IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LIGGETT GROUP INC., et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 00C-01-207 HDR
AFFILIATED FM INSURANCE COMPANY, et al.,	)	
Defendants.	)	

Submitted: May 21, 2001
Decided: September 12, 2001

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O P I N I O N

UPON PLAINTIFF LIGGETT GROUP INC.'S AND PLAINTIFF BROOKE GROUP HOLDING INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST NATIONAL UNION FIRE INSURANCE COMPANY ON THE DUTY TO DEFEND PLAINTIFFS WITH RESPECT TO SELECTED UNDERLYING ACTIONS DENIED
PARTIAL SUMMARY JUDGMENT IS GRANTED IN FAVOR OF DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY

RIDGELY, President Judge

Plaintiffs, Liggett Group Inc. and Brooke Group Holding Inc., have filed this civil action against Affiliated FM Insurance Company and thirty-two other insurance companies[1] to determine Plaintiffs' rights and Defendants' obligations under more than one-hundred liability insurance policies sold to the plaintiffs (and/or their parent companies) by the thirty-three defendants from 1970 until 2000. Plaintiffs seek both defense and indemnification coverage for underlying claims that have arisen in connection with tobacco health-related lawsuits filed against Plaintiffs throughout the United States.[2]

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[1] The defendants are: Affiliated FM Insurance Company, Ace Property and Casualty Insurance Company, A.I.U. Insurance Company, Birmingham Fire Insurance Company of Pennsylvania, Commercial Union Insurance Company, Continental Casualty Company, Continental Insurance Company, Federal Insurance Company, First State Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Insurance Company of the Midwest, Home Indemnity Company, The Home Insurance Company, International Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., New England Insurance, Northbrook Excess and Surplus Insurance Company, Old Republic Insurance Company, Pacific Insurance Company, Ltd., Reliance Insurance Company of Illinois, Royal Indemnity Company, Royal Insurance Company of America, Seaboard Surety Insurance Company, St. Paul Mercury Insurance Company, Transcontinental Insurance Company, Transportation Insurance Company, Travelers Casualty and Surety Company, Twin City Fire Insurance Company, Vigilant Insurance Company, Westport Insurance Company, and Zurich Insurance Company.

[2] Proceedings on these complaints are in various stages ranging from discovery to judgment. The Court takes judicial notice, for example, that in Engle v. R.J. Reynolds Tobacco Co., et al., No. 94-08273CA (20) (Circuit Court, 11th Judicial Circuit, Dade County), a Florida Circuit Court has entered a final judgment against Liggett jointly and severally with other tobacco companies for $12.7 million dollars in compensatory damages in favor of certain representative plaintiffs. Punitive damages were directly assessed against the defendants in the total amount of $145 billion dollars. Liggett's share of the punitive damages is $790

Liggett is a Delaware corporation that manufacturers in North Carolina tobacco products which it distributes throughout the United States. Plaintiffs Liggett and Brooke (collectively "Liggett") have been sued in more than one-thousand cases filed by plaintiffs seeking to hold Liggett liable for a broad range of personal injuries and property damage. The underlying complaints assert a variety of legal theories including negligence, negligent design defect, negligent failure to warn, negligent misrepresentation, intentional infliction of emotional distress, conspiracy, and concerted action.

Defendants are thirty-three insurance companies that sold Plaintiffs (or their parent companies) commercial general liability insurance for thirty years, from 1970 until 2000.[3] Defendants' deny coverage in this case on various grounds including late notice, expected or intended harm, known loss,

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million dollars. Final Judgment And Amended Omnibus Order (Nov. 6, 2000).

[3] During this period Liggett's operations have included not only tobacco but also pet food, spirits and wines, soft drinks, sporting goods and other products. Excerpt from 1981 Liggett Form 10-K, Vol. I of Certain Defendants' Appendix (Docket No. 641) at 1-4. At this time its principal business is tobacco products. It appears to be undisputed in this case that for a period of years Liggett maintained two separate lines of liability insurance for its operations. The first line was CGL insurance at issue in this case with exclusions of coverage for smoking and health claims. Defendants' Joint Appendix (Docket No. 682) at 2813-16. The second line was "tobacco health insurance" which provided coverage for smoking-and-health claims on a claims-made, indemnity only basis. Federal Appendix (Docket No. 748) at 670-807. Under this claims-made insurance program, Liggett reserved complete control over the defense of these claims. Federal Appendix, supra, at 405, 494, 584, 672, 676. However, it is unnecessary to consider this extrinsic evidence of other insurance procured by Liggett to decide the present motions before the Court.

misrepresentation, fraud, rescission, reformation, and the terms of specific exclusions within the policies.

The Court has ordered Liggett and Defendants to identify up to twenty representative complaints each for purposes of motions for summary judgment on the insurers' duty to defend Liggett against the underlying complaints.[4] Liggett has selected twenty underlying complaints for which it now moves for partial summary judgment on that duty.[5] Defendants have moved for partial summary judgment on a different set of twenty complaints.[6] A description of these complaints is attached as an Appendix.

Liggett and certain Defendants have filed nine motions for partial summary judgment on the duty to defend. Additional Defendants have joined in four of these motions.[7] In this opinion I address Liggett's motion for partial summary judgment against National Union Fire Insurance Company of Pittsburgh, Pa. I conclude that National Union is entitled to partial summary judgment because the tobacco exclusion precludes coverage.

I. POLICY COVERAGE AND EXCLUSIONS

At issue here is the National Union policy which was sold to

[4] Docket No. 638.

[5] Docket No. 694.

[6] Docket No. 682.

[7] Thirty CD-ROMs containing the briefs and appendices on these motions and joinders have been filed by the parties pursuant to Superior Court Civil Rule 107(h). The Court expresses its appreciation to the parties for using this technology to concisely present their respective positions, to facilitate review of citations, and to reduce the time needed for the Court to decide the pending motions in this complex litigation.

GrandMet USA, Inc. (Liggett's corporate parent from January 1983 until October 1986) for the period October 1, 1985 to October 1, 1986. Liggett is a named insured under the policy as a subsidiary of GrandMet USA, Inc. The policy provides coverage for bodily injury, property damage, and personal injury. The policy also provides defense coverage, or litigation insurance, for each type of coverage.

A. Coverage for Bodily Injury and Property Damage

The policy provides that:

> [National Union] will pay on behalf of [Liggett] all sums which [Liggett] shall become legally obligated to pay as damages because of
>
> **A. bodily injury** or
>
> **B. property damage**
>
> to which this insurance applies, caused by an occurrence, and [National Union] shall have the right and duty to defend any suit against [Liggett] seeking damages on account of such **bodily injury** or **property damage**, even if any of the allegations of the suit are groundless, false or fraudulent . . . .

"Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." "Property damage" is defined as "physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom." The policy defines "occurrence" to mean "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage

neither expected nor intended from the standpoint of the insured."

B. Coverage for Personal Injury Claims

The policy also provides that:

> [National Union] will pay on behalf of [Liggett] all sums which [Liggett] shall become legally obligated to pay as damages because of injury (herein called "personal injury") sustained by any person or organization and arising out of one or more of the following offenses committed in the conduct of [Liggett's] business:
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> Group A – false arrest, detention or imprisonment or malicious prosecution;
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> Group B – the publication or utterance of a libel or slander or of other defamatory or disparaging material or a publication or utterance in violation of an individual's right of privacy . . .
>
> Group C – wrongful entry or eviction, or other invasion of the right of private occupancy;
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> if such offense is committed during the policy period . . . [and National Union] shall have the right and duty to defend any suit against [Liggett] seeking damages on account of such **personal injury** even if any of the allegations of the suit are groundless, false or fraudulent . . . (emphasis in original).

The National Union policy expands personal injury coverage to include "injury to the feelings or reputation of any person."[8]

[8] The parties dispute whether the structure and wording of Endorsement No. 18 establishes that the "injury to the feelings or reputation of any person" is an enumerated offense or, on the other hand, is an injury that is required to arise out of an enumerated offense. However, because there is no personal injury coverage in this case for mental injuries or anguish arising from excluded "bodily injury," "sickness," or "disease," the Court need

C. The Tobacco Exclusion

The National Union policy also contains a clause that limits coverage, entitled "Tobacco Products Health Hazard," (hereinafter "tobacco exclusion") which states as follows:

> It is agreed that such insurance as is afforded by the Products Hazard or the Contractual Liability Coverage Part shall not apply to Health Hazard (defined as "bodily injury, sickness, disease or death of any person allegedly arising out of the use over a period of days, weeks, months or longer of any tobacco product manufactured, sold, handled or distributed by the Names Insured").
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> All other policy terms and conditions shall apply with respect to tobacco products sold, handled or distributed by the Named Insured.

II. CHOICE OF LAW

This Court has previously held that the rights and the duties of the parties with respect to the policies at issue in this case shall be determined by the law of North Carolina because that jurisdiction has the "most significant relationship" to the transactions and the parties.[9]

III. THE DUTY TO DEFEND

The duty to defend and the duty to indemnify are separate obligations assumed by an insurer under an insurance policy.[10] It is often said that an insurer's duty to defend is broader than

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not resolve that issue.

