brand.

Pay careful attention to the time frame in which the fire occurred. There is only a small window of time during which the cigarette can be dropped, smolder under low but adequate oxygenation, combust, and injure the smoker and others.

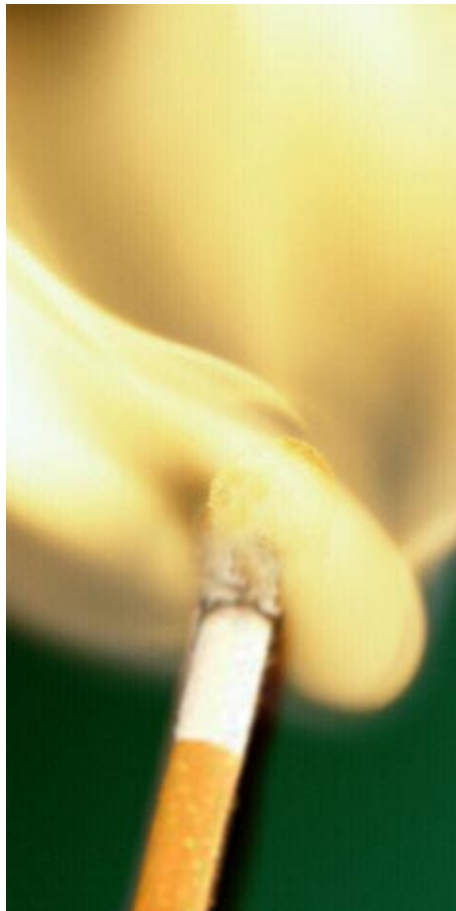
Besides the smoker, many potential victims can be exposed to injury, death, and damage from smoldering-cigarette fires. Innocent family members in a home, strangers in adjoining apartments or hotel rooms, firefighters attempting rescues, and property owners and their subrogated insurance carriers are all potential plaintiffs. Many of these victims have more jury appeal than the smoker, or even the smoker's family. Because the tobacco defendant in a products liability action will undoubtedly blame the smoker for allowing the fire to start by improperly discarding a lit cigarette, a plaintiff wholly disassociated with the fire's source is in a better position to seek recovery.

Once you have satisfactorily evaluated these factors and decided to accept the case, you must be prepared to spend substantial time and money developing the case to succeed. Above all, plan an efficient strategy that adequately anticipates aggressive defense tactics and lets you assemble strong evidence in support of each element of the claim.

Where to begin

The logical starting point is to learn as much as possible about the history of safer cigarettes. This will alert you to obstacles you must clear to have the greatest chance of success. It will also help you develop a list of potential witnesses and consultants for pretrial discovery, if not for trial testimony.

Fire service groups and organizations—fire departments, volunteer



firefighters, and fraternal orders of firefighters—have warned the cigarette industry and lawmakers for decades.² Legislative materials from efforts to regulate cigarettes and their potential to cause fires chronicle the fire risk associated with cigarettes, potential alternative cigarette designs, and the industry's resistance to the need for change. Federal and state

legislators have pushed hard to require performance standards for cigarettes, aimed at lessening their ignition propensity.³

Many government publications and records from those efforts can provide credible evidence of the cigarette-fire problem.⁴ For example, cigarette companies' internal memos attached to the congressional testimonial record show that some manufacturers were capable of making a safer cigarette as early as the 1970s but were questioning their legal liability should a safer cigarette be placed on the market.⁵ The record reveals the tobacco industry's reasons for not marketing safer cigarettes on a wide scale.⁶ They also document the industry's efforts to avoid implementing a standard test for cigarettes' fire safety.⁷

A 1987 report by the U.S. National Bureau of Standards revealed that some cigarettes already on the market have characteristics that make them less fire-prone, such as reduced tobacco-packing density, smaller circumference, less porous paper, shorter length, and the absence of a filter tip and a burn additive in the paper. In addition, five patented modifications show significantly reduced ignition propensity.⁸ The report also states that less fire-prone cigarettes have been technologically feasible to manufacture since at least 1987.⁹

Finally, an article published by the National Institute of Standards and Technology (formerly the National Bureau of Standards) states that by the year 2000, the major U.S. cigarette manufacturers had successfully test-marketed a self-extinguishing cigarette that was less likely to

start fires.¹⁰ The article also reported scientifically acceptable tests to compare various cigarettes' ignition propensities. These are likely to be valuable resources for plaintiff experts to test whether an alternatively designed cigarette would have lessened the likelihood of a fire.¹¹

These publications and records, when supplemented with adequate

assigned to the defendant in your case.

