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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PATRICIA HENLEY, Plaintiff and Respondent, v. PHILIP MORRIS INC., Defendant and Appellant.	A086991 (San Francisco County Super. Ct. No. 995172)

Plaintiff brought this action for personal injuries allegedly sustained as a result of defendant's tortious misconduct in the manufacture and marketing of cigarettes. The jury returned a special verdict awarding plaintiff $1.5 million in compensatory damages and $50 million in punitive damages. The trial court denied defendant's motions for new trial and judgment notwithstanding the verdict, except that it ordered a new trial on punitive damages unless plaintiff consented to reduce the punitive award to $25 million. Plaintiff consented to the reduction, and defendant filed a timely appeal.

Defendant raises a host of objections, many not preserved for appeal. Its primary contentions are that (1) all of plaintiff's claims are barred by the immunity conferred on tobacco manufacturers from 1988 to 1998 by former Civil Code section 1714.45 (section 1714.45);[1] (2) the jury was misinstructed on the limitations imposed on

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III, IV, V, VI, VII, and VIII.

1 All future references to former section 1714.45 are to the version in effect from January 1, 1988, to January 1, 1998.

plaintiff's claims by the Public Health Cigarette Smoking Act of 1969, title 15 United States Code section 1331 et seq. (the 1969 Act); (3) each of plaintiff's claims is deficient in various particulars; and (4) the punitive damage award cannot be sustained. We find no prejudicial error, and affirm the judgment.

INTRODUCTION AND BACKGROUND

We begin with a fundamental principle persistently overlooked by defendant: "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 394.) Thus in ascertaining the underlying facts for purposes of appellate analysis, the reviewing court "must consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment." (*Id.* § 359, p. 408, italics in original.)

Viewed most favorably to the judgment, the evidence shows that plaintiff, who was born in 1946, began smoking cigarettes in 1961 or 1962, at the age of 15, when she "lit up" with some school friends outside a dance. At that time she felt smoking was "cool" and "grown up," provided the pleasure of the forbidden, made her look older, and served as a "rite of passage." Then and for some years thereafter, nobody told her that cigarettes could cause her serious disease. There were no warnings on cigarette packages or in advertisements. Plaintiff was not taught in school about the dangers of tobacco. As a result she believed that cigarettes, which contained "[t]obacco, pure and simple," were "not a harmful product." Nor did she know that cigarettes or nicotine could be addicting. Nothing in the advertising she saw suggested that if she started smoking she might be unable to stop.

The jury could also find that starting no later than December 1953, defendant and other cigarette manufacturers agreed to act together to counter mounting scientific evidence about the health risks of cigarette smoking. By the time plaintiff began smoking, defendant knew that tobacco contained numerous carcinogenic substances as well as flavoring additives that also produced carcinogenic compounds upon combustion. Tobacco manufacturers were also aware of epidemiological studies that showed a strong correlation between smoking and the incidence of lung cancer. Yet they launched a concerted public relations campaign to deny any link between smoking and serious illness. A major part of this strategy was the creation of a "research institute" that would, as the public was told, attempt to find the truth about smoking and health—though in fact it was permitted to conduct very little research that might confirm a link, serving mainly, as the jury was entitled to find, to gather ammunition against tobacco's detractors. Other strategies included manipulating the mass media to suppress or make light of adverse news developments, such as new studies or reports.

The jury could also find that defendant engaged in saturation advertising, much of it consciously targeting the teenage audience from which new ("replacement") smokers had to come. Defendant knew that persons who did not begin smoking during their teen years were unlikely to do so. In particular, defendant sold the brand of cigarette plaintiff preferred, Marlboro, using symbols of the independence, autonomy, and mature strength for which teenagers were understood to yearn. The jury could find that these targeted teenage consumers possessed less critical judgment, and were more receptive to marketing manipulation generally, than might be the case with adults. The jury could find that teenagers who went past the experimentation phase became addicted to tobacco, as a result of which they found it extremely difficult to stop smoking and often suffered impaired judgment with respect to the consequences of continuing to do so.[2] The jury

[2] We use the term "addicted" as shorthand without meaning to declare as a judicial fact that tobacco is addictive in any settled medical sense. That question is not before us. The jury here presumptively found that tobacco was addictive in a sense supported by the evidence and supportive of the judgment.

could find that the strategy of marketing to teenagers and causing them to become addicted to its products was central to the tremendous success and profitability of the Marlboro brand in particular, helping defendant to become one of the largest and most successful corporations in the world.

In 1966, as evidence of health risks mounted, Congress required that cigarette packages bear the relatively mild warning that smoking "may be hazardous." In the 1969 Act, Congress required a somewhat stronger warning and required that it appear in advertising as well as on packages. At the same time, Congress explicitly preempted any state law imposing a "requirement or prohibition with respect to advertising or promotion" of cigarettes—language that has since been construed to preempt many but not all common-law tort claims. Although the warnings have since been further strengthened, this partial federal immunity remains in place, and is one of defendant's major defenses here. (See section II, below.)

In 1988 the tobacco industry acquired a safe harbor under California law when, riding the coattails of a legislative compromise, tobacco was listed among "common consumer products" in former section 1714.45, a statute construed the following year to create an almost complete "immunity" from tort liability. The Legislature repealed that protection effective January 1, 1998, but defendant contends that it nonetheless applies to defeat most or all of plaintiff's claims here. (See section I, below.)

The jury was entitled to find that well before these legislative defenses became applicable, plaintiff had become an addicted smoker with sharply impaired judgment and will where cigarettes were concerned. Plaintiff testified that on the subject of cigarette smoking and health, "my brain wasn't going to register anything that anybody said." When she saw the first package warnings, she minimized the perceived "degree[] of danger," thinking to herself that it was also "dangerous to walk across the street." She testified that while she heard the United States Surgeon General was saying things about cigarettes, she also knew "that the tobacco companies were saying different." As a

result, the package warning "didn't faze me one way or the other. I wasn't going to give the cigarettes up at that point."

Plaintiff's first regular brand of cigarettes was Marlboro, and it remained her favorite brand throughout almost all of her 35-year smoking history. From age fifteen until she was about 43 years old (around 1989), she apparently smoked one-and-a-half to two packs a day of "Marlboro Red," a brand rated to deliver relatively high amounts of tar and nicotine. At that age, however, she switched to Marlboro Lights, a lower-tar brand, on what the jury was entitled to view as the direct advice of a Philip Morris agent. Plaintiff testified that around that time she began to hear that "low-tar cigarettes were better. You wouldn't get as much tar and nicotine and, you know, their advertising on the low-tar cigarettes was really out there. [¶] I'm thinking, 'Well, okay. Maybe there's something to this.' So when I was approximately 43, I decided that, 'Well, I'll check into this and maybe I'll change from the Reds to the Lights.' [¶] So I did indeed call the Marlboro, Philip Morris company and expressed, you know, my concerns as to, 'Is it really true? Is there less tar in this or less nicotine?' [¶] And I was assured at the time that if I was concerned that, yes, I could switch to the Lights . . . ." She did so and, in a few weeks, had more or less doubled her intake, to three-and-a-half packs a day.

By mid-October 1997 plaintiff "was feeling really bad" and "down for the count with what I thought was heavy-duty flu." She was diagnosed in February 1998 with small-cell carcinoma of the lung. The jury was more than entitled to find that this affliction was directly caused by cigarette smoking.

ANALYSIS

I.
IMMUNITY UNDER FORMER SECTION 1714.45[3]

A. Nature of Error; Standard of Review.

Defendant contends that the trial court erred by "refus[ing] to apply" the immunity granted to tobacco manufacturers prior to 1998 by former section 1714.45. This is not an adequate specification of error. (See 9 Witkin, Cal. Procedure, *supra,* Appeal, § 340, p. 382 [court reviews trial court's actions, not reasoning]; *Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 215 ["It is the duty of counsel to refer the reviewing court to the portion of the record to which he objects and to show that the appellant was prejudiced thereby."]; *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 ["it is not the burden of this court to act as counsel for either party and we will not assume the task of making a search for error"]; *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 229 [refusing to consider claims of attorney misconduct unaccompanied by record references].) However, defendant elsewhere notes that the trial court denied a motion for nonsuit based on former section 1714.45. This is a specific and reviewable ruling. Other matters to which defendant alludes in this regard are not, for various reasons, cognizable

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3 The same or related issues are currently pending before the Supreme Court in at least five cases: *Myers v. Phillip Morris Companies, Inc.* (9th Cir. 2001) 239 F.3d 1029, certification accepted March 21, 2001 (S095213); *Souders v. Philip Morris Inc.* (2001) * Cal.App.4th * [104 Cal.Rptr.2d 821], review granted, May 16, 2001 (S096570); *Naegele v. R. J. Reynolds* (2000) * Cal.App.4th * [96 Cal.Rptr.2d 666], review granted, Oct. 18, 2000 (S090420); *Bowyer v. Philip Morris, Inc.* (Mar. 28, 2001) B145673 [nonpub. opn.], review granted, June 13, 2001 (S097441); *Reynolds v. Philip Morris, Inc.* (July 10, 2001) B141850, [nonpub. opn.], review granted, October 10, 2001 (S099989). In addition, as this opinion was being prepared for filing, the Fourth District published *In re Tobacco Cases II* (Oct. 25, 2001) __ Cal.App.4th __ [2001 Cal.App. LEXIS 841, 2001 C.D.O.S. 9195]. The court there concluded that nothing in the statute "unmistakably express[ed] any legislative intent that the amended statute be applied retroactively." (*Id.* at p. __ [2001 Cal.App. LEXIS 841, *47-48; 2001 C.D.O.S. at p. 9201].) Our study of the statutory language has led us to the contrary conclusion.

grounds for reversal.[4]

Defendant was entitled to nonsuit if "as a matter of law, the evidence presented by plaintiff [was] insufficient to permit a jury to find in [her] favor." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) Since this is an issue of law, we review it de novo, employing the same standard as the trial court. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542.) For present purposes it is not seriously disputed that the evidence was sufficient to support findings that plaintiff started smoking cigarettes in the early 1960s and continued to do so until late 1997, as a result of which she contracted lung cancer. Although defendant makes a half-hearted attempt to cast the point in doubt, we infer in support of the judgment that plaintiff did not and could not reasonably discover her cancer before early 1998, when she was diagnosed with that illness and told that it resulted from cigarette smoking. The question thus presented is whether former section 1714.45 precluded the imposition of liability on defendant for plaintiff's injuries as a matter of law. We hold that it did not.