[9] Liggett Group Inc. v. Affiliated FM Ins. Co., Del. Super., C.A. No. 00C-01-207, Ridgely, P.J. (May 15, 2001) (choice of law opinion).

[10] St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co., M.D.N.C., 724 F. Supp. 1173, 1177 (1989).

its duty to indemnify.[11] This Court has described this obligation under an insurance policy as "litigation insurance."[12] The duty to defend is broader than the duty to indemnify because it is not contingent upon the success of the underlying claim. The insurer typically promises to defend the insured in the event a particular type claim is filed against the insured. As a result, the duty to defend is ordinarily measured by the facts as alleged in the initial pleadings.[13] The insurer also promises to indemnify the insured for the claim itself. Consequently, the duty to indemnify is measured by the facts ultimately determined on the underlying claim at trial.[14] Thus, "the duty to defend arises whenever there is a potential or possible liability to pay based on the allegations in the complaint and is not dependent on the probable liability to pay based on the facts ascertained through trial."[15]

In order to determine under North Carolina law if an insurer owes its insured a defense, the Court must conduct a "comparison test."[16] The policy provisions must be analyzed and then compared

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[11] Id.

[12] Schreckengast v. State Farm Fire & Cas. Co., Del. Super., No. 97C-06-015, 1998 WL 731566 at *1 n.1, Ridgely, P.J. (May 18, 1998).

[13] Waste Management of Carolinas, Inc. v. Peerless Ins. Co., N.C. Supr., 340 S.E.2d 374, 377 (1986).

[14] Id.

[15] St. Paul Fire at 1177.

[16] St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co., 4th Cir., 919 F.2d 235, 239 (1990) (applying North Carolina law).

with the events as alleged in the underlying complaint.[17] More specifically, "the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded."[18] If "the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable."[19] Every allegation of the complaint does not need to fall within the coverage of the policy to invoke the duty to defend as "[a]llegations of facts that describe a hybrid of covered and excluded events or pleadings that disclose a mere possibility that the insured is liable (and that the potential liability is covered) suffice to impose a duty to defend upon the insurer."[20] Also, "[a]ny doubt as to coverage is to be resolved in favor of the insured."[21] Conversely, "if the facts [as alleged] are not even arguably covered by the policy, then the insurer has no duty to defend."[22]

The Supreme Court of North Carolina has stated that "[a]n insurer's duty to defend is ordinarily measured by the facts as

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[17] Id.

[18] Id.

[19] Id.

[20] Waste Management at 377.

[21] Id. at 378.

[22] Id. Nor would there be a duty to indemnify since the duty to defend is broader than the duty to indemnify.

alleged in the pleadings."[23] Thus, the Court must examine the facts as alleged and not rely on conjecture or generalize about the "essence" of the underlying action. Even so, the Court will not accept an unreasonable interpretation of the allegations, but will adopt a fair construction of the allegations in light of their context and purpose in the underlying complaints.[24]

IV. THE LEGAL STANDARD FOR SUMMARY JUDGMENT

Pursuant to Superior Court Civil Rule 56(c), the movant on summary judgment bears the burden of demonstrating that "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law."[25] A motion for summary judgment requires the Court to examine the record to determine whether the evidence is so one-sided that one party should prevail as a matter of law.[26]

The Court will consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits in making its determination.[27] If, after viewing the record in the light most favorable to the nonmoving party, the Court finds no genuine

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[23] Id. at 377.

[24] Eon Labs Mfg., Inc. v. Reliance Ins. Co., Del. Supr., 756 A.2d 889, 893 (2000) (adopting a "fair reading" of the underlying complaints); Continental Cas. Co. v. Alexis I. duPont School Dist., Del. Supr., 317 A.2d 101, 105 (1974) (reading each underlying complaint "as a whole.")

[25] Del. Super. Ct. Civ. R. 56(c).

[26] Burkhart v. Davies, Del. Supr., 602 A.2d 56, 59 (1991), cert. denied, 112 S. Ct. 1946 (1992).

[27] Del. Super. Ct. Civ. R. 56(c).

issues of material fact, summary judgment is appropriate.[28] However, summary judgment may not be granted when the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[29]

The moving party initially bears the burden of showing a genuine material issue of fact does not exist.[30] If a properly supported motion for summary judgment shows no genuine issue of material fact, the burden shifts to the nonmoving party to prove material issues of fact exist.[31] To carry its burden, the nonmovant must produce specific facts which would sustain a verdict in its favor.[32] The nonmovant cannot create a genuine issue for trial through bare assertions or conclusory allegations.[33] The principles governing a motion for summary judgment do not change when the issue being decided is an

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[28]Hammond v. Colt Ind. Operating Corp., Del. Super., 565 A.2d 558, 560 (1989).

[29]Wilson v. Triangle Oil Co., Del. Super., 566 A.2d 1016, 1018 (1989).

[30]Moore v. Sizemore, Del. Supr., 405 A.2d 679, 680 (1979).

[31]Id. at 681.

[32]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986) (Because the Federal Rules of Civil Procedure and the Delaware Superior Court Civil Rules are similar, construction of the Federal Rules is persuasive concerning the construction of Superior Court Rules. Hoffman v. Cohen, Del. Supr., 538 A.2d 1096, 1097-98 (1988)).

[33]Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Martin v. Nealis Motors, Inc., Del. Supr., 247 A.2d 831, 833 (1968).

insurer's duty to defend.[34]

Finally, the Court may award summary judgment in favor of a nonmoving party if it finds that the material facts are undisputed and that the nonmoving party is entitled to judgment as a matter of law.[35]

V. DISCUSSION

A. Contentions of the Parties

Liggett contends that allegations in twelve complaints all raise the potential for insurance coverage and, therefore, impose a duty to defend on the insurers. Liggett contends that, by its terms, the tobacco exclusion does not apply to: (1) personal injury involving "any injury to the feelings of any person;" (2) bodily injury claims not specifically alleging the use of a tobacco product manufactured, sold, handled or distributed by Liggett; (3) allegations of property damage; or (4) claims outside of the "products hazard" such as negligent failure to warn. Liggett asserts that there are numerous allegations of injury that fit within the four categories above and fall outside the language of the exclusion. National Union does not dispute that the allegations in the underlying complaints fall within the original grant of coverage in the policy. However, National

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[34] See, e.g., Steadfast Ins. Co. v. Eon Labs Mfg., Inc., Del. Super., C.A. No. 98C-01-058, Del Pesco, J. (June 1, 1999) (reciting the usual standard for a motion for summary judgment when deciding an insurer's duty to defend).

[35] Stroud v. Grace, Del. Supr., 606 A.2d 75 (1992); Bank of Delaware v. Claymont Fire Co., Del. Supr., 528 A.2d 1196 (1987); 10A Charles Alan Wright et al., Federal Practice and Procedure § 2720 at 347-352 (3d ed. 1998).

Union contends that the tobacco exclusion bars coverage for these actions. Thus, the controversy here, at least initially, centers on the interpretation and application of the tobacco exclusion.

B. North Carolina's Rules of Contract Interpretation

Under North Carolina law, questions of contract interpretation are questions of law for the Court which are governed by well-established rules of construction.[36] As with all contracts, the goal of construction is to arrive at the intent of the parties.[37] If the terms of the contract are plain and unambiguous, the intention of the parties must be derived from the meaning expressed by those terms.[38] The Court must determine the meaning of the terms of the contract "without resort to extrinsic evidence to 'aid' in its interpretation."[39] North Carolina courts have long recognized that the "fundamental right of freedom of contract" requires courts "to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used."[40] However, if the language in the contract is reasonably susceptible to more than

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[36]North Carolina Farm Bureau Mut. Ins. Co., N.C. Ct. App., 530 S.E.2d 93, 95 (2000).

[37]C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., N.C. Supr., 388 S.E.2d 557, 563 (1990).

[38]Cherokee Ins. Co. v. Aetna Cas. & Sur. Co., N.C. Ct. App., 264 S.E.2d 913, 916 (1980) (citing Gould Morris Elec. Co. v. Atlantic Fire Ins. Co., N.C. Supr., 50 S.E.2d 295, 297 (1948)).

[39]Employer's Reinsurance Corp. v. Teague, 4th Cir., 919 F.2d 235 (1990) (citing Metric Constructors, Inc. v. Indus. Risk Insurers, N.C. Supr., 401 S.E.2d 126, 128 (1991)).