Do not limit your search to patent materials for less fire-prone cigarette designs; also search the patent literature for designs related to cigarette paper, cigarette-paper additives, and cigarette-making machines. These patents will often claim and illustrate how the invention can produce a less ignition-

■ The tobacco paper, or wrapper—the thin white or opaque paper made from cellulose fibers—that contains the tobacco column.

Manufacturers can change the design of any of these elements to lessen the risk of fire if a cigarette is mishandled or dropped. A cigarette's ignition propensity can be reduced if it is designed to burn its full length uninterrupted, with less heat migration from the coal or tip of the cigarette to the surrounding environment. Cigarettes can also be designed to self-extinguish when they sit idle, so if one is discarded or dropped, there will be no heat to migrate into surrounding combustible materials.

The tobacco industry will contend that any redesigned cigarette is not commercially feasible unless it smokes, tastes, and feels like a traditional cigarette; does not increase the known health risks associated with cigarette smoking; and can be manufactured at the rate required to meet production needs, using available equipment. This is where liability will be hotly contested.

Strict liability and negligent design. To establish that a conventional cigarette is defective because it is unreasonably dangerous, you must establish that the danger of fire is not simply inherent in the product.

The defendant will argue that it is common knowledge that cigarettes are hot and that they will cause fires if mishandled or disposed of improperly. Often, the position that cigarettes are inherently dangerous will be couched in a motion for summary judgment or another dispositive motion based on Comment i, §402A of the *Restatement (Second) of Torts* or state statutes adopting the

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discovery from the defendant manufacturer, form a sturdy framework for effective proof against the tobacco makers.

Another resource is the U.S. Patent and Trademark Office (USPTO), which maintains a searchable database of existing and expired patents, available at low cost and easily accessible online.¹² You can search patents and patent applications for alternative cigarette designs and request a copy of relevant patents' application files, which often will provide important evidence to support your allegations regarding the availability of alternative designs. Other countries' patent databases can also be beneficial and should be included in any analysis of cigarette design and manufacturing.¹³

Patent applications for alternative designs will help you prove that safer designs are scientifically achievable. This evidence is even better if the patent application was granted or

prone product that can be manufactured at commercial speeds or assembled using conventional technology. With this evidence, you can rebut later defense arguments that the alternative design you propose lacks commercial feasibility because of production requirements.

Establish liability

Cigarette components. A conventional cigarette has three parts:

■ A column, or "rod," of tobacco, packed at varying densities. The column also includes additives designed to form a slow-burning coal to produce smoke, which delivers nicotine to the smoker.

■ A filter attached to the tobacco column, through which the smoke is drawn into the smoker's mouth. Manufacturers can use different filter designs to alter the strength of the chemicals and compounds in the smoke, the flavor, and other subjective characteristics of the cigarette.

Restatement or a similar approach.¹⁴

Comment i clearly reflects the intent of the *Restatement* committee to exclude from the definition of “unreasonably dangerous” products whose danger is commonly known to the ordinary consumer, possessing ordinary knowledge common to the community.¹⁵ Dangers beyond what would be contemplated by the ordinary consumer, however, can form the basis of a defect claim.

Unexpected danger

To establish a basis for a defect, you must present evidence that the cigarette’s design and assembly, and its flammable contents, create an unexpected danger. Once compounds or chemicals that do not occur naturally in tobacco or paper wrappers are added, and the design of the cigarette fosters a sustained, yet artificially engineered, burn rate, then you can claim that the manufacturer adulterated the tobacco or paper, making it dangerous beyond what the ordinary consumer would expect.¹⁶

During the paper-making process, tobacco manufacturers add chemicals and compounds—such as sodium citrate and potassium citrate—that enable cigarettes’ sustained burning.¹⁷ These chemicals must be added to the paper, manufacturers’ attorneys claim, to ensure that it burns uniformly with an aesthetically pleasing appearance, and that the cigarette maintains a steady, uninterrupted burning coal from the tip of the rod to the filter. Thus, the technology employed to sustain a burning cigarette during the active and passive phases of smoking transforms it into a slow-smoldering “fuse.” Research has shown that elimination of citrate

additives in some cases reduced the likelihood of ignitions.¹⁸

When the cigarette contacts an environment containing a proper mix of oxygen and fuel, the chemical burn promoters in the cigarette wrapper can allow the cigarette to keep burning and eventually create a smolder in a flammable item nearby. This process typically takes from 30 minutes to two hours, depending on such variables as the amount of oxygen available, nearby fuel sources, drafts or wind currents, and the amount of tobacco left when the cigarette contacts an item like a seat cushion.