B. Former Section 1714.45.

Defendant relies on former section 1714.45 as in effect from January 1, 1988, to January 1, 1998. At that time the statute provided that a manufacturer or seller could not be liable in a "product liability action" for injuries caused by a product if the product was

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[4] Defendant's claim of erroneous admission of evidence is not cognizable in the absence of an objection below on the ground now asserted. (Evid. Code, § 353, subd (a).) Defendant's statement that the evidence was admitted "despite objection" is somewhat disingenuous: the cited objections had nothing to do with the issue now under discussion. Defendant's complaint that the trial court should have instructed the jury to disregard evidence of conduct supposedly immunized by the statute founders on the acknowledged fact that no such instruction was proffered or requested. Nor does the cited authority (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 333-334) support defendant's claim that the court was required to give such an instruction on its own motion. Finally, in ruling on post-trial motions the trial court was entitled to consider objectionable evidence to which no objection was asserted. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 393, p. 484; Cal. Law Rev. Com. com., West's Ann. Evid. Code, § 140.)

"inherently unsafe," was "known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community," and was "a common consumer product intended for personal consumption, such as . . . tobacco . . . ." (Former section 1714.45, subd. (a); Stats. 1987, ch. 1498, § 3, pp. 5778-5779.) "[P]roduct liability action" was defined as "any action for injury or death caused by a product, except . . . an action based on a manufacturing defect or breach of an express warranty." (*Id*., subd. (b).)

In 1989 Division Two of this court described former section 1714.45 as a "poorly drafted statute" that failed to convey a single " 'plain meaning' " but, "[o]n the contrary," was "on its face amenable to two diametrically opposed interpretations, each of which conflicts in some significant way with the words the Legislature used." (*American Tobacco Co. v. Superior Court* (1989) 208 Cal.App.3d 480, 485 (*American Tobacco*).) The court nonetheless concluded that the statute created an "immunity" for manufacturers of the enumerated products that was both "automatic" (*id*. at p. 486) and "nearly complete" (*id*. at p. 487). The breadth of this reading may have been cast in some question by *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, which held that in an action for damages resulting from lung disease, an asbestos manufacturer could not reduce its own "comparative responsibility" under Proposition 51 (Civ. Code, § 1431 et seq.) by seeking to attribute a share of responsibility to an absent tobacco company. The court confirmed that former section 1714.45 "immunized" tobacco suppliers. (*Id*. at pp. 1000, 1001, 1003, fn. 8.) At the same time, the court seemed to reserve judgment on the scope and extent of the immunity provided. (*Id.* at pp. 999, 1003, fn. 8.)

The year after *Richards* was decided the Legislature itself undertook to amend former section 1714.45 as it affected tobacco products. From these efforts emerged two statutes. The first added a subdivision (d) to the former statute declaring that it posed no impediment to actions by public entities to recoup the cost of benefits provided to persons injured by tobacco products. (Stats. 1997, ch. 25, § 2, p. 230.) We are more concerned with the second amendment, Senate Bill No. 67, ultimately chaptered as Statutes 1997, Chapter 570 (SB 67). Because it was not an urgency measure, it took effect on January 1,

1998. (See Gov. Code, § 9600, subd. (a).) It made the following changes to former section 1714.45: (1) deleted tobacco from the list of products in subdivision (a); (2) inserted a new subdivision (b), stating that the statute did not "exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions"; (3) modified and renumbered (as subdivision (e)) subdivision (d), which had just been added as noted above; (4) inserted a new subdivision (f) declaring a legislative intention to abolish any "statutory bar" to claims by persons "who have suffered or incurred injuries" and to ensure that "claims which were or are brought" would be "determined on their merits"; and (5) inserted a new subdivision (g) declaring section 1714.45 inapplicable to "tobacco industry research organization[s]." (§ 1714.45.) Accompanying the amendment was a further uncodified declaration of legislative intent. (Stats. 1997, ch. 570, § 2.)

SB 67 thus effected a *repeal* of section 1714.45 insofar as it had conferred an immunity on tobacco manufacturers, their successors, and tobacco industry research organizations. The term "repeal" appears in the one-sentence "summary" or "digest" in nearly all of the committee and floor reports. (E.g., Sen. Com. on Judiciary, Rep. on Sen. Bill No. 67 (1997-1998 Reg. Sess.) as amended Feb. 14, 1997 ["This bill would repeal the current immunity conferred upon manufacturers and sellers of tobacco products, as specified in Civil Code Section 1714.45, for products liability."].)

C. Effect of Statute.

1. Express Terms.

The question presented, then, is whether the 1998 repeal of the immunity formerly granted to tobacco manufacturers by former section 1714.45 applies to permit plaintiff's suit. Innumerable authorities acknowledge a general " 'presumption' " against giving retroactive effect to statutory changes (e.g., *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 536, fn. 6, quoting *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265), but beyond that the jurisprudence of statutory retroactivity is a dense conceptual jungle. We have elected to more or less follow the analytical approach taken

in *Landgraf, supra*, 511 U.S. at p. 280. In that approach, the first task is to determine whether the enacting body "has expressly prescribed the statute's proper reach." (*Ibid*.) If it has, there is no occasion to resort to "judicial default rules." (*Ibid*.; see *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 ["when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us"].) Only if the statute lacks an express directive must the court attempt to determine "whether the new statute would have retroactive effect" for purposes of the judicial presumption. (*Landgraf, supra*, 511 U.S. at p. 280) In short, we need not decide whether application of the change to a particular state of facts would be "retroactive" if the statute plainly calls for such application.

We have concluded that the statute here expressly calls for application to the present case. Subdivision (f) of section 1714.45 (subdivision (f)) states, "It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that *there exists no statutory bar to* tobacco-related personal injury, wrongful death, or other tort *claims* against tobacco manufacturers and their successors in interest *by California smokers* or others who *have suffered or incurred injuries*, damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also the intention of the Legislature to *clarify* that those *claims that were or are brought shall be determined on their merits, without* the imposition of *any* claim of *statutory bar or categorical defense*." (Italics added.)

Three portions of this declaration expressly prescribe a retroactive effect. The first extends the abolition of the prior immunity to persons who "*have* suffer*ed* or incurr*ed*" damages from tobacco products. A statute " 'speaks from the date it takes effect.' " (*Hersh v. State Bar* (1972) 7 Cal.3d 241, 245, quoting *People v. Righthouse* (1937) 10 Cal.2d 86; see *Righthouse, supra*, at p. 88 ["every statute speaks as though the Legislature was in session on the day when the act takes effect and passed it on that day"].) The statute thus must be understood as a statement by the Legislature, speaking on January 1, 1998, that persons who "ha[d] suffered" damages from tobacco products, as

of that date, were not to be impeded in the assertion of claims by the immunity formerly afforded to tobacco manufacturers. As a matter of common sense, the words chosen could hardly mean anything else, and as a matter of grammar, they do not. The quoted phrase uses what is usually referred to as the "present perfect" tense. It refers to an event beginning in the past and either completed in the past or continuing into the present. The event here described—the suffering of an injury—necessarily contemplates antecedent injury-producing *conduct* by the defendant. The quoted phrase thus constitutes an explicit extension of the repeal to at least some injuries and conduct preceding its enactment.

The statute next declares an intent that "those *claims* that *were* or are *brought* shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense." This wording, using the simple past tense, is unusual, but that does not deprive it of effect. The statute speaks as of its effective date, and a reference on January 1, 1998, to claims that "were brought" can only mean *claims brought prior to that date*. We conceive no interpretation of this language, and defendant suggests none, which gives it any other meaning. It thus reiterates and reinforces the legislative intention to extend the repeal of immunity to at least some past claims—not only claims based on past events and conduct, but also claims "brought" before the effective date.