[40]Fidelity Bankers Life Ins. Co. v. Dortch, N.C. Supr., 348

one interpretation, the ambiguous term will be construed against the insurance company as the drafter of the contract and in favor of the insured and coverage.[41]

Furthermore, the policy "must be examined as a whole."[42] The construction of the policy "must not be strained, arbitrary, unnatural, or forced, but rather it should be reasonable, logical, and practical, having reference to the risks and purposes of the entire contract."[43] Non-technical words should "be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning."[44] The Court may use "standard nonlegal dictionaries" as a guide "in construing the ordinary and plain meaning of disputed terms."[45]

C. The Underlying Complaints Do Not Allege "Personal Injury" Apart From Excluded "Bodily Injury,""Sickness" or "Disease"

Liggett argues that the tobacco exclusion does not bar coverage for allegations within the twelve underlying complaints of mental and emotional injury. Liggett contends that an endorsement to the National Union policy expands personal injury

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S.E.2d 794, 796 (1986).

[41]Cherokee at 916.

[42]Blake v. St. Paul Fire & Marine Ins. Co., N.C. Ct. App., 248 S.E.2d 388, 390 (1978).

[43]Id.

[44]Stockton v. North Carolina Farm Bureau Mut. Ins. Co., N.C. Ct. App., 532 S.E.2d 566, 567-568 (2000).

[45]C.D. Spangler at 568.

coverage to include any complaint that alleges "injury to the feelings or reputation of any person." Liggett argues that, as a result, allegations of emotional pain and suffering, loss of enjoyment of life, fear of future injury, and loss of consortium are all covered under the policy.

I conclude that there is no "personal injury" coverage in the National Union policy for mental injury or anguish arising from an excluded bodily injury, sickness, or disease. The tobacco exclusion by its express terms bars coverage for claims for "bodily injury," "sickness," or "disease" where it arises from the use of Liggett's tobacco products. The underlying complaints clearly allege "disease" resulting from smoking: lung cancer (Alexander), emphysema and heart attack (Adkins), diverticulosis, carcinoma, and chronic obstructive pulmonary disease (Anderson), addiction (Armendariz), hypertension and lung disease (Floyd), carcinoma of the tongue (Monty), heart attack (Jones), chronic obstructive pulmonary disease (Satchell), diseased lungs and dyspnea (Soliman and Marcum).[46] I am satisfied that the allegations of mental and emotional injury cited by Liggett are not separate from the alleged bodily injury, sickness, or disease but are merely symptoms of it.[47] Under

[46]Two of the complaints do not allege a specific sickness or disease such as cancer. Klein alleges only the plaintiff has suffered "great pain," and Vandermeulen alleges only tobacco products were "deleterious to Plaintiff's health." However, the definition of "disease" as "a cause of pain" and "a disorder or want of health in mind or body" clearly encompass both allegations.

[47]Compare Whiteville Oil Co. v. Federated Mut. Ins. Co.,

Liggett's interpretation, even if a plaintiff's cancer claim is excluded, his or her "emotional pain and suffering" from that cancer is still covered. It is hard to imagine any claim to which the exclusion would apply if such an interpretation were adopted.

D. There Is No Coverage For The Second-Hand Smoke Claims or Concerted Activity Claims

Liggett contends that National Union owes Liggett a defense for the underlying actions by individuals who did not allege use of Liggett's tobacco products. Liggett contends that some complaints do not specifically allege that it was Liggett's products that caused the alleged injuries, thereby removing the claims from the ambit of the tobacco exclusion. Liggett also argues that claims alleging injury from "second-hand" smoke are not excluded from coverage because the nature of "second-hand" smoke makes it difficult, if not impossible, to determine the origin of the smoke. Thus, Liggett contends, the complaints should be read as alleging injuries against Liggett that arise from the use of non-Liggett tobacco products.

Liggett relies on the "concurrent cause" doctrine which provides that where there is more than one proximate cause for a purported injury, coverage is not excluded if at least one of the

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E.D.N.C., 889 F. Supp. 241, 246 (1995) (pollution exclusion that barred coverage for "bodily injury" or "property damage" also barred coverage for claims of "mental anguish, stress and medical bills and 'illness'" from release of gasoline fumes); See also South Carolina Ins. Co. v. White, N.C. Ct. App., 345 S.E.2d 414, 416 (1986) (consortium claim is derivative of relatives bodily injury).

causes is covered.[48] As a result, coverage under an insurance policy is available "whenever an insured risk constitutes simply a concurrent proximate cause of the injuries."[49]

I find that there is no coverage for the claims at issue. Several claims alleging direct liability against Liggett actually do allege the use of Liggett's tobacco products and these claims are excluded under the policy. The claims seeking to hold Liggett liable for injuries caused by the use of another manufacturer's tobacco products allege that Liggett was involved in a conspiracy. If proved, this is intentionally caused harm which is not covered. Finally, the claims against Liggett which do not expressly allege the use of Liggett's products still arise from their use.[50]

With regard to the first category of allegations, the eight actions listed by Liggett do allege the use of a Liggett product. The complaint in Alexander alleges that Plaintiff smoked "various brands of cigarettes . . . all of which were manufactured and/or distributed and/or sold by Defendants." The

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[48] State Capital Ins. Co. v. Nationwide Mut. Ins. Co., N.C. Supr., 350 S.E.2d 66, 71 (1986).

[49] Id. at 72 (emphasis in original).

[50] To the extent Liggett argues that the complaints should be read to allege that Liggett's products combined with other products to cause the alleged injury, a circumstance which is not alleged in any underlying complaint, such injuries would still "arise out of" the use of Liggett's tobacco products. See, e.g., Eon Labs at 893 (holding that "combination claims are not -- as Eon claims --'claims seeking to hold Eon liable for injuries from another companies' products' . . . as the essential fact [is] that in all of the cases it is the involvement or presence of Eon's [product] . . . that is the basis of the fen-phen suits.")

plaintiffs in Adkins and Anderson both allege that "Plaintiff consumed tobacco and tobacco containing products manufactured by the Defendants at all times relevant herein." The Jones complaint states that "Plaintiff is a consumer who purchased Defendants' tobacco products for personal use." The plaintiff in Armendariz alleges that "Defendants manufactured, produced, and marketed a defective, dangerous product, that being cigarettes, whereby Plaintiff was injured by and is still suffering from it." The Soliman complaint alleges that tobacco products "were sold to retailers, who sold said Defendants' defective tobacco products to Plaintiff." The Plaintiff in the Monty action alleges that "Plaintiff is or was an individual who purchased and consumed tobacco products manufactured, distributed, endorsed or otherwise promoted by all Defendants during the aforementioned period of time." Lastly, the Floyd complaint alleges that "Plaintiff's longevity is now questionable as a result of using defendants manufactured, defective products." Thus, a fair reading of the complaints makes clear that it is the use of Liggett's products that forms the basis of these lawsuits. The complaints assert direct liability against Liggett as one of several defendant tobacco manufacturers for injuries caused by the use of its tobacco products. In fact, the only source of direct liability facing Liggett must arise from the use of its tobacco products. Furthermore, the tobacco exclusions exclude coverage for claims alleging the use of Liggett's product regardless of who is the user or consumer. Thus, the tobacco

exclusion equally bars coverage for second-hand smoking injuries as well as first-hand smoking injuries.

The second category of allegations charge that Liggett acted in concert with other tobacco manufacturers to market a dangerous product and conceal the hazards of smoking.[51] The complaints allege that Liggett is liable as a co-conspirator or through some related agency theories of liability like "concerted action" or "aiding and abetting." While these claims do not expressly allege the "use" of a Liggett tobacco product, they are not covered under the policy because they are not "occurrences." An "occurrence" is defined in the National Union policy as an accident that "results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Thus, there is no duty for National Union to defend claims that allege the insurer intentionally caused harm. "A complaint that the insured has conspired to commit certain acts necessarily charges intentional conduct on the part of the defendant-insured."[52]

Finally, even if it is arguable that the alleged injuries were neither expected nor intended, coverage of any claim against Liggett based upon its tobacco market share is barred by the tobacco exclusion because Liggett's share of that market

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[51] See, e.g., Armendariz (alleging "Defendants have conspired to manufacture, produce, and market a dangerous, defective product"); Soliman (stating that "[e]ach Defendant is sued individually as a co-conspirator and aider and abettor.")

[52] Brooklyn Law Sch. v. Aetna Cas. & Sur. Co., 2d Cir., 849 F.2d 788, 789 (1988).

necessarily arises from the use of tobacco products which it manufactured, sold, handled or distributed.[53]

E. Certain Underlying Complaints Alleging Property Damage Have Yet to Invoke the Insurers' Duty to Defend

Liggett argues that the tobacco exclusion does not apply to the allegations in Satchell and Monty of property damage. Satchell and Monty allege that they "sustained separate and distinct damages to business and/or property, including but not necessarily limited to, burns to his/her home furnishings and automobile upholstery." National Union argues that it has no duty to defend Liggett with respect to these claims until those claims are asserted in a lawsuit.

The National Union policy limits the duty to defend to defending "suits." Liggett concedes that on the record no lawsuit has been brought. However, Liggett contends that the written demand given to Liggett is equivalent to the commencement of a lawsuit.

North Carolina courts have interpreted the word "suit" to require insurers to defend certain proceedings by the state involving compliance orders to clean up toxic wastes even though no lawsuit was filed.[54] The North Carolina Supreme Court concluded that compliance orders issued by the Environmental

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[53]See, e.g., Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Ins. Co., 1st Cir., 220 F.3d 1, 3 (2000) (Claims arising from plaintiff's participation in firearms market did not circumvent insurance policy exclusion of liability for injuries arising out of plaintiff's products).

[54]C.D. Spangler at 570.

Protection Agency invoked an insurers duty to defend "suits" because they were "an attempt by the State to 'gain an end by legal process.'"[55] However, no North Carolina court has extended this holding to demand letters by private parties. I am not persuaded that the Supreme Court of North Carolina would do so. Rather, I am satisfied it would recognize, as other jurisdictions have, the significant difference between federal or state environmental cleanup demands and private party demand letters.[56] Because no suit has been filed in Satchell or Monty, there is no duty to defend.

F. The Tobacco Exclusion Bars Claims Based On Negligent Failure to Warn

Liggett argues that the tobacco exclusion does not bar claims for negligent failure to warn. The plaintiff in Marcum alleges that Liggett negligently breached its "duty to warn of the addictive nature of nicotine and the harmful nature of their products." The plaintiff in Floyd alleges that Liggett "failed

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[55] Id. (citing Webster's Third New World International Dictionary (1976)).

[56] See, e.g., Aetna Cas. & Sur. Co. v. Pintlar Corp., 9th Cir., 948 F.2d 1507, 1516 (1991) (garden variety demand letter only exposes one to potential threat of future litigation, but PRP notice carries immediate severe implications; Northern Security Ins. Co. v. MITEC, D. Vt., 38 F. Supp.2d 345 (1999) ("suit" does not encompass private party demand letters); A.Y. McDonald Indus., Inc. v. Insurance Co. of North America, Iowa Supr., 475 N.W.2d 607, 629 (1991) (EPA [**13] PRP letter has more serious consequences than conventional demand letter); Hazen Paper Co. v. United States Fidel. & Guar. Co., Mass. Supr., 555 N.E.2d 576, 581-82 (1990) (EPA letter not equivalent of conventional demand letter; naive to characterize it as request for voluntary action); Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., Mich. Supr., 519 N.W.2d 864, 871 (1994) (EPA essentially usurps court's role in determining and apportioning liability).

to warn of all dangers and other major health consequences [and] failed to warn of the addictive nature of tar and nicotine." The plain language of the tobacco exclusion only bars claims within the "products hazard." The policy defines "products hazard" to include "bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto . . . ." Liggett maintains that the negligent failure to warn claims in Marcum and Floyd are not within the products hazard and are, therefore, not excluded. I conclude that negligent failure to warn claims are within the "products hazard" as such claims "arise out" of Liggett's products.

There is no precedent from the North Carolina courts directly on this point. Liggett cites the rationale of three cases applying Pennsylvania and Idaho law that conclude that claims for negligent failure to warn are not excluded.[57] The Supreme Court of Idaho explained that the definition of the "products hazard" makes clear that the parties intended to exclude coverage for injuries arising out of the sale of defective products or as a result of negligence in affirmative representations regarding the product.[58] However, the Court observed that the definition of "products hazard" does "not

[57]Chancler v. American Hardware Mut. Ins. Co., Idaho Supr., 712 P.2d 542 (1985); Devich v. Commercial Union Ins. Co., W.D. Pa., 867 F. Supp. 1230, 1235 (1994); Harford Mut. Ins. Co. v. Moorhead, Pa. Super., 578 A.2d 492 (1990).

[58]Chancler at 547.

mention omissions or failure to warn when there is an affirmative duty to do so."[59] If the insurer wanted to exclude coverage for omissions as well as affirmative representations, the Court concluded, it could have done so with a much clearer declaration.[60]

The Pennsylvania Superior Court has analyzed this issue differently, drawing a distinction between strict liability, as "product-oriented," and negligence, as "conduct-oriented."[61] That Court observed that a claim for negligent failure to warn should be characterized "as charging improper conduct, and not one of making a defective product."[62] Consequently, the Court found that a claim for negligent failure to warn arises out of the insured's conduct, not the insured's product.[63]

I decline to adopt the reasoning of these cases. Instead, I will focus, as North Carolina law requires, on the intention of the parties as derived from the plain meaning of the words used in the policy. The tobacco exclusion applies to all "bodily injury and property damage arising out of [Liggett's] products." The phrase "arising out of" is unambiguous language "that lends itself to uncomplicated, common understanding."[64] It is akin to

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[59] Id.

[60] Id.

[61] Harford at 501.

[62] Id.

[63] Id.

[64] Eon Labs Mfg., Inc. v. Reliance Ins. Co., Del. Supr., 756

"but for" causation.[65] Thus, a claim for negligent failure to warn arises out of a product if but for the product there would be no claim.[66]

A failure to warn claim involves "[a] defendant whose conduct creates a danger" and fails "to exercise reasonable care by failing to warn of the danger."[67] If the danger the defendant created involves selling an unsafe product, then its duty to warn of the danger and the injuries caused thereby "arise out" of that product. I am convinced that the North Carolina Supreme Court would analyze this very issue as the Delaware Supreme Court did in Eon Labs.[68] The negligent failure to warn claims against Liggett are excluded because but for Liggett's tobacco products there would be no failure to warn claim.

VI. CONCLUSION

For the foregoing reasons, the Court finds the tobacco exclusion precludes coverage for Liggett's claims. Accordingly, the plaintiff's motion for summary judgment on the duty to defend under the National Union policy is **DENIED**. Because there is no material dispute of fact and because there is no coverage for the

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A.2d 889, 893 (2000).

[65] Id. (stating that "but for Eon's product, there would be no combination that would lead to the fen-phen claims.")

[66] Id.

[67] Restatement (Third) of Torts § 18(a) (2001) (Tentative Draft No. 1).

[68] Eon Labs at 893.

suits filed, partial summary judgment is entered in favor of National Union on the underlying actions selected by Liggett.

IT IS SO ORDERED.

/s/ Henry duPont Ridgely
President Judge

cmh
Enclosure
oc: Prothonotary
xc: Distribution by CLAD

A P P E N D I X

PLAINTIFFS' REPRESENTATIVE COMPLAINTS

1. Adkins v. The American Tobacco Company, et al., C.A. No. 00-C-1381, Cir. Ct. of Kanawha County, WV (filed May 31, 2000).

Charles Adkins and his wife have sued Liggett and other entities for various injuries. The complaint asserts the following legal theories: fraudulent concealment; deliberate, wilful, and malicious misrepresentation; negligent misrepresentation; unlawful, unfair, and fraudulent business practices; unfair competition and unfair, deceptive, untrue, or misleading advertising; breach of express warranty; intentional infliction of emotional distress; deliberate and intentional concealment of the addictive nature of cigarettes; manufacturing defects; breach of the warranty of merchantability; failure to warn; and conspiracy to conceal the hazards of smoking. Adkins alleges various personal injuries including pain and suffering, medical expenses, loss of enjoyment of life, loss of earnings, mental and emotional distress, and loss of consortium. Mr. Adkins smoked cigarettes for approximately fifty-seven years. Mr. and Mrs. Adkins demand $1,000,000 in compensatory damages and $3,000,000 in punitive damages.

2. Alexander v. Philip Morris Companies, Inc., et al., C.A. No. 99-C-3975-A, 27th Judicial District Ct. for the Parish of St. Landry, Louisiana (filed September 27, 1999).

Earl Alexander and his wife have sued Liggett and other entities for various injuries. Mr. Alexander smoked cigarettes from around 1952 to 1995. On September 28, 1998, Mr. Alexander was diagnosed with lung cancer. The complaint asserts the legal theory that the Defendants' actions in the nearly fifty years since the Winder Report linked cigarettes to cancer constitute unfair trade practices under Louisiana's Unfair Trade Practices Act. Alexander alleges various personal injuries including physical and emotional pain and suffering, loss of enjoyment of life, fear of impending death, and economic damages. Mr. and Mrs. Alexander demand compensatory damages, punitive damages, costs, and attorney's fees.

3. Anderson v. the American Tobacco Company, et al., C.A. No. 00-C-1370, Cir. Ct. of Kanawha County, WV (filed May 30, 2000).

Deloris May Anderson has sued Liggett and other entities for various injuries. Ms. Anderson smoked cigarettes from about 1949 to 1990. On December 15, 1990, Ms. Anderson was diagnosed with diverticulosis of the colon, with possible underlying malignancy. On June 18, 1998, she was diagnosed with COPD and Basal Cell Carcinoma. The complaint asserts the following legal theories: fraudulent concealment; deliberate, wilful, and malicious misrepresentation; negligent misrepresentation; unlawful, unfair, and fraudulent business practices; unfair competition and unfair, deceptive, untrue, or misleading

advertising; breach of express warranty; intentional infliction of emotional distress; deliberate and intentional concealment of the addictive nature of cigarettes; manufacturing defects; breach of the warranty of merchantability; failure to warn; and conspiracy to conceal the hazards of smoking. Ms. Anderson alleges various personal injuries including pain and suffering, medical expenses, loss of enjoyment of life, loss of earnings, and mental and emotional distress. Ms. Anderson demands $1,000,000 in compensatory damages and $3,000,000 in punitive damages. On January 14, 2000, this case was removed to the United States District Court for the Western District of Louisiana (Case No. 00-00822).

4. Armendariz v. Philip Morris, et al., Doc. 999 No. 862, District Ct. of Douglas County, NE (filed November 17, 2000).

John Armendariz, Jr., a pro se plaintiff, has sued Liggett and other entities for various injuries. Mr. Armendariz claims to have begun smoking as early as seven years of age, and indicates that he smoked through his adolescence and continually until he was able to quit in April of 1999. Mr. Armendariz alleges injuries both as a result of smoking and exposure to second-hand smoke. He alleges that he was exposed to second-hand smoke from birth, due to the smoking habits of his mother, grandmother, and grandfather. He indicates that he continues to be exposed to second-hand smoke currently, in the course of his current

incarceration in Nebraska. The complaint asserts the theory that the Defendants have conspired to manufacture, produce, and market a dangerous and defective product which has caused injury to Mr. Armendariz. The injuries claimed consist of unspecified lung damage and future susceptibility to lung disease. The Plaintiff requests $18,000,000 in monetary damages from each Defendant, $58,000,000 in special damages from each Defendant, and costs.

5. Cutlip v. The American Tobacco Co., et al., No. 00-C-293, Circuit Ct. of Ohio County, WV (filed July 24, 2000).

Darrell Eugene Cutlip and his wife have sued Liggett and other entities for various injuries. The complaint asserts the following legal theories: fraudulent concealment; deliberate, wilful, and malicious misrepresentation; negligent misrepresentation; unlawful, unfair, and fraudulent business practices; unfair competition and unfair, deceptive, untrue, or misleading advertising; breach of express warranty; intentional infliction of emotional distress; deliberate and intentional concealment of the addictive nature of cigarettes; manufacturing defects; breach of the warranty of merchantability; failure to warn; and conspiracy to conceal the hazards of smoking. Cutlip alleges various personal injuries including pain and suffering, medical expenses, loss of enjoyment of life, loss of earnings, mental and emotional distress, and loss of consortium. Mr. Cutlip smoked cigarettes for approximately fifty-two years. Mr.

and Mrs. Cutlip demand $1,000,000 in compensatory damages and $3,000,000 in punitive damages.

6. Dimm v. R.J. Reynolds Tobacco Co., et al., No. 53919, 18th Judicial District Ct. for the Parish of Iberville, LA (filed July 19, 2000).

Plaintiffs have sued Liggett and other entities for various injuries. Deceased Plaintiff Sadie Hood, the complaint states, began smoking cigarettes at age eleven. She continued smoking until she died of lung cancer. The complaint asserts the following legal theories: fraud; negligent misrepresentation; negligence, gross negligence; intentional or negligent infliction of emotional distress; intentional or negligent false and misleading advertising; breach of express and implied warranty; redhibition; and strict products liability. Plaintiffs seek survival and wrongful death damages for the deceased Plaintiff's physical and economic injuries and injuries suffered by the other Plaintiffs, her children, as a result of her death. They also seek loss of consortium damages and any equitable relief to which they may be entitled. Plaintiffs also seek punitive damages, interest, and costs. On August 21, 2000, this case was removed to the United States District Court for the Middle District of Louisiana (C.A. No. 00-CV640 "A" (2)).

7. Edwards v. The American Tobacco Co., et al., No. 00-C-269, Circuit Ct. of Ohio County, WV (filed July 6, 2000).

Hubert Glenwood Edwards and his wife have sued Liggett and other entities for various injuries. Mr. Edwards has

been diagnosed with emphysema, lung cancer, high blood pressure, heart problems, hardening of arteries, and congestive heart failure, all of which he relates to his years of cigarette smoking. The complaint asserts the following legal theories: fraudulent concealment; deliberate, wilful, and malicious misrepresentation; negligent misrepresentation; unlawful, unfair, and fraudulent business practices; unfair competition and unfair, deceptive, untrue, or misleading advertising; breach of express warranty; intentional infliction of emotional distress; deliberate and intentional concealment of the addictive nature of cigarettes; manufacturing defects; breach of the warranty of merchantability; failure to warn; and conspiracy to conceal the hazards of smoking. Edwards alleges various personal injuries including pain and suffering, medical expenses, loss of enjoyment of life, loss of earnings, mental and emotional distress, and loss of consortium. Mr. Edwards smoked cigarettes for approximately fifty-two years. Mr. and Mrs. Edwards demand $1,000,000 in compensatory damages and $3,000,000 in punitive damages.

8. Floyd v. Brown & Williamson Corp., et al., No. 291, Feb. Term 2000, Pa. Ct. of Common Pleas (filed February 8, 2000).

Plaintiff, a prisoner in Pennsylvania, is suing Liggett and other entities for various alleged injuries sustained by himself and his deceased mother. Plaintiff indicates that he smoked from 1959 through 1987, and his mother, who died of lung cancer, smoked for as long as he can remember.

Plaintiff appears to be seeking wrongful death and survival damages on behalf of his deceased mother, as well as damages for injuries that he alleges he incurred. Plaintiff's alleged personal injuries include decreased lung capacity, injury to the endocrine glands, palpitations, addiction to nicotine, mental and physical pain and suffering, and future loss of capacity to earn a living. The complaint asserts the following legal theories: failure to warn; design defect; negligence; gross negligence; fraudulent and negligent misrepresentation; breach of express and implied warranty; negligent infliction of emotional distress; conspiracy; and strict products liability. Plaintiff seeks compensatory damages of $500,000 from each Defendant, as well as $500,000 in punitive damages from each Defendant.

9. Hemetek v. The American Tobacco Co., et al., No. 00-C-267, Circuit Ct. of Ohio County, WV (filed July 3, 2000).

Bobby Jo Hemetek has sued Liggett and other entities for various injuries. Mr. Hemetek smoked cigarettes from about 1948 through the present. He has been diagnosed with emphysema and asbestosis. The complaint asserts the following legal theories: fraudulent concealment; deliberate, wilful, and malicious misrepresentation; negligent misrepresentation; unlawful, unfair, and fraudulent business practices; unfair competition and unfair, deceptive, untrue, or misleading advertising; breach of express warranty; intentional infliction of emotional distress; deliberate and intentional concealment of the

addictive nature of cigarettes; manufacturing defects; breach of the warranty of merchantability; failure to warn; and conspiracy to conceal the hazards of smoking. Mr. Hemetek alleges various personal injuries including pain and suffering, medical expenses, loss of enjoyment of life, loss of earnings, loss of consortium, and mental and emotional distress. Mr. Hemetek demands $1,000,000 in compensatory damages and $3,000,000 in punitive damages.

10. Johnson v. The American Tobacco Co., et al., No. 00-C-247, Circuit Ct. of Ohio County, WV (filed June 16, 2000).

Arthur Johnson and his wife have sued Liggett and other entities for various injuries. Mr. Johnson has allegedly smoked for approximately fifty-five years. He has been diagnosed with lung cancer, asbestosis, and COPD. The complaint asserts the following legal theories: fraudulent concealment; deliberate, wilful, and malicious misrepresentation; negligent misrepresentation; unlawful, unfair, and fraudulent business practices; unfair competition and unfair, deceptive, untrue, or misleading advertising; breach of express warranty; intentional infliction of emotional distress; deliberate and intentional concealment of the addictive nature of cigarettes; manufacturing defects; breach of the warranty of merchantability; failure to warn; and conspiracy to conceal the hazards of smoking. Mr. and Mrs. Johnson allege various personal injuries including pain and suffering, medical expenses, loss of enjoyment of life, loss of earnings,

mental and emotional distress, and loss of consortium. Mr. and Mrs. Johnson demand $1,000,000 in compensatory damages and $3,000,000 in punitive damages.

11. Jones v. R.J. Reynolds Tobacco, et al., No. 00-C-1419, Circuit Ct. of Kanawha County, WV (filed June 6, 2000).

Wendell E. Jones has sued Liggett and other entities for various injuries. Mr. Hemetek smoked cigarettes from about 1945 to 1994. He has suffered from a heart attack. The complaint asserts the following legal theories: fraudulent concealment; deliberate, wilful, and malicious misrepresentation; negligent misrepresentation; unlawful, unfair, and fraudulent business practices; unfair competition and unfair, deceptive, untrue, or misleading advertising; breach of express warranty; intentional infliction of emotional distress; deliberate and intentional concealment of the addictive nature of cigarettes; manufacturing defects; breach of the warranty of merchantability; failure to warn; and conspiracy to conceal the hazards of smoking. Mr. Jones alleges various personal injuries including pain and suffering, medical expenses, loss of enjoyment of life, loss of earnings, loss of consortium, and mental and emotional distress. Mr. Jones demands $1,000,000 in compensatory damages and $3,000,000 in punitive damages.

12. Klein v. The American Tobacco Company, et al., No. L-7798-00, N.J. Super. Ct. (filed September 21, 2000).

Janet Klein and her husband have sued Liggett and other

entities for various injuries. Janet Klein relates past and future injuries to her health to the inhalation of second-hand smoke. Mr. Klein seeks damages for loss of consortium. The complaint asserts the following legal theories: fraud, misrepresentation, and strict product liability. Mr. and Mrs. Klein seek compensatory damages, punitive damages, interest and costs.

13. Lewis v. Philip Morris, Inc., et al., No. MICV2000-03447, Mass. Super. Ct., Middlesex County (filed July 25, 2000).

Plaintiffs Tarji Lewis and Barbara Burtt, both individually and as the next friend of her son, David Burtt, have brought a suit against Liggett and other entities. The three individuals seek to represent a class of Massachusetts residents who began smoking as minors between the years of 1970 and 2000. They seek damages for the class resulting from their addiction to cigarettes. The suit focuses on the advertising strategies of the tobacco companies, and alleges that the companies targeted their advertising at the class in reckless disregard of the health problems they knew cigarettes would cause the class. The Plaintiffs seek, as damages, disgorgement of profits gained through sales to the class, as well as costs, fees, and such other or further relief as may be just in order to assist the class in seeking professional help to treat the addiction. On October 10, 2000, this case was removed to the United States District Court, District of Massachusetts, (Case No. 00-12089-RW2).

14. Marcum v. Philip Morris, et al., No. 00-CV-089, Circuit Court of Dane County, WI (filed March 29, 2000).

Pro se Plaintiffs Harrison Marcum and Donald Zunker have sued Liggett and several other entities for a variety of injuries. Mr. Marcum began smoking cigarettes in 1971 at eleven years of age, and Mr. Zunker began smoking in 1989 at twelve years of age. The Plaintiffs allege a long list of specific injuries to their physical, mental, and emotional health. Most serious among these injuries appears to be a four month hospitalization of Mr. Marcum in 1979 for bilateral spontaneous pneumothorax. That condition required two surgeries to repair. Otherwise, it appears that Plaintiffs have simply assembled a laundry list of the reported negative effects of cigarette smoking, ranging in severity from chronic bronchitis to snoring. Plaintiffs' complaint asserts the following legal theories in their claims against Liggett and the other Defendants: fraudulent misrepresentations and deceptive advertising; knowing and intentional misrepresentations; negligent fabrications; restraint of trade conspiracy; assumption of and wilful failure to perform a special duty; unjust enrichment; negligence; products liability; public nuisance; conspiracy; and malicious disregard of the Plaintiffs' rights. Mr. Marcum and Mr. Zunker seek various forms of injunctive relief, compensatory damages (specifically including $150,000 to each Plaintiff for compensation for money spent on tobacco products and on later drug abuse Plaintiffs

attribute to nicotine addiction), punitive damages, costs, and attorney's fees.

15. Monty v. Harvard Pilgrim Healthcare, et al., No. __, Mass. Super. Ct., Middlesex County (served on Liggett unsigned, verified complaint on February 28, 2000).

Plaintiff Carol A. Monty is a 54 year old Massachusetts resident who claims to have been a smoker since age 21. She has sued Liggett and several other entities, including her physician and health care organization, for a variety of injuries. She has been diagnosed with an advanced squamous cell carcinoma of the tongue with lymph node involvement. This condition required surgery. The cancer and surgery has resulted in difficulty speaking intelligibly and leaves Ms. Monty with a grim prognosis. The complaint asserts the following legal theories: violation of the Massachusetts Consumer Protection Act; RICO violations; breach of warranty; conspiracy; negligence; battery; intentional infliction of nicotine addiction; and fraud. Ms. Monty demands damages for personal injuries, medical expenses, pain of body, and anguish of mind. She also demands interest and costs.

16. Newsom v. R.J. Reynolds Tobacco Co., et al., No. 105838, 16th Judicial District Ct. for the Parish of St. Mary, LA (filed May 17, 2000).

Plaintiffs, Samuel Newsom and his children, have sued Liggett and several other entities for various injuries they relate to the smoking related death of their wife and mother, Fannie Newsom. Plaintiffs seek Survival and

Wrongful Death damages for Fannie Newsom's physical and economic injuries, as well as injuries Plaintiffs suffered upon her death. Fannie Newsom, who had smoked cigarettes since age 15, died of lung cancer. The complaint asserts the following legal theories: fraud and deceit; negligent misrepresentation; intentional infliction of emotional distress; negligence and negligent infliction of emotional distress; negligent false and misleading advertising; intentional false and misleading advertising; breach of express warranty; breach of implied warranty; strict product liability; and redhibition. Plaintiffs seek compensatory damages for past and future pain and suffering, medical expenses, and mental anguish. They also seek punitive damages, interest, and costs. On June 2, 2000, this case was removed to the United States District Court for the Western District of Louisiana, Lafayette Opelousas Div. (Case No. 6:00CV1333).

17. Potts v. R.J. Reynolds Tobacco Co., et al., No. 41844, 40th Judicial District Court for the Parish of St. John the Baptist, LA (filed on April 6, 2000).

Odelia Potts, her husband, and her children, have sued Liggett and other entities for various injuries. Odelia Potts smoked cigarettes since she was 18 years old. She was diagnosed with lung cancer in July of 1999. The legal theories asserted by the complaint include: fraud and deceit; negligent misrepresentation; intentional infliction of emotional distress; negligence and negligent infliction

of emotional distress; negligent false and misleading advertising; intentional false and misleading advertising; breach of express warranty; breach of implied warranty; strict product liability; and redhibition. Plaintiffs seek damages for medical expenses, survival damages, physical pain and suffering, mental anxiety and anguish, wrongful death, loss of consortium, and any other damages to be more fully shown at trial. In addition to compensatory damages, Plaintiffs seek punitive damages, interest, and costs.

18. Satchell v. R.J. Reynolds, et al., No. ___, Mass. Super. Ct., Middlesex County. (Served on Liggett as an unsigned, verified Complaint on February 4, 2000).

Plaintiff Rita Satchell is a 79 year old Massachusetts resident who claims to have been a smoker since age 15. She has sued Liggett and several other entities, for a variety of injuries. She has been diagnosed with end stage chronic obstructive pulmonary disease which requires the utilization of home oxygen. The complaint asserts the following legal theories: violation of the Massachusetts Consumer Protection Act; breach of warranty; conspiracy; negligence; battery; RICO violations; intentional infliction of nicotine addiction; and fraud. Ms. Monty demands damages for personal injuries, damage to property and/or business, medical expenses, pain of body, and anguish of mind. She also demands interest and costs.

19. Soliman v. Philip Morris, et al., No. 311057, Cal. Super. Ct. (filed March 28, 2000, amended to include Liggett as a defendant on May 17, 2000).

Maher Soliman has sued Liggett and other entities for various injuries. Mr. Soliman alleges that he began smoking in 1968 at the age of 14. Mr. Soliman suffers from shortness of breath and damaged lungs. He claims that his lung age is estimated to be eighty-five years and that his physicians have warned him that his lungs are on the verge of collapse. Mr. Soliman claims that he continues to smoke and is unable to quit. The complaint asserts the following legal theories: strict product liability; negligence; breach of express warranty; breach of implied warranty of merchantability and fitness; fraud; intentional misrepresentation; conspiracy to commit fraud and misrepresentation; and intentional infliction of emotional distress. Mr. Soliman prays for compensatory damages in excess of $100,000,000, punitive damages in excess of $100,000,000, equitable relief in the form of a medical fund to be established by Defendants to cover all of Plaintiff's future health care costs, attorney's fees, and costs.

The case was apparently removed to the U.S. District Court for the Northern District of California. On November 13, 2000, this case was dismissed as barred by California's one-year statute of limitations on personal injury actions. Notice of Appeal was filed by Mr. Soliman on November 20, 2000.

20. Vandermeulen v. Philip Morris, Inc., et al., No. 00-030548-CZ, Cir. Ct. of Wayne, MI (filed September 18, 2000).

Plaintiffs have brought a class action suit against

Liggett and other entities on behalf of themselves and all persons who have bought cigarettes manufactured or sold by Defendants in the state of Michigan. Plaintiffs seek $74,000 in damages for each member of the proposed class, exclusive of costs and interests. The complaint asserts the following legal theories: negligence; violation of the Michigan Consumer Protection Act; Breach of warranty; and fraudulent concealment. On October 10, 2000, this case was removed to the United States District Court for the Eastern District of Michigan (Case No. 00-74582).

DEFENDANTS' REPRESENTATIVE COMPLAINTS

1. Badillo v. American Tobacco Co., et al., CV-N-97-00573-DWH (N.D. NV, filed 1997).

Plaintiffs have brought a proposed class action suit on behalf of non-smoking casino dealers in Nevada who have been subjected to the dangers of second-hand smoke, as well as the estates, representatives, administrators, spouses, children, relatives, and "significant others" of such casino dealers. They seek damages for physical and economic losses as well as emotional distress. They also seek equitable relief in the form of the establishment of a medical monitoring fund. The complaint asserts the following legal theories: fraud and deceit; negligent misrepresentation; intentional infliction of emotional distress; negligence and negligent infliction of emotional distress; breach of express warranty; breach of implied warranty; and strict product liability. The Plaintiffs pray for compensatory

damages; medical monitoring, either through damages or through equitable relief; attorney's fees; interest; and costs.

2. Baker v. Liggett Group Inc., et al., No. 86-1326-W (D. Mass., filed 1985).

Anne Baker and her husband have sued Liggett and R.J. Reynolds for various injuries. Ms. Baker developed oat cell carcinoma of the left lung, and had surgery to replace her left lung. The complaint asserts the following legal theories: negligence and breach of implied warranty. Mrs. Baker demands $5,000,000 in compensatory damages from each Defendant for injuries, past and future pain and suffering, medical care, and inability to attend to usual activities, plus interest and costs. Mr. Baker demands $2,000,000 from each Defendant for loss of consortium, plus interest and costs.

3. Blue Cross & Blue Shield v. Philip Morris, Inc., et al., CV983287 (E.D.N.Y., filed 1998).

Plaintiffs, twenty-one independent Blue Cross and/or Blue Shield plans, have brought suit against Liggett and several other entities for economic injury to the business property of the BC/BS Plans, as distinct from harms suffered by individual plan members. The following theories are asserted by all Plaintiffs in the complaint: RICO violations; violations of the Sherman Act; fraudulent misrepresentation; fraudulent concealment; breach of special duty; unjust enrichment; conspiracy; and violation of the

New York Deceptive Trade Act. Individual Plaintiffs assert legal theories based on alleged violations of state statutes. These include unfair competition laws, false advertising laws, unfair trade practices laws, consumer fraud laws, consumer protection laws, restraint of trade laws, antitrust laws, civil remedies for criminal practices laws, state racketeering laws, trade regulation laws, and combinations and monopolies laws. Plaintiffs also assert statutory and common law claims, except for antitrust claims in subrogation. They also assert subrogation claims for: product liability-design defect and failure to warn; negligent design and negligent failure to warn; and declaratory relief. Plaintiffs seek injunctive relief to prevent future repetition of alleged violations of law, fair restitution, damages and compensation in excess of $1 billion for all past and future harm suffered by the Plans. In the alternative, they seek declaratory judgment establishing subrogation rights, and awarding aggregate compensation and damages to be awarded to the Plans as subrogees. Plaintiffs also seek punitive damages, treble damages, disgorgement of profits based on unjust enrichment, interest, attorneys' fees, and costs.

4. Bourgeois v. Liggett Group Inc., et al., No. 97-580-CIV-T-17B (U.SD.C., M.D. FL, filed 1997).

Harold and Patricia Bourgeois have sued Liggett and several other entities for various injuries. Mr. Bourgeois claims to suffer from emphysema, shortness of breath,

pneumonia, and various other ailments he relates to smoking. He began smoking cigarettes in 1942. The complaint asserts the following legal theories: negligence; strict liability; conspiracy to commit actual fraud; and conspiracy to commit constructive fraud. Plaintiffs demand judgment for compensatory damages based on the following injuries: various physical illnesses; pain and suffering; disability; disfigurement; mental anguish; loss of capacity for the enjoyment of life; expense of hospitalization; medical and nursing care and treatment; loss of earnings; loss of ability to earn money; aggravation of a previously existing condition; fear of cancer, and loss of consortium. They also demand judgment for costs and interest.

5. Bullitt, J.M. v. Liggett Group Inc., et al., No. 85-2500-W (D. Mass., filed 1985).

John M. Bullitt filed suit against Liggett and several other entities, on behalf of himself and as father and next friend of David M. Bullitt, for various injuries. John Bullitt claims to have developed lung cancer and other serious illnesses as a result of cigarette smoking. John Bullitt smoked cigarettes from approximately 1935 through 1984. The complaint asserts the following legal theories: negligence; breach of warranty; misrepresentation; and unfair or deceptive acts or practices. John Bullitt demands a $5 million judgment, against Liggett, as well as interest and costs, for his claims based on each of the first three theories. For his unfair or deceptive acts or practices

claim, based on a Massachusetts statute, he demands treble damages, costs and attorney's fees. On behalf of David Bullitt, he seeks damages for loss of consortium, demanding a judgment of $1 million, interest and costs under both the negligence and misrepresentation claims, and treble damages, costs, and attorney's fees under the unfair or deceptive acts or practices claim.

6. Cipollone v. Liggett Group Inc., et al., No. 83-2864 SA (D.N.J., filed 1983).

Rose Cipollone and her husband brought suit against Liggett and two other entities for various injuries. Mrs. Cipollone smoked cigarettes from approximately 1942 through 1981. Mrs. Cipollone developed bronchogenic carcinoma. The complaint asserts the following legal theories: products liability; failure to warn; negligence; gross negligence; breach of express warranty; and design defect. Mrs. Cipollone demands compensatory damages, interest, and costs. Mr. Cipollone also demands compensatory damages, interest, and costs for his loss of consortium claim.

7. Engle v. R.J. Reynolds Tobacco Co., et al., No. 94-08273 CA(20) (Circuit Court, 11th Judicial Circuit, Dade County, FL, filed [unknown]).

Plaintiffs brought suit against Liggett and several other entities on their own behalf and in an attempt to represent a proposed class. The proposed class includes essentially all U.S. citizens and residents, dead or alive, who have been made ill by cigarette smoking and could not quit. The class also includes the survivors of those who

died of diseases or conditions caused by smoking. During the course of this litigation, the class has been limited, by the Florida Court of Appeals for the Third District, to Florida residents only. The complaint asserted the following legal theories: strict product liability; fraud and misrepresentation; conspiracy to misrepresent and commit fraud; breach of implied warranty; intentional infliction of emotional distress; negligence; and breach of express warranty. Plaintiffs sought $100 billion in compensatory damages for bodily injury, pain and suffering, disability, disfigurement, loss of capacity for the enjoyment of life, medical care and expenses, loss of wage earning capacity, and mental anguish. Plaintiffs also sought $100 billion in punitive damages, equitable relief including the establishment of a medical monitoring fund, attorneys' fees, and costs.

8. Evans, Sr., Robert D. v. The American Tobacco Co., et al., No. 28926/96 (Supreme Court, Kings County, NY, filed 1996).

Plaintiff, as the administrator of his wife's estate, filed suit against Liggett and several other entities for various injuries. The complaint asserts the following legal theories: failure to warn; fraud and deceit; negligent misrepresentation; negligent and defective design; strict product liability; breach of express warranty; breach of implied warranty of merchantability; breach of implied warranty of fitness for a particular purpose; pecuniary loss to Mrs. Evans' heirs. Plaintiff demands $5 million in

compensatory damages for the counts corresponding to each of the above theories, for physical and personal injuries, pain and suffering, loss of enjoyment of life, mental anguish, emotional distress, medical expenses, and more. Plaintiff also demands $25 million in punitive damages, as well as attorneys' fees and costs.

9. Haight v. American Tobacco Co., et al., No. 84C-2072 (Circuit Court of Kanawha County, WV, filed 1984).

Rosilee Haight, Andrew Goodman, Charles Forbes, and their respective spouses brought suit against Liggett and several other entities for various injuries they related to cigarette smoking. The complaint asserts the following legal theories: intentional omission of material facts; negligence; breach of warranty of merchantability; and breach of warranty of fitness for purpose. For each count in the complaint, each of the three primary Plaintiffs seek $25 million in compensatory damages and $200 million in punitive damages, while each spouse seeks $10 million in compensatory damages and $25 million in punitive damages for their loss of consortium claims.

10. Haines v. Liggett Group Inc., et al., No. 84-678D (D.N.J., filed 1984).

Susan Haines brought suit against Liggett and several other entities for the wrongful death of her father, Peter Rossi. She brought the suit on behalf of her father's heirs at law. Mr. Rossi smoked cigarettes from 1942 through 1982. Mr. Rossi suffered from bronchogenic carcinoma, which

caused his death on May 28, 1982. The complaint alleges the following legal theories: failure to warn; negligence; fraudulent advertising; gross negligence; false advertising; conspiracy; and design defect. Plaintiff demanded judgment against the Defendants for compensatory damages, interest, and costs.

11. Henin v. Philip Morris, Inc., et al., 97-29320CA05 (Circuit Court, 11th Judicial Circuit, Dade County, FL, filed 1997).

Mr. Henin brought suit against Liggett and several other entities for various injuries he related to smoking cigarettes. Mr. Henin began smoking cigarettes in 1939, at twenty years of age. He apparently smoked until about 1965. Around 1995, Mr. Henin was diagnosed with emphysema, lung cancer, and other forms of cancer, all allegedly caused by cigarette smoking. The complaint asserts the following legal theories: negligence; strict product liability; and fraud. Mr. Henin seeks compensatory damages, interest, and costs.

12. Karp, Leo v. Liggett & Myers Tobacco Co., No. [unknown] (Supreme Court, New York County, NY, filed 1966).

Mr. Karp brought suit against Liggett for injuries he related to the smoking of cigarettes. The complaint indicates that Mr. Karp had been diagnosed with cancer. The complaint seems to be based largely on the legal theories of false or misleading advertising, breach of express warranty, and breach of implied warranty. Mr. Karp demanded judgment against Liggett in the form of $1 million in compensatory

damages, $1.5 million in punitive damages, and costs.

13. Kranz v. Brown & Williamson Tobacco Corp., et al., No. 96-1689-CIV-T-17E (U.S.D.C., M.D. FL, filed 1996).

Mr. Kranz and his wife brought suit against Liggett and other entities for various injuries. Mr. Kranz began smoking cigarettes in 1954. The complaint alleges that cigarettes caused him several serious health problems, including emphysema, heart disease, and COPD. The complaint asserts the following legal theories: negligence; strict product liability; conspiracy to commit actual fraud; and conspiracy to commit constructive fraud. Mr. Kranz seeks compensatory damages, costs, and interest for each of the counts corresponding to the above legal theories, and Mrs. Kranz seeks compensatory damages, costs, and interest for loss of consortium.

14. Mike Moore, et al. v. The American Tobacco Co., et al., No. 94-1429 (Jackson County, MS, filed 1994).

Plaintiff Mike Moore, as Attorney General of Mississippi, brought this suit against Liggett and several other entities for various injuries. The complaint was brought on behalf of the state and its citizens. The counts of the complaint are based on the following legal theories: restitution/unjust enrichment; indemnity; common law public nuisance; and injunctive relief. The complaint prayed for the following relief: damages to re-pay and pay in advance the state’s expenses due to Defendants’ wrongful conduct; interest; attorneys’ fees; costs; punitive damages; and

injunctive relief enjoining the Defendants from promoting the sale of cigarettes to minors or aiding, abetting or encouraging the sale or distribution of cigarettes to minors.

15. The National Asbestos Workers Medical Fund v. Philip Morris, Inc., et al., No. CV 98 1492 (E.D.N.Y., filed 1998).

Plaintiffs are a number of self-insured building trades health and welfare plans suing Liggett and other entities for various injuries on behalf of themselves and all similarly situated plans. These injuries center around the millions of dollars paid by the plans in medical assistance for smoking-related health care costs. The claims for relief in the complaint are based on the following asserted legal theories: RICO violations; restitution based upon unjust enrichment; restitution based on indemnity; and breach of a voluntarily undertaken duty. The Plaintiffs requested the following relief: compensatory damages for past and future damages including health care expenditures caused by Defendants' alleged illegal acts; an Order forcing Defendants to release and publish all previous research that they conducted, directly or indirectly, regarding the issue of smoking, health, and addiction; an Order forcing Defendants to fund a corrective public education campaign; an Order forcing Defendants to make corrective statements and enjoining them from continuing to mislead or deceive; an Order to fund smoking cessation programs for Plaintiff's participants and beneficiaries; an Order to disclose

nicotine yields; attorneys' fees; costs; restitution estimated at $500 million; punitive damages of $1 billion; a declaration that Defendants targeted children; an Order enjoining Defendants from continuing to target children; an Order enjoining Defendants from targeting blue collar workers; and any other relief Plaintiffs may be found entitled to receive.

16. Navajo Nation v. Philip Morris, Inc., et al., No. WRCV 449 99 (District Court of the Navajo Nation, Judicial District of Window Rock, AZ, filed 1999).

Navajo Nation brought suit against Liggett and several other entities, seeking both damages and civil penalties based on alleged violations of the Navajo Nation's Civil Tobacco Liability Enforcement and Recovery Act. The violations were alleged based on the following asserted legal theories: unfair and deceptive acts and practices; conspiracy to restrain trade; unconscionable acts and practices; negligence, and strict product liability. The Plaintiff's complaint requests the following relief: damages to reimburse the Navajo Nation for money expended or to be made for health conditions caused by Defendants' products; maximum civil penalties under the statute; costs; attorneys' fees; and any other appropriate relief.

17. Rogers v. R.J. Reynolds Tobacco Co., et al., No. E121486 (Jefferson County, TX, filed 1985).

Plaintiff I. D. Rogers, individually and as executor of his deceased wife's estate, and his children brought this survival and wrongful death suit against Liggett and several

other entities. Marjorie Rogers was diagnosed with lung cancer in November of 1982, and it progressed until her death on December 17, 1983. She had smoked since she began in about 1940 at the age of 15. The complaint asserts the following theories of liability: strict liability for design and marketing defects; negligence and gross negligence; fraud and misrepresentation; violations of the Texas Deceptive Trade Practices Act; civil conspiracy; intentional infliction of harm; ultrahazardous and abnormally dangerous activity; supplying dangerous chattels to youth; marketing highly dangerous, addictive products without medical supervision; and enterprise, alternative, concert of action, and market share liability. The Plaintiffs seek compensatory damages for pain and suffering; medical care; funeral and burial expenses; impairment; disfigurement; loss of earnings and earning capacity; loss of love, society, companionship, etc.; mental anguish, grief and bereavement; and loss of consortium. The Plaintiffs also seek punitive damages based on deceit, fraud, malice, civil conspiracy, gross negligence, intentional wrongdoing and unconscionable conduct.

18. The State of Ohio v. Philip Morris, Inc., et al., No. 97-CVH05-5114 (Court of Common Pleas, Franklin County, OH, filed 1997).

Plaintiff, State of Ohio, brought this suit against Liggett and several other entities for various injuries. The complaint was brought on behalf of the state and its

citizens. The counts of the complaint are based on the following legal theories: violations of the Ohio Consumer Sales Practices Act; violations of Ohio's antitrust law; corrupt activity; restitution based on unjust enrichment; constructive trust based upon unjust enrichment; breach of voluntarily undertaken duty; conspiracy; and public nuisance. The complaint included the following prayers for relief: an Order requiring full disclosure of research; Orders forcing Defendants to fund a public education campaign and sustained cessation programs; an Order requiring Defendants to make corrective statements; civil penalties, disgorgement of profits, and double or treble damages for various statutory violations, as well as fees, expenses, and costs; restitution damages; damages and compensation to the State for past and future damages such as health care expenses, as well as interest and costs; the imposition of a constructive trust against the Defendants for the benefit of the State in the amount of health care costs expended due to Defendants' alleged wrongful conduct; a declaration that Defendants targeted children; an Order enjoining such targeting in the future; and any other appropriate relief.

19. State of Texas v. The American Tobacco Co., et al., C.A No. 5-96CV91 (U.S.D.C. E.D. of TX, filed 1996).

Plaintiff, State of Texas, brought this suit against Liggett and several other entities for various injuries. The complaint was brought on behalf of the state and its

citizens. The counts of the complaint are based on the following legal theories: violations of the federal RICO statute; violations of the Sherman Act; violations of Texas's antitrust act; negligence; strict product liability; breach of express and/or implied warranties; restitution/unjust enrichment; common law public nuisance; negligent performance of a voluntary undertaking; and fraud and intentional misrepresentation. The complaint included the following prayers for relief: a declaration that the Defendants violated the RICO Act and an Order enjoining them from continuing to do so; a similar declaration and Order regarding the Sherman Act; an Order forcing the Defendants to dissolve the Council for Tobacco Research and the Tobacco Institute; recovery of $1 million dollars per violation of the Texas Free Enterprise and Antitrust Act of 1983 against each Defendant; restitution damages for money spent by the State on health care due to Defendants' alleged wrongful acts; interests, fees, and costs; punitive damages; a declaration that Defendants targeted children; an Order enjoining such targeting in the future; and any other appropriate relief.

20. Earl William Walker v. Liggett Group Inc., No. 2:97-0102 (S.D.W.V., filed 1997).

Mr. Walker has brought a class action suit against Liggett. Mr. Walker was diagnosed with lung cancer in 1996. The putative class described in the complaint is all persons who have suffered injury as a result of smoking

Defendant's cigarettes, as well as the estates, representatives, and administrators of those persons. The complaint asserts the following legal theories: strict product liability; failure to warn; design defects; negligence; breach of express warranty; breach of implied warranty; negligent misrepresentation; conspiracy; fraudulent misrepresentation; and RICO violations. The Plaintiff seeks as relief for the class: compensatory damages; an Order forcing Defendant to establish a medical monitoring fund; punitive damages; fees, costs, and interest; and any and all other appropriate relief.