Most consumers are aware of neither the existence nor the effect of additives that enhance a cigarette’s burn characteristics. This should form the basis for satisfying the elemental requirement of “unreasonable danger.” The additives are an adulteration of an otherwise common, naturally occurring product that could be made safer by either modifying the chemical additive or incorporating other safety measures designed to lessen the risk of a smoldering fire.

Feasible alternative design

To establish a cause of action for negligent design or strict liability based on design defects, take care to demonstrate a technologically, economically, and commercially feasible alternative design that would have lessened your client’s risk of injury, death, or property damage. Even if your jurisdiction does not require you to provide proof of such a design, offering it will enhance your client’s chance of obtaining a favorable verdict from the jury.

Traditionally, proof of alternative feasible designs focused on cigarette-design parameters described in another 1987 U.S. National Bureau of Standards report.¹⁹ Some of the designs were used for cigarettes available in the marketplace. The difficulty is proving that these less ignition-prone designs would have reduced the risk of a smoldering fire in your client’s case.

Fortunately, the burden of assembling this evidence has eased; in 2000, Philip Morris USA, Inc., introduced a less porous paper, PaperSelect, in its Merit Ultra Light 100 cigarettes. This design incorporates bands of the paper around the rod of the cigarette to serve as “speed bumps” as the tobacco burns.²⁰ If the cigarette is not being puffed when the burning coal reaches a band, the cigarette will extinguish itself.

Before PaperSelect, plaintiffs attempting to establish the existence of a feasible alternative design had to rely on patented designs that had never been commercially produced, or evidence of commercially marketed cigarettes that incorporated qualities such as a reduced paper porosity, smaller circumference, or increased packing density. In addition to the difficulty in establishing causation, these alternative designs left open the issue of whether the modified cigarette was actually commercially feasible across all product lines. Because the flavor and smoking characteristics of the commercially marketed cigarettes containing one or more of these characteristics were different, the tobacco industry has claimed that adopting these alternative designs in all cigarettes would create products that consumers would not like and would not buy.

However, with the introduction of the new “banded” paper design, only the characteristics of the paper wrapper have been altered. If consumers accept banded-paper cigarettes, and their toxicity is within the range of traditional cigarettes, then a technologically, economically, and commercially feasible alternative design exists.

To show that the banded-paper alternative design would have reduced the risk of fire in your client’s case, you can use National Institute of Standards and Technology Technical Note 1436, which addresses the ignition propensity of banded cigarettes compared to that of conventional cigarettes.²¹ The institute has tested the banded product, showing it is less likely to ignite. More important, it sets forth test methodologies that are scientifically valid and reproducible; plaintiff experts could test to compare the cigarette brand at issue and the banded alternative design.

Of course, there are some environments in which any cigarette, regardless of design, can cause a fire. The banded-paper cigarette simply lessens that risk because it self-extinguishes. Be sure to thoroughly examine the circumstances and determine whether the alternative design would have lessened the risk of fire before you invest substantial time and money or initiate litigation.

The prosecution of a cigarette-fire case requires that you overcome several obstacles. But as more evidence of the availability of alternative designs is uncovered, the obstacles will no longer appear insurmountable. Before you file suit, make sure you are confident that

your case is based on sound factual and legal footing, because every element of your case will face multiple challenges in court. ■

Notes

1. The Centers for Disease Control and Prevention Web site contains links to searchable databases of major tobacco companies’ document archives, as well as the Minnesota Tobacco Document Depository. Available at www.cdc.gov/tobacco/industrydocs/index.htm.

2. *The Fire Safe Cigarette Act of 1994: Hearings on H.R. 3885 Before the Subcomm. on Commerce,*

Hearings on H.R. 3885, supra note 2, at 75-78 (memo of Henry B. Merritt, Principal Engineer, Philip Morris, Inc.).

6. *Id.* at 92-165 (joint statement of Charles Whitley, Senior Consultant, The Tobacco Institute, and David B. Townsend, Principal Scientist, R.J. Reynolds Tobacco Co.; statement of American Tobacco Co.).

7. *Fire Safe Cigarette Safety Act of 1984: Hearings on H.R. 3885, supra note 2, at 311-26* (statement of Philip Morris USA and R.J. Reynolds Tobacco Co.).