Further textual evidence of retroactive intent appears in the statement that the Legislature intends to "*clarify*" that the described claims will be decided on their merits without regard to the former statutory bar. Here "clarify" is a term of art presumably intended to invoke the rule that "a statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment." (*Western Security Bank v. Superior Court* , *supra*, 15 Cal.4th 232 at p. 243, italics omitted.) Of course a flat repeal of a prior statute is *not* in fact a mere "clarification"; by definition it changes the law. The Legislature's characterization of such a change as a "clarification" is not binding on us. (*Id.* at p. 244.) Nonetheless it is textual *evidence* that "may still effectively reflect the Legislature's purpose to achieve a retrospective change." (*Ibid*.)

Relying on *Colfield v. American Tobacco Company* (E.D.Cal. Aug. 6, 1999, Civ-S-98-1695 DFL DAD)—an unpublished memorandum of opinion from a federal trial court—defendant makes a series of arguments against reading subdivision (f) as expressly disclosing retroactive intent.[5] Defendant notes that the statute lacks a retroactivity clause as explicit as those found in other statutes. The short answer to this is that California law does not require the most explicit possible clause. The question is whether the Legislature has disclosed by " 'express language or clear and unavoidable implication' " an intent to apply the statute to prior events. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208.) We have answered that question in the affirmative. That the Legislature could have made its intentions clearer does not mean it failed to make them clear enough.

Quoting the unpublished *Colfield* decision, defendant asserts that subdivision (f) " 'seems to take a later perspective in time, after January 1, 1998, when it could accurately be said that "there exists no statutory bar . . . to tobacco-related tort claims." ' " (Ellipsis defendant's.) To the same effect is the suggestion that subdivision (f) might be " 'read from the perspective of future courts, to whom the Legislature is providing interpretive advice.' " These statements are devoid of logical force because they are couched in terms of mere apparency or possibility, as if it were unnecessary to say what the statute actually means. Insofar as they assert anything, it is

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5 Defendant has burdened an already mammoth record with vast quantities of unpublished authority from other jurisdictions. Our own unpublished opinions are not authority, and parties are forbidden to cite them as such. (Cal. Rules of Court, rule 977(a).) Nor does a written opinion by a California trial court possess precedential value. (*Santa Ana Hospital Medical Center v. Belshé* (1997) 56 Cal.App.4th 819, 831; see *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 282, quoting *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596 [" '[T]rial courts make no binding precedents.' "].) The federal district courts are trial courts, and their opinions are subject to this same principle. (*Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 20, fn. 8.) Indeed, on questions of state law *no* federal court opinion is binding on us—even that of the United States Supreme Court. (*East Quincy Services Dist. v. General Accident Ins. Co.* (2001) 88 Cal.App.4th 239, 246.)

that the verbs in subdivision (f) speak from some future time. We discern no basis for this hypothesis, which flatly contradicts the principle that a statute speaks as of the time of its enactment. (*Hersh v. State Bar, supra*, 7 Cal.3d at p. 245.) The quoted rumination to the contrary seems to reflect nothing more than an unwillingness to give the Legislature's words their apparent meaning.

We are likewise unpersuaded by the statement that " '[a]n unexplained shift in verb tense is too slender a reed on which to base such a significant departure from normal legislative practice.' " In addition to the reasons already stated, to disregard statutory language as insignificant violates the canon that "whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330.) We are not free to adopt an argument that simply dismisses statutory language as "unexplained" or "too slender."

Somewhat more plausibly, defendant contends that an intent to apply the 1998 legislative changes to past conduct, injuries, or claims, is incompatible with that portion of subdivision (e) of section 1714.45 (subdivision (e)) stating that, in any recoupment action brought by a public entity, "the fact that *the injured individual's claim against the defendant may be barred by a prior version of this section* shall not be a defense." (Italics added.) According to defendant, the italicized language is an explicit acknowledgement that as of the effective date of the statute, and thereafter, prior versions of the statute could continue to bar claims. Defendant also suggests that the quoted language would be superfluous if the 1998 amendments effected a complete retroactive repeal of the prior immunity.

Defendant thus obliquely invokes two rules of construction. The first, which we have already noted, counsels against a construction that will render parts of a statute superfluous. (*Agnew v. State Bd. of Equalization, supra*, 21 Cal.4th at p. 330.) Defendant seems to imply that if the Legislature intended to retroactively lift the former immunity as it affected individual claims, it would not bother to prescribe a rule for cases in which individual claims might be subject to the immunity. Second, defendant may be

understood to suggest that, for similar reasons, subdivision (e) actually *conflicts* with subdivision (f) insofar as the latter is construed to make the repeal retroactive; implicit in this suggestion is the further proposition that the conflict should be resolved in favor of subdivision (e).

The indirectness of this argument may stem from the difficulty of asserting it more cogently without exposing its fatal weakness. In a sentence, the cited language from subdivision (e) does no more than acknowledge the *possibility* that *some* claims "may" be "barred by a prior version of this section." There is no logical conflict between such a statement and an expression of legislative *intent* that claims *not* be barred. Even if the two provisions appeared to be in tension with each other, such tension would not provide a sufficient basis to simply ignore one of them. "It is fundamental that legislation should be construed so as to harmonize its various elements without doing violence to its language or spirit." (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788; *People v. Garcia* (1999) 21 Cal.4th 1, 6.) Thus if a statute contains two potentially conflicting terms, a court will attempt to avoid an interpretation that requires it to disregard one of them "or to rewrite some of their provisions." (*People v. Garcia*, *supra*, 21 Cal.4th at p. 6.) Such a neutralizing construction, or "reformation," may be undertaken if "compelled by necessity and supported by firm evidence of the drafters' true intent." (*Ibid*.) It should be avoided, however, "when the statute is reasonably susceptible to an interpretation that harmonizes all its parts without disregarding or altering any of them." (*Ibid*.)

Here the cited provision of subdivision (e) is readily harmonized with the retroactive repeal of the statutory immunity, at least as applicable to this case. It can be read as a reflection of legislative uncertainty about the future judicial treatment of the repeal. In *Landgraf, supra*, 511 U.S. at p. 261, the court rejected an argument that language specifying the prospective effect of some parts of a statute would be superfluous if other parts were not applied retroactively. The court said that the specification of prospectivity was explained by, among other things, "Congressional doubt concerning judicial retroactivity doctrine." (*Ibid*.) Here, the Legislature was not

required to gamble that courts would retroactively apply the repeal of tobacco immunity to any and all individual claims. The Legislature was entitled to anticipate that courts might hold some claims barred, and to act on that possibility by declaring that it had no effect on recoupment claims by public entities.

Defendant makes no attempt to harmonize or reconcile subdivisions (e) and (f) but would simply rewrite the latter to remove any reference to past claims. But defendant makes no attempt to show, and we see no basis to conclude, that such a treatment is "compelled by necessity" or "supported by firm evidence of the drafters' true intent." (*People v. Garcia, supra*, 21 Cal.4th at p. 6.) As we have explained, the supposedly conflicting provisions can be reconciled by positing legislative uncertainty over the extent to which courts would carry out the expressed intent that the statute apply to events and claims predating its effective date. The provisions of subdivision (e) therefore afford no occasion to disregard those expressions of intent.

We conclude that the 1998 amendments to section 1714.45 manifest on their face a legislative intent that the repeal of the immunity originally conferred on tobacco companies be effective with respect to claims involving events antecedent to the effective date of the amendments. This is not to say, and we do not decide, whether the repeal extends to *all* claims asserting antecedent events. It is enough for our purposes that the Legislature expressed an intent to extend the repeal to *some* class of antecedent claims. As will appear, if the statute applied to *any* such claims, it necessarily applies to plaintiff's claims. (See section E, below.)

2. Extrinsic Evidence of Legislative Intent.

Defendant contends that notwithstanding the text of subdivision (f), the legislative history of the 1998 repeal establishes that it was not intended to apply retroactively. This argument depends not on the history of the statute as it ultimately became effective but on the failure, by veto, of another measure introduced in that same session to abolish tobacco manufacturers' immunity under section 1714.45. The gist of defendant's argument appears to be that the other measure, Senate Bill No. 340 (1997-1998 Reg.

Sess.) (SB 340), explicitly provided for retroactive effect; thus, defendant implies, the failure of that measure is a repudiation of such effect.

We find this contention unsound in a number of respects. First, although a court seeking to ascertain the proper application of a statute "may properly rely upon extrinsic aids, it should first look to the words of the statute to determine the Legislature's intent." (*O'Kane v. Irvine* (1996) 47 Cal.App.4th 207, 211; see *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129 ["If the language of a statute is clear and unambiguous, judicial construction is not necessary and a court should not indulge in it."]; *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1578 [noting dangers inherent in "reading the tea leaves of legislative history"].) Here we see no need to resort to legislative history, or other extrinsic evidence, given the explicit references to past events and claims in subdivision (f).

Second, evidence of unenacted legislation has been repeatedly rejected as a basis for establishing the intent of enacted legislation. (E.g., *People v. Escobar* (1992) 3 Cal.4th 740, 751 [" 'weak reed upon which to lean' "]; *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1003 [same]; *id*. at p. 1003, fn. 4 [vetoed statute overturning prior decision "provide[d] no guidance"]; *California Labor Federation v. Industrial Welfare Com.* (1998) 63 Cal.App.4th 982, 994 [disregarding vetoed bill overturning regulatory action]; *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 181, fn. 10 ["legislative history tea leaves"].)

Third, such light as SB 340 might shed on the legislative intent of SB 67 is unfavorable to defendant's position. SB 340 would have added a new section 1714.55 to the Civil Code dealing exclusively with the application of section 1714.45 to claims asserting specified theories of liability against tobacco manufacturers, their successors, and tobacco industry research organizations. (SB 340 as enrolled Sept. 3, 1997; http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0301-0350/sb_340_bill_19970903_enrolled.html.) The new statute would have: (1) declared section 1714.45 inapplicable to any action against one of the specified defendants by a person who did not voluntarily consume tobacco; (2) declared section 1714.45 inapplicable to any action against one of

the named defendants sounding in fraud, misrepresentation, or conspiracy; (3) declared the legislative "intent" that section 1714.45 "never applied" to such actions; and (4) declared that *American Tobacco*, *supra*, 208 Cal.App.3d 480, "misinterpreted the intent of the Legislature" to a stated extent such that the new statute would not change, but would be declaratory of, existing law. (SB 340, § 1.) The bill also contained a further uncodified expression of legislative intent of little apparent relevance. (*Id*., § 2.)

The governor's veto message, to which defendant does not allude, states that his refusal to sign the bill rests not on any desire to limit the abolition of the former immunity but on the belief that the bill was redundant of SB 67 and thus threatened to generate needless confusion. The governor wrote that he was refusing to sign the bill because it "creat[ed] exceptions to an immunity which no longer exists." (Governor's Veto Message to Sen. on Sen. Bill No. 340 (Oct. 3, 1997) (1997-1998 Reg. Sess.).) It was in that light that he believed its enactment "would . . . serve no purpose," and that it would, if it became law, "create confusion over the meaning of the statute as it is now amended." (*Ibid*.) Thus the Governor's opinion that the proposed statute was redundant of SB 67, far from supporting defendant's argument, suggests that the Governor expected SB 67 to have a similar effect—i.e., to apply to all claims within its scope regardless of when they arose or when the events on which they rested occurred.

Finally, while defendant fails conspicuously to discuss the legislative evolution of SB 67 itself, and while the legislative record lacks a "smoking gun" on the subject of retroactivity, we find substantial support in it for the premise that subdivision (f) was intended, and indeed its primary purpose was, to extend the abolition of the former immunity to at least some past events and claims. As originally proposed the bill contained no such provision. The first committee analysis on the bill contained the following comments under the heading "Prospective repeal only": "Some concern has been expressed that SB 67 would apply only to causes of action arising on or after January 1, 1998, assuming it is enacted this year. In the absence of specific language in the legislation specifying retroactive application, a measure will operate prospectively only upon its enactment." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 67 (1997-

1998 Reg. Sess.) as amended Feb. 14, 1997, for hearing date of Apr. 8, 1997.) One week after this acknowledgment of "concern" about a prospective-only application of the amendments as then drawn, the bill was amended by the insertion of what is now subdivision (f). (SB 67, *supra*, as amended Apr. 16, 1997.)

The record also contains evidence that (1) the broad "immunity" found in *American Tobacco* came as a surprise; and (2) the original statute had been enacted under a mistaken understanding induced at least in part by the tobacco industry's own deceptions. In a Senate floor analysis, a supporter of SB 67 is quoted as follows: " 'At the time [of enacting former section 1714.45], it was not anticipated that the California courts would interpret [it] so broadly. Over the last decade, we have also learned much regarding the addictive nature of tobacco and the industry's intentional efforts to mislead the public on the health effects of tobacco. This, coupled with the courts' broad interpretation of the California statute, has precipitated the need to change that statute and remove tobacco's liability protections.' " (Sen. Rules Com., Floor Analysis, Sen. Bill No. 67 (1997-1998 Reg. Sess.) as amended Aug. 11, 1997.)

We conclude that the legislative history does nothing to detract from, and if anything enhances, our conclusion that the express references to past events and claims in subdivision (f) must be applied to extend abolition of the statutory immunity to at least some events and claims antedating January 1, 1998.

D. Constitutionality.

Defendant asserts that application of the 1998 amendments so as to deny it the immunity provided by the previous version of the statute will violate the constitutional guarantee of due process of law and the prohibition against ex post facto laws. This, at any rate, is the assertion in defendant's argumentative heading. However, the ensuing text argues, not that such an application of the amendments is constitutionally prohibited, but that the statute must be *construed* not to permit such an application, under the " 'cardinal principle' that statutes must be construed, whenever possible, to avoid raising constitutional issues." (Quoting *United States v. Security Industrial Bank* (1982) 459

U.S. 70, 78.)

First, defendant suggests that the Legislature cannot retroactively abolish a preexisting defense without violating the due process rights of a party who would otherwise have been entitled to raise that defense. The primary cited authority for this supposed rule is *Morris v. Pacific Electric Ry. Co.* (1935) 2 Cal.2d 764, 768-769. Although the analysis in that case is somewhat oblique, the real holding appears to be that a legislative change in the principles governing the doctrine of "negligence per se" was a substantive change in law which could not be accomplished without a clear indication of legislative intent. Defendant quotes, in heavily edited form, the following comment: "[T]he legislature may not, *under pretense of regulating procedure or rules of evidence*, deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore." (*Id*. at p. 768, italics added.) More critical to our analysis is a statement defendant ignores altogether: "*The legislature did not assume to make the amendment retrospective* and under the circumstances *the court is not warranted in doing so*." (*Id*. at p. 769, italics added.)

Defendant cites *In re Marriage of Garcia* (1998) 67 Cal.App.4th 693, 698-699, where we cited *Morris* in holding that a statute silent as to its own application to past events could not, by the expedient of calling it "procedural," deprive a party of substantive defenses to which he had long since become entitled by passage of time. We did not purport to hold that retroactive application, if called for by the Legislature, would have been unconstitutional. Similarly, *Zellers v. State of California* (1955) 134 Cal.App.2d 270, was concerned with the effects of an enactment that did not purport by its terms to apply to pre-enactment matters.

Defendant also quotes the statement in *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1207, that "[i]n general, legislation that makes certain conduct unlawful cannot be applied to conduct that was lawful and completed before its enactment." Application of this proposition is conditioned on (1) categorization of the case in which it is asserted as falling within the "general" rule, and (2) characterization of the conduct at issue as having been "completed" when the

statute took effect. Moreover, this generalization is expressly conceded by the court to rest largely or entirely not on any constitutional prohibition against a contrary result but on the "constructional policy against the retroactive application of legislation." (*Ibid*.) As we have seen, that policy—which is a presumption or preference and not, as defendant suggests, a prohibition—is overcome here by the express language of the statute. The court's general reference to "constitutional prohibitions" is no more effective than defendant's to establish that this case falls within such a prohibition.

In sum, none of the cases cited by defendant or known to us actually rests on the proposition that the Legislature lacks the *power* to retroactively abolish a defense it has previously created. Indeed we see little basis for such an argument. Even if the defense had become a vested right—a dubious proposition—such rights " ' "may be impaired 'with due process of law' under many circumstances." ' " (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592.) The dispositive question appears to be " ' "whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." ' " (*Ibid*.) The Legislature might well conclude that it was, particularly in light of evidence, alluded to in the legislative record (see above), of concerted efforts by the tobacco industry to deceive smokers, the public, and legislators themselves concerning the dangerous effects of their products.

We also note that any claim of unfairness in the abolition of a statutory defense must take account of Government Code section 9606, which provides, "Any statute may be repealed at any time, except when vested rights would be impaired. *Persons acting under any statute act in contemplation of this power of repeal*." (Italics added.) On its face this provision sharply limits any claim by a defendant that its wrongful conduct is shielded by having been undertaken in reliance on the assurance provided by a statutory defense. Defendant contends in essence that it was entitled to market dangerous products and misrepresent their dangerousness because it had been promised that it could do so without fear of liability. The promise, however, was subordinated to an express legislative reservation of a power of revocation. Upon learning of the true nature of defendant's conduct, the Legislature exercised that power. We see no reason to suppose

that defendant was any more entitled to rely on the statute as protection against inchoate claims, i.e., claims not yet presented and adjudicated, than a plaintiff would be to rely upon the continued future existence of a statutory cause of action not yet reduced to judgment.

We conclude that defendant has demonstrated no sufficient basis on which to hold that application of the 1998 amendments here would offend the due process clause.

Defendant also makes passing suggestions that application of the 1998 repeal to this case would constitute an ex post facto law in violation of the federal and state constitutions. This argument can have no bearing on an award of *compensatory* damages; the ex post facto clauses " 'apply only to penal statutes.' [Citation.]" (*Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550.) Defendant may be understood to suggest that the award of *punitive* damages was "penal" for purposes of the constitutional prohibition, and thus that the 1998 repeal cannot authorize recovery of those damages based on conduct prior to its effective date.

Assuming a punitive damages award might be deemed "penal" for purposes of the prohibition against ex post facto laws, the prohibition only applies if the challenged law "makes that criminal or penal which was not so *at the time the action was performed . . . .*" (*Thompson v. Missouri* (1898) 171 U.S. 380, 383; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 172-173, fn. 7.) (Italics added.) The statutory immunity asserted by defendant only existed from January 1, 1988, to January 1, 1998. Accepting for the moment the premise that penalizing conduct *during that period* would offend the ex post facto clause, the same cannot be said for conduct *before 1988*. That conduct, if subject to penalty when it occurred, would remain subject to penalty today—at least, the ex post facto clause is no impediment. The intervening period of immunity might be relevant to some issues, but would have no relevance to the ex post facto analysis.

It is at least arguable that defendant's most culpable conduct *as to this plaintiff* took place during the 1960s, while plaintiff was being induced as a teenager to become thoroughly addicted to cigarettes. The jury may well have imposed punitive damages

entirely on the basis of that conduct, or on other conduct prior to 1988. We are directed to no evidence that defendant requested an instruction informing the jury that it could not award punitive damages based on conduct during the time the immunity was in effect (the immunity window). Indeed we are directed to no evidence that defendant ever sought to separate the ex post facto issue, as it arose under section 1714.45, from the claim of a total defense based on that statute. Since the ex post facto argument could at most warrant relief affecting punitive damages, and in that regard only to limit the evidence that the jury could consider, it was not adequately presented by a motion for nonsuit, and is not properly before us.

E. Application to Present Case.

We have concluded that the 1998 amendments to section 1714.45, and particularly the addition of subdivision (f) to that section, represent a clear expression of legislative intent that such immunity as existed under the original statute be repealed or abolished with respect to at least some past events and claims against tobacco companies. We need not decide whether some claims remain barred, or where the line lies between those that may be barred and those that may proceed. Subdivision (f) explicitly contemplates that some cases may proceed even though they were "brought" before the amendments took effect. This case was "brought" *after* the amendments took effect, and so far as has been shown on appeal, after the "accrual" of plaintiff's cause of action for limitations purposes. If subdivision (f) does not require the adjudication of *this* case "on [its] merits, without the imposition of" the former "statutory bar or categorical defense," then we fail to see how that subdivision can serve any purpose whatsoever.[6]

We conclude that section 1714.45 was not a defense to this action.

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6 This analysis makes it unnecessary to address plaintiff's argument that because her claim "accrued" after the effective date of the 1998 amendments, application of those amendments here would not be retroactive.

II.
FEDERAL PREEMPTION.

Defendant contends that many or all of the legal grounds on which the jury was permitted to impose liability were preempted by the 1969 Act. The only specific errors suggested are that (1) the court erroneously permitted the jury to consider evidence made inadmissible by the 1969 Act, and (2) the trial court gave an instruction overstating the extent to which the jury could find liability consistent with federal law.[7]

The suggestion of evidentiary error is too vague for appellate consideration. No particular ground of exclusion is offered. We may *infer* that defendant relies on the premise that preemption rendered certain evidence irrelevant, but we will not address errors at the very nature of which we are forced to guess. Furthermore defendant makes no attempt to establish that any pertinent objection has been preserved for appeal by timely interjection in the trial court. (See Evid. Code, § 353.) We therefore pass this claim without further consideration.

Defendant waived much of its instructional objection by *express consent and invitation*. Defendant stipulated in open court that all instructions actually read to the jury were given at the "request and the invitation" of both parties except insofar as objections were embodied or expressed (1) in certain dispositive motions denied just before the stipulation was entered; (2) by express statement immediately *after* entry of the stipulation; or (3) immediately after the reading of instructions, insofar as any party might assert that the instructions as read did not conform to those called for by the

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[7] As italicized in defendant's brief, the challenged instruction provided in part: "[B]ecause of federal law, *and except only as stated below*, you may not base any findings of liability on a determination that (a) defendant Philip Morris, through its advertising or promotional practices, neutralized, minimized or undermined the effect of the federally-mandated warnings after July 1, 1969, or (b) defendant Philip Morris, after July 1, 1969, failed to disclose, or concealed or suppressed, information about the health risks of smoking. [¶] *The federal law does not limit the potential liability of Philip Morris against claims* that it made misrepresentations about the health risks of smoking

stipulation.

Defendant does not claim to have asserted federal preemption as a ground for any of the motions to which the stipulation referred, and appears not to have done so. This stands to reason since preemption by the 1969 Act furnishes no defense to claims arising before its effective date. As for express objections voiced *after* the stipulation was entered, defendant lodged exactly one: namely, that the instructions were erroneous insofar as they allowed a verdict for plaintiff based on a theory of *conspiracy to conceal* after July 1, 1969. Counsel stated that defendant's "only objection" was that the instructions failed "to *incorporate the July 1, 1969 limitation* as it relates to the *conspiracy to conceal* claim." (Italics added.)

No party will be heard to complain of an error it invited. (*Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 121 ["a party cannot successfully take advantage of error committed by the court at his request."]; see *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 847.) Defendant is not relieved of this rule by Code of Civil Procedure section 647, which states that jury instructions are among judicial actions "deemed excepted to" without an express exception. (Code Civ. Proc., § 647.) The statute only means that "an appellant is deemed to have excepted to the instructions *he has not requested or agreed to*." (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 759, italics added; see *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653-1654, 1655; *id*. at p. 1653, quoting *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 ["The invited error doctrine applies 'with particular force in the area of jury instructions.' "].)

By the express terms of the stipulation, defendant "request[ed] and invit[ed]" the instruction complained of except insofar as it allowed recovery for *conspiracy to conceal* after 1969. Defendant cannot enlarge this objection on appeal so as to argue that the jury was improperly permitted to consider other theories in connection with post-1969 events

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or *that it conspired with other cigarette companies to conceal, suppress, or misrepresent information regarding the health effects of smoking*."

and conduct.

With the issue thus narrowed, we find it unnecessary to decide whether the instruction accurately states the scope of federal preemption because it is impossible to say that the verdict was probably affected by any cognizable error. "To prevail on a claim of instructional error, the appellant must show a reasonable probability of a more favorable result in the absence of the error." (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1313.) In considering whether it " ' "seems probable" that the error "prejudicially affected the verdict," ' " a reviewing court "should consider not only the nature of the error . . ., but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 983, quoting *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-581.) The burden is on the complaining party to "demonstrate [that] a miscarriage of justice arose from the erroneous instruction." (*Rutherford, supra*, 16 Cal.4th at p. 983.)

Defendant's showing here falls far short of demonstrating that an instruction barring liability for conspiracy to conceal after 1969 would probably have affected the outcome. The jury found for plaintiff on *all eight* legal theories embodied in the instructions, i.e., (1) supplying a product that failed to perform as safely as an ordinary consumer would expect it to perform; (2) supplying a product before 1969 while failing to give adequate warning of its dangerousness; (3) simple negligence; (4) breach of express warranty; (5) intentional misrepresentation; (6) fraudulent concealment; (7) fraudulent promise; and (8) negligent misrepresentation. The jury also found that defendant committed conspiracy to defraud by concealment, suppression, or misrepresentation of the health effects of cigarette smoking. Only one of these findings (conspiracy to commit fraudulent concealment) is affected by the alleged error before us, and it is only partially affected; a holding in defendant's favor would only mean the jury could not find for plaintiff on that theory on the basis of post-1969 conduct. On the face of the special verdict alone, it appears unlikely that such a limitation would have had any

effect on the ultimate finding of liability.

Defendant argues that the court's error with respect to preemption was prejudicial in that it caused the court to "improperly allow[] into evidence a mass of documents and testimony" concerning post-1969 advertising, failures to warn, and concealment of health risks. This is not a showing of "prejudice," but a back-door attempt to charge evidentiary error without laying the necessary foundation. (See Evid. Code, § 353.) Defendant makes no coherent showing that this evidence was not admissible for a proper purpose unrelated to concealment, e.g., to establish scienter in support of a claim for fraud. Fraud is outside the preemptive scope of the 1969 Act. (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 528 (*Cipollone*).)

Defendant's next claim of prejudice is that in argument to the jury, plaintiff's counsel relied heavily on the supposedly preempted theory embodied in the challenged instruction. The passages cited by defendant, however, concern not conspiracy to conceal after 1969, but inadequate package warnings *before* 1969. In her first allusion to package warnings counsel said, "*[W]hen Patricia started smoking* at age 15 in 1961, there was nothing on the package. There was no warning." (Italics added.) Counsel went on to argue that given the health risks posed by cigarettes, "you'd expect to see a skull and crossbones on it (indicating). You'd expect to see the word 'Poison' on it." Counsel next alluded to package warnings in connection with the first warning mandated in 1965, which counsel denounced as inadequate to deter plaintiff, by this time "a regular smoker [who] needed her cigarettes." Federal law posed no impediment to this argument, and defendant does not suggest otherwise. (*Cipollone*, *supra*, 505 U.S at pp. 519-520.)

The specific passage cited by defendant echoed the earliest one in its reference to a skull and crossbones, and also followed, if at slightly greater distance, explicit references to plaintiff's original acquisition of the smoking habit. Thus counsel conceded plaintiff's inability to specify a date and advertisement that caused her to begin smoking Marlboros. Instead, counsel said, plaintiff had started smoking Marlboros because of a " 'cute guy at school' " who " 'looked like the Marlboro Man.' " Counsel then discussed defendant's

use of the "Marlboro Man" as a symbol of independence particularly appealing to teenagers. To support this argument counsel read aloud from, apparently, a 1976 Philip Morris memorandum quoting a 1969 source which itself was apparently derived from an earlier source. Counsel argued that defendant exploited the symbolism of the Marlboro Man in order to induce teenagers to start smoking its products: "You don't become the No. 1 cigarette brand because you don't appeal to teenagers. That's the only way that you *get starters*. *Starters equal children.* And children do not make informed choices. [¶] And had that [apparently indicating image of skull and crossbones] appeared on the pack, there's a greatly [*sic*] likelihood that somebody would see that, instead of a red and white color package that looks so nice . . . . That's the kind of warning that would be paid attention to . . . ."

Given this context we find it disingenuous of defendant, at best, to characterize these remarks as having been made "without any distinction as to time." Indeed plaintiff's counsel told the jury, if somewhat elliptically, that it could not predicate liability on a failure to warn after 1969. She went on to argue that the jury should find for plaintiff on a consumer expectations theory because the years preceding 1969 were "the time frame when [plaintiff] was . . . becoming hooked." Nothing in counsel's argument provides any basis to think that the jury relied on a theory of post-1969 conspiracy to conceal, or that had it expressly forbidden to do so it would have found for defendant on any other theory—let alone all of them.

III.
STRICT PRODUCTS LIABILITY.

A. Post-1969 Defect Under "Consumer Expectations Theory."

Defendant contends that, for a variety of reasons, plaintiff was not entitled to judgment on her theory of strict tort liability for manufacture of a defective product. The jury was instructed by stipulation that this claim was established if, as pertinent to this appeal, plaintiff was injured as the result of a design defect in a product manufactured by defendant. A product is defective, the jury was told, if (1) it "fails to perform as safely as

an ordinary consumer would expect when used in an intended or reasonably foreseeable manner"; or (2) its use in a foreseeable manner involves a substantial danger not readily recognized by the ordinary user, the danger was known or knowable at the time of manufacture in light of generally recognized and prevailing scientific and medical knowledge, and the manufacturer "failed to give an adequate warning of that danger before July 1, 1969."

Defendant asserts that the trial court erred by permitting plaintiff's "consumer expectations" claim to go to the jury without restricting it to the time before the effective date of the 1969 Act. We have serious reservations about the soundness of this argument, which sounds in federal preemption, but we need not decide the issue because the point is barred by the parties' stipulation. (See section II, above.) Defendant argues that it preserved the point by objecting to the portion of the instructions permitting the jury to find conspiracy to conceal after 1969. We fail to see how. Under the stipulated portions of the instructions the jury was free to return a verdict for plaintiff if it found that the cigarettes smoked by her were *at any time* more dangerous than the ordinary consumer of cigarettes would expect. The jury obviously made such a finding, which was supported by overwhelming evidence.

B. Failure to Heed Warnings.

Defendant asserts two related arguments to the effect that the presence of package warnings barred recovery on a products liability theory as a matter of law.

First, defendant contends that a product labeled with mandatory warnings "cannot" be found to "fail California's consumer expectations test." Insofar as this argument hints at federal preemption it is not cognizable on appeal for the reasons already stated. We address it solely as a proposition of California tort law. We find no persuasive basis for it in the cases cited by defendant.

In *Papike v. Tambrands Inc.* (9th Cir. 1997) 107 F.3d 737, cert. denied, the court affirmed a summary judgment for a tampon manufacturer on a claim that its product caused the plaintiff to suffer toxic shock syndrome. Defendant cites the case for its

disposition of the plaintiff's consumer expectations claim in two terse sentences: "Tambrands' warnings met the federal requirements and Papike's design defect claim therefore fails the 'consumer expectation' test. To rule otherwise would allow the anomalous circumstance that a consumer is entitled to expect a product to perform more safely than its government-mandated warnings indicate." (*Id.* at p. 743.) We are unpersuaded that these comments conform to California law, at least if taken outside the facts of that case. The warnings there might well have justified summary judgment for the defendant, because they explicitly notified the user of the very danger at issue and there is no suggestion of any countervailing evidence raising a genuine material issue of fact as to the likely expectations of consumers. The court's unilluminated statement that liability would be "anomalous" does not furnish a sufficient ground to take the matter from the jury.

In *Macias v. State of California* (1995) 10 Cal.4th 844, the court held that insecticide makers had no duty to issue warnings to the public in connection with an emergency insect eradication program, where the state had already issued warnings required by applicable statutes. (*Id.* at p. 857.) The holding did not rest on some presumption that the mandatory warnings were adequate as a matter of law, but on the injudiciousness of requiring private parties to "interfere with" the state's emergency efforts. (*Ibid*.)

In *Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1094, the court affirmed a summary judgment on the ground that the warning given there was sufficient as a matter of law, as shown by the evidence. Nothing in that decision suggests that a government-mandated warning categorically bars liability for a product otherwise shown to be more dangerous than ordinary consumers expect. Other cases cited by defendant do not purport to apply California law, and are not persuasive on the point at issue. (See *Haddix v. Playtex Family Products Corp.* (7th Cir. 1998) 138 F.3d 681, 686 [tampons came within Illinois rule for "simple products," and were not unreasonably dangerous given specificity of warnings and plaintiff's admission that she read them]; *Lescs v. Dow Chemical Co.* (W.D. Va. 1997) 976 F. Supp. 393, 399 [federal labeling act *preempted*

claim under Virginia law that insecticide was defective under consumer expectations theory].)

Defendant's second argument concerning package warnings is that plaintiff's supposed failure to heed warnings precludes, as a matter of law, a finding that any defect in the product was a proximate cause of her injuries. This argument seems to proceed as follows: (1) Where a product bears government-mandated warnings, they must be presumed sufficient to apprise the user of the steps necessary to avoid injury; (2) where a plaintiff fails to take such steps, his or her conduct is a superseding cause of any injury she suffers; (3) had plaintiff quit smoking in compliance with package warnings, "she almost certainly would not have developed lung cancer from smoking"; therefore (4) any defect in defendant's product was not a proximate cause of plaintiff's injuries.

In support of the first point defendant cites four cases for a proposition they do not remotely support, i.e., that "[u]nder California law, a plaintiff's failure to heed a product warning negates any potential liability because, under such circumstances, the plaintiff's own conduct, not a product defect, is the proximate cause of the plaintiff's injury." In *Schwoerer v. Union Oil Co.* (1993) 14 Cal.App.4th 103, 110-111, the court reversed a summary judgment for a defendant based on its claim that its product warnings were adequate as a matter of law; the court assumed the proposition, conceded by the plaintiff, that "where *adequate* warnings have been passed along from manufacturer or seller to the ultimate consumer, there can be no liability." (Italics in original.). It cited *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 174, 178, where a jury verdict for a ski binding maker was affirmed over the plaintiff's argument that the defendant breached a *duty to warn* as a matter of law; the court held that the defendant's duty was discharged by giving appropriate warnings to the ski shop that installed the bindings. Similarly, in *Carmichael v. Reitz* (1971) 17 Cal.App.3d 958, 989, 991, the court affirmed a jury verdict for a drug manufacturer despite a failure to warn the plaintiff, where adequate warnings were given to her physician.

Defendant apparently cites *Oakes v. E. I. Du Pont de Nemours & Co, Inc.* (1969) 272 Cal.App.2d 645, 649, for its general discussion of failure to warn as a species of

product defect. Aside from the inaptness of this discussion to the question of proximate cause, portions of the decision contradict defendant's position. Most notably, the court said that a product bearing an adequate warning, " '*which is safe for use if it is followed*, is not in defective condition, nor is it unreasonably dangerous.' " (*Ibid*., quoting Rest.2d Torts, § 402A, com. *j*, italics added.) Defendant points to only one warning here that ever gave any instruction to be "followed"—a statement that "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health." This warning was not adopted until October 12, 1984, and was not required to appear until one year after enactment. (Pub.L. No. 98-474 (Oct. 12, 1984) 98 Stat. 2202.) Plaintiff had then been smoking for some 23 years. We are directed to no evidence concerning the medical probability that quitting in 1985 would have affected the course of her illness. In any event *Oakes* does not support the point for which it is cited.

Likewise *Luque v. McLean* (1972) 8 Cal.3d 136, 145, is concerned not with proximate cause but with the kind of *contributory negligence* that will constitute a defense to a product liability claim. " 'For such a defense to arise,' " the court wrote, " 'the user or consumer must *become aware* of the defect and danger and *still proceed unreasonably* to make use of the product.' " (*Ibid*., italics added; see *id*. at p. 145, fn. 9 [discussing Rest.2d Torts, § 402A, com. *n*, and other authorities on " 'assumption of risk' " in strict liability cases].) Defendant apparently waived any such defenses; the stipulated instructions included none on these subjects. The *Luque* decision therefore has no bearing on this appeal.

C. Reliance on Expert Testimony.

Defendant also contends that the jury's finding of liability on a consumer expectation theory rests impermissibly on expert testimony. This argument depends upon a misconstruction of *Soule v. General Motors Corp*, *supra*, 8 Cal.4th 548 at p. 567, concerning the general impropriety of relying on expert witnesses to establish the expectations of the ordinary consumer. The actual holding is that "*where the minimum safety of a product is within the common knowledge of lay jurors*, expert witnesses may

not be used to demonstrate what an ordinary consumer would or should expect." (*Ibid*., italics added.) In a footnote, the court confirmed, in the context of "specialized" products, the implied corollary of the above rule: "[I]f the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper." (*Id*. at pp. 568-569, fn. 4.) This rationale would seem to authorize the admission of expert testimony at least for the purpose of establishing what *smokers* expected at various times *in the past*, most particularly during the critical period when plaintiff began to smoke and became "hooked."[8]

Defendant extracts from *Soule* the proposition that "[b]y using experts, plaintiff disqualified herself as a matter of law from relying on a 'consumer expectations' theory . . . ." In other words, by merely proffering expert testimony, plaintiff waived her consumer expectations theory. The proposition is absurd if only because expert witnesses may well be called on issues having nothing to do with consumer expectations. (*Soule*, *supra*, 8 Cal.4th at p. 567.) Furthermore, the argument again rests on supposed evidentiary and instructional errors that are not separately stated or coherently demonstrated on appeal and are not shown to have been raised below. If defendant's argument was sound, the remedy was to exclude the expert testimony or withhold the consumer expectations theory from the jury—not to suffer admission of the testimony, stipulate to the jury's consideration of the theory, and then seek reversal on appeal.

D. Inherently Dangerous Product: Comment i and BAJI No. 9.00.6.

Defendant next asserts that plaintiff's product liability claims were barred by the

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8 We do not consider two related questions, not presented in *Soule*, concerning the applicability of its holding where (1) the ordinary user of a product may be predisposed by psychological and pharmacological factors associated with its use to perceive its risks differently than do other members of the public, and (2) the "minimum safety" of the product is a matter of public controversy as to which consumers have been exposed to a variety of conflicting opinions, assertions, and sophisticated propaganda techniques intended to neutralize any perception of danger.

doctrine stated in comment *i* to section 402A of the Restatement Second of Torts (comment *i*) and BAJI No. 9.00.6. Two distinct errors seem to be asserted. One is that the claims were barred as a matter of law and thus, by implication, should not have been submitted to the jury at all. The other is that the court committed "instructional error" by refusing a supposed request to give BAJI No. 9.00.6.

The claim of instructional error has been waived. Defendant asserts in its reply brief that it requested the instruction in connection with all of plaintiff's product liability theories. No such request is cited. Instead, at the cited point in the transcript, *both counsel agreed* with the court's statement "that the defense did request that the court give 9.006 [*sic*] *on the risk/benefit prong of* Barker versus Lull." This was an allusion to a specific theory of product liability asserted by plaintiff. (See *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413.) In response to that limitation, plaintiff expressly abandoned the *Barker* theory. As a result, the court did not give BAJI No. 9.00.6. If defendant was in any way surprised by this, it was required under the parties' stipulation to object no later than immediately after the instructions were read. It did not do so.

In the face of this record defendant states, somewhat astonishingly, that "[f]or reasons not explained on the record, the trial court was willing to give BAJI 9.00.6 had plaintiff proceeded to trial on a risks/benefits design defect theory, but refused to give the instruction on the consumer expectations and failure to warn claims . . . ." The court did not "refuse" to do anything; it omitted an instruction which it apparently believed defendant had only requested conditionally. Its reasons were anything but unexplained: the condition under which defendant requested the instruction had ceased to exist. If the court was mistaken, it was up to defendant to say so, not let the matter pass and then offer it on appeal as grounds for a retrial.

This leaves defendant's argument that the doctrine embodied in comment *i* and BAJI No. 9.00.6 entitled defendant to judgment *as a matter of law.* Defendant cites six motions or memoranda raising related points; none raises this specific argument. Nonetheless, this is the kind of argument which, if limited to its potential as a *complete bar* to liability, we may consider on appeal notwithstanding the failure to raise it below.

The problem with defendant's many other arguments of similar nature is that they depend on factual predicates, such as package warnings, that do not pertain to the entire period at issue in this suit. As a result they raise only a partial defense. If comment *i* actually raised a categorical bar, as defendant now contends, the bar might well extend to the entire period at issue. Defendant's argument fails, however, because to the extent comment *i* reflects California law, it does not furnish a categorical defense but a question of fact—or multiple questions of fact—for the trier of fact.

Comment *i* is a gloss on the general rule that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused . . . ." (Rest.2d Torts, § 402A, subd. (1).) The entire point of comment *i* is to emphasize and enlarge upon the requirement that the product must be "unreasonably dangerous."[9] This requirement "was added to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (for example, butter, drugs, whiskey and automobiles) would become 'automatically responsible for all the harm that such things do in the world.' " (*Cronin v. J.B.E. Olson Corp*. (1972) 8 Cal.3d 121, 132, quoting Prosser, Strict Liability to the Consumer in

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9 Comment *i* provides: "i. *Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fu[]el oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

California (1966) 18 Hastings L.J. 9, 23.)

In *Cronin, supra,* 8 Cal.3d at pp. 134-135, the court held that the "unreasonably dangerous" requirement is not part of California's law of strict product liability. This holding remains good law. (See *Barker v. Lull Engineering Co., supra,* 20 Cal.3d 413 at p. 417; *Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1057; *American Tobacco, supra,* 208 Cal.App.3d 480, 489.) Indeed, except as modified by section 1714.45 (see section I, above), it has been legislatively ratified. (§ 1714.45, subd. (d).) Defendant somehow acknowledges this while still asserting that comment *i*, which serves only to illuminate this inapplicable requirement, states the rule applicable to this case. Defendant cites no California case since *Cronin* that has applied the comment or endorsed its application. (Cf. *Harris v. Belton* (1968) 258 Cal.App.2d 595, 608; *Oakes v. E .I. Du Pont de Nemours & Co., Inc., supra,* 272 Cal.App.2d 645, 648.)

Not only does comment *i* explicate a rule that is not part of our law, it does not by its terms support the categorical bar to recovery defendant would have us adopt. The comment states that to warrant liability, the product must be "dangerous *to an extent beyond that which would be contemplated* by the ordinary consumer." (Rest.2d Torts, § 402A, com. *i*, italics added.) This invites a showing by an injured smoker that while cigarettes may have been generally known or believed to pose hazards, they were in fact far more dangerous than was "contemplated by the ordinary consumer." In arguing otherwise, counsel flatly misrepresents applicable authority. In the reply brief counsel writes, "*Under Comment i*, it is not necessary that the ordinary consumer know or understand every possible risk associated with smoking, so long as cigarettes are 'known to be unsafe.' *See American Tobacco,* 208 Cal.App.3d at p. 490 (there is 'no requirement . . . that consumers fully appreciate all the risks involved')." (Italics added.) The quoted passage actually states: "As to the second and third claims, there is no requirement *under this statute* [former § 1714.45] that consumers fully appreciate all the risks involved in the use or consumption of the products within the purview of *this section*. In order to be covered *by this statute* it is sufficient that the ordinary consumer knows the product is 'unsafe.' " (*American Tobacco, supra,* 208 Cal.App.3d at pp. 489-

490, fn. 5, original italics omitted, new italics added.) The court then goes on to say that but for the statute, the situation could well be different: "Evidence that the *risks are greater than those anticipated*, either because the product contains unknown dangerous elements or because it may be used in conjunction with substances that unknowingly increase the risks involved, *could possibly be used to support a claim that the product is defective* under the standards outlined in *Barker v. Lull Engineering Co.*, *supra*, 20 Cal.3d 413 (see Discussion, *ante*, at fn. 4, p. 489)." (*Ibid.*, italics added.)

Defendant has failed to demonstrate any entitlement to judgment as a matter of law on the authority of comment *i*.

E. Generally Recognized Danger: Comment j.

Next defendant contends that it should receive some kind of appellate relief on the authority of comment *j* to Restatement Second of Torts section 402A, which concerns the effect on a failure-to-warn theory of common knowledge of a product's risks. Defendant does not mention in this context any proceedings in the lower court by which this issue was raised or preserved for appeal. We observe, however, that it was one basis for a motion for judgment notwithstanding the verdict. Even viewing the brief as containing an adequate specification of error, the argument on this point is woefully deficient, as epitomized in the assertion that "[b]ecause plaintiff knew of and accepted the risks of smoking, PM cannot be strictly liable to her." Plaintiff denied that she "knew of and accepted the risks of smoking" as they affected her, and indeed presented evidence that few people outside the research community and the tobacco industry appreciated the risks of smoking at the time she was becoming "hooked." In the absence of a compelling showing to the contrary, we presume the jury accepted this testimony and otherwise made any findings necessary to reject defendant's factual premise. Defendant's one-page argument on appeal does not include a compelling showing.

IV.
FRAUDULENT MISSTATEMENT.

A. Misstatement.

Defendant contends that plaintiff failed to establish two elements of her claims for fraudulent misstatement and fraudulent promise, i.e., a false representation of fact (or actionable false promise) and actual reliance by plaintiff. As defendant puts it, plaintiff presented "no evidence of a misrepresentation of material fact" and "no evidence of actual reliance or causation."

A claim of "no evidence" is a claim of insufficient evidence to support the challenged findings. One raising such a claim assumes a "daunting burden." (*In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329.) We must *presume* that the record contains substantial evidence to support every finding necessary to support the judgment. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888.) To overcome this presumption, the party challenging a finding "must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*. (*Trailer Train Co. v. State Bd. of Equalization* (1986) 180 Cal.App.3d 565, 587-588.)" (*Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208, italics added.) Where a party presents only facts and inferences favorable to his or her position, "the contention that the findings are not supported by substantial evidence may be deemed waived." (*Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.)

Defendant makes no attempt to provide a fair summary of the evidence on which the findings of fraudulent misrepresentation and reliance might (and presumptively do) rest. We recognize that the record is exceptionally large, the scope of proof vast, and the limitations on brief length constraining. Fairness might require relaxation of the foregoing requirement if defendant had made a good faith effort to comply with it by at least identifying the evidence *most* favorable to the judgment. Defendant, however, has made *no* attempt to set forth the evidence most supportive of the finding and to "show how and why it is insufficient." (*Roemer v. Pappas, supra,* 203 Cal.App.3d at p. 208.)

Our review of the record satisfies us that there was substantial evidence, which defendant does not cogently dispute for purposes of this appeal, that it engaged in a conscious, deliberate scheme to deceive the public, and individual smokers and potential smokers (many or most of whom it knew to be adolescents), about the health hazards and addictive effects of cigarette smoking. The jury could properly find that commencing no later than 1953 and continuing at least until the time of plaintiff's diagnosis, defendant and other cigarette manufacturers acted both in concert and individually to issue innumerable false denials and assurances concerning the dangers of smoking, deliberately fostering a false impression by the public, or more precisely by smokers and prospective smokers, that assertions of health risk were overblown products of puritanical prejudice, that any real hazards had yet to be shown, and that the industry itself was acting and would act diligently to discover the scientific truth of the matter and promptly disclose its findings, good or bad. The jury could also find that plaintiff heard of these false assurances and denials, if only indirectly, and was falsely led to believe, as defendant intended, that there was a legitimate "controversy" about whether cigarettes actually caused cancer or carried any other serious health risks. As a consequence of that information and the distorted judgment brought about by addiction, she was unaffected by reports of adverse health effects because she was unpersuaded they were true or reliable enough to warrant any action by her.

Defendant contends that many of the statements alleged by plaintiff were matters of opinion and thus not actionable. This argument relies on the general rule that statements of opinion will not support an action for fraud, while ignoring the exception on which the jury was instructed, and which it presumptively found applicable to any statements of opinion: " '[W]hen one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused

if it be false.' " (*Harazim v. Lynam* (1968) 267 Cal.App.2d 127, 131 quoting *Haserot v. Keller* (1924) 67 Cal.App. 659, 670-671.) Further, if a statement of opinion " 'misrepresents the facts upon which it is based or implies the existence of facts which are nonexistent, it constitutes an actionable misrepresentation.' " (*Id.* at p. 133, quoting *Seeger v. Odell* (1941) 18 Cal.2d 409, 414.) The jury here was entitled to find that insofar as any of defendant's statements constituted opinions, they implied the existence of superior knowledge as well as a state of facts that did not exist.

B. Reliance and Causation.

Defendant contends that even if plaintiff showed an actionable misrepresentation, she failed to show that she actually and reasonably relied on anything defendant said or failed to say. Likewise defendant suggests that plaintiff failed to show the closely related element of causation.

Defendant incorrectly asserts that "[t]here is no evidence that plaintiff ever saw or heard . . . any . . . statements by [defendant] (or other cigarette manufacturers) relating to the health risks of smoking." Defendant ignores plaintiff's testimony that while she recalled "listening and seeing things that the Surgeon General was saying," she was also aware "that *the tobacco companies were saying different*." (Italics added.) Thus, she testified, package warnings never "faze[d] me one way or the other. I wasn't going to give the cigarettes up at that point." The jury was entitled to find that by this time, in her addicted state, plaintiff was easy prey for defendant's disinformation campaign and readily clutched at the industry's caricature of objective inquiry.

Contrary to defendant's implicit contention, plaintiff did not have to prove that she heard these matters directly from defendant, or from any of its coconspirators. It was enough that the statements were, as the jury was entitled to find, issued to the public with the intent that they reach smokers and potential smokers, and that plaintiff, as a member of that class, heard them. As the jury was correctly instructed, "One who makes a misrepresentation or false promise or conceals a material fact is subject to liability if he or she intends that the misrepresentation or false promise or concealment of a material

fact will be passed on to another person and influence such person's conduct in the transaction involved." (See Rest.2d Torts, § 533; *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601, 605 [summarizing principles and noting that "if defendant makes the representation to a particular class of persons, he is deemed to have deceived everyone in that class"]; *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1098 [confirming principle but noting inapplicability where plaintiff unaware of misrepresentation]; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548 [citing and following *Geernaert*]; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 219 [applying principle to misleading advertising]; cf. *Gawara v. United States Brass Corp.* (1998) 63 Cal.App.4th 1341, 1351, 1355 [indirect reliance not shown by evidence].)

Here defendant's and its coconspirators' innumerable misrepresentations concerning the unsettled state of relevant knowledge, and by implication the unreliability of evidence of a cigarette-cancer link, were made with the intention and expectation that they would circulate among and influence the conduct of *all* smokers and prospective smokers. They were passed to plaintiff, who knew that while the Surgeon General was saying one thing, the industry was "saying different." This brings her within the cited rule.

Defendant attempts to characterize and then attack plaintiff's fraud theory as "fraud on the market," a concept developed under federal securities law, which the court in *Mirkin*, *supra*, 5 Cal.4th 1082, refused to import into our common law of torts. "Fraud on the market" has nothing to do with this case. Its essential principle is that an investor in a security, the price of which has been influenced by fraud, may be deemed to have relied on the fraud. (*Id.* at p. 1089, citing *Basic Inc. v. Levinson* (1988) 485 U.S. 224, 241-247, 250.) Neither that rule nor its context-specific rationale has any bearing on fraud contended to have been practiced on a vast group of consumers, causing many of them to sustain personal injuries. The facts of this case might be more accurately called "fraud on the public," but even that it is misleading. Plaintiff herself was an intended target and victim of the fraud, through precisely the mechanisms of transmission intended

by defendant and its coconspirators. Defendant has failed to show any defect in the jury's verdict on the affirmative fraud claims.

V.
BREACH OF EXPRESS WARRANTY.

Defendant contends that plaintiff offered "no evidence of an express warranty," such that the judgment in her favor "on this claim" must be reversed. The gist of this argument is that plaintiff showed no express "affirmation of fact," as distinct from an implication, opinion, or general commendation of goods, of which she was personally aware, or on the basis of which she personally acted. Defendant also asserts that there was insufficient evidence to establish that any warranty the jury might have found was actually the basis of any bargain between plaintiff and defendant.

Defendant has once again failed to meet its burden as a party challenging the sufficiency of the evidence. To cite the most obvious example, defendant relegates to a footnote plaintiff's simplest evidence of a direct, express warranty from defendant. Plaintiff testified that at some point prior to the late 1980s she began to hear that "low-tar cigarettes were better" and that by smoking them "[y]ou wouldn't get as much tar and nicotine." Accordingly she decided to " 'check into this,' " thinking, " 'Maybe I'll change from the Reds to the Lights.' " She "did indeed call the Marlboro, Philip Morris company and expressed, you know, my concerns as to, 'Is it really true? Is there less tar in this or less nicotine?' [¶] And I was assured at the time that if I was concerned that, yes, I could switch to the Lights, which presented a real problem, because approximately a month or two after switching to Lights, I went from two packs of cigarettes to three and a half packs of cigarettes a day."

Defendant fails to "show how and why [this evidence] is insufficient" (*Roemer v. Pappas*, *supra*, 203 Cal.App.3d at p. 208) to establish an express warranty. In a footnote it mischaracterizes the testimony as confirming only "that *if plaintiff wanted to smoke cigarettes with less tar and nicotine*, she could switch to light cigarettes." (Italics added.) We presume the jury did not adopt this interpretation. The least that the testimony

reasonably could be understood to mean was that defendant represented to plaintiff that she would take in less tar and nicotine if she switched to Lights. This proved false (the warranty was breached) when (as defendant knew was common) plaintiff simply increased the number of cigarettes she smoked.

Further, even though plaintiff's trial testimony about this conversation was somewhat ambiguous, it supported an inference that defendant's representative expressly assured plaintiff that Lights eliminated or reduced whatever risks smoking might otherwise pose. That is, the assurance as stated at trial was that switching to Lights would address some unspecified "concern[s]." The jury could infer that the "concerns" discussed were related to what plaintiff said motivated the call, i.e., that she had heard "low-tar cigarettes were better." By "better," the jury could infer, plaintiff meant "healthier."

Even if defendant had carried its burden of showing that the record lacks substantial evidence of an express warranty, no prejudice appears. We see no reasonable likelihood that the jury's consideration of this theory had any effect on its findings on other matters, notably the fraud and strict liability claims.

VI.
FRAUDULENT CONCEALMENT.

Defendant contends that the jury verdict for plaintiff on the issue of fraudulent concealment cannot be sustained because (1) plaintiff and the public were aware of the health risks of smoking at all relevant times; (2) "plaintiff did