8. NAT’L BUREAU OF STANDARDS, *supra* note 4, at 5-9.

9. *Id.* at 15.

10. RICHARD G. GANN ET AL., NAT’L INST. STANDARDS & TECH., RELATIVE

In a new, less porous paper, bands serve as ‘speed bumps’ as the tobacco burns. If it is not being puffed, the cigarette extinguishes itself.

Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce, 103d Cong. 294 (1994) (statement of John R. Hall Jr., Assistant Vice President, Fire Analysis and Research, National Fire Protection Association), available at 1994 WL 14185938 (last visited Sept. 26, 2003).

3. The first successful, modern-era bills to attempt a cigarette fire-safety standard were passed in 1984 and 1990, and required a feasibility study. See Cigarette Safety Act of 1984, Pub. L. No. 98-567, 98 Stat. 2925 (codified at 15 U.S.C. §2054 note) and Fire Safe Cigarette Act of 1990, Pub. L. No. 101-352, 104 Stat. 405 (codified at 15 U.S.C. §2054 note). Repeated attempts in 1994, 1998, 1999, and 2002 have been unsuccessful. However, New York passed legislation mandating safer cigarettes, effective Jan. 1, 2003 (N.Y. Exec. Law §156-c (McKinney 2003)).

4. NAT’L BUREAU OF STANDARDS, TOWARD A LESS FIRE-PRONE CIGARETTE, FINAL REPORT OF THE TECHNICAL STUDY GROUP ON CIGARETTE AND LITTLE CIGAR SAFETY, CIGARETTE SAFETY ACT OF 1984 (1987), available at www.bfirl.nist.gov/pdf/TSG_Final_Report.pdf (last visited Sept. 26, 2003); see also related Rep. Nos. 1-7; U.S. CONSUMER PROD. SAFETY COMM’N, OVERVIEW: PRACTICABILITY OF DEVELOPING A PERFORMANCE STANDARD TO REDUCE CIGARETTE IGNITION PROPENSITY, REP. NO. 1, TECHNICAL ADVISORY GROUP, FIRE SAFE CIGARETTE ACT OF 1990 (1993), available at www.cpsc.gov/LIBRARY/FOIA/Foia00/osl_propens.pdf (last visited Sept. 26, 2003); see also *Fire Safe Cigarette Act of 1994: Hearings on H.R. 3885, supra note 2, at 1-355.*

5. *Fire Safe Cigarette Safety Act of 1984: Hearings on H.R. 3885, supra note 2, at 75-78* (memo of Henry B. Merritt, Principal Engineer, Philip Morris, Inc.).

IGNITION PROPENSITY OF TEST MARKET CIGARETTES, TECHNICAL NOTE 1436, at 2-3, 17 (2001), available at www.fire.nist.gov/bfirlpubs/fire01/PDF/f01007.pdf (last visited Sept. 26, 2003).

11. *Id.* at 3-17.

12. www.uspto.gov.

13. See, e.g., www.patent.gov.uk.

14. See, e.g., CAL. CIV. CODE §1714.45 (West 2003); TEX. CIV. PRAC. & REM. CODE ANN. §82.004 (Vernon 2003).

15. RESTATEMENT (SECOND) OF TORTS §402A, cmt. i (1965).

16. See, e.g., *Thomas v. R.J. Reynolds Tobacco Co.*, 11 F. Supp. 2d 850 (S.D. Miss. 1998); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997); see also *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455 (D.D.C. 1997); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995). But see *Sacks v. Philip Morris, Inc.*, No. Civ. A. WMN-95-1840, 1996 WL 780311 (D. Md. Sept. 19, 1996), *aff’d*, 139 F.3d 892 (4th Cir. 1998).

17. NAT’L BUREAU OF STANDARDS, *supra* note 4, at 5-8.

18. *Id.* at 8.

19. ROSALIE T. RUEGG ET AL., NAT’L BUREAU OF STANDARDS, IMPROVING THE FIRE SAFETY OF CIGARETTES: AN ECONOMIC IMPACT ANALYSIS, REP. NO. 4, TECHNICAL STUDY GROUP ON CIGARETTE AND LITTLE CIGAR SAFETY, CIGARETTE SAFETY ACT OF 1984 (1987).

20. Philip Morris USA Press Room, *Philip Morris USA to Launch New Cigarette Paper Nationwide on All Merit Cigarettes* (July 12, 2000), available at www.philipmorrisusa.com (last visited Sept. 26, 2003).

21. GANN ET AL., *supra* note 10, at 2-4 n.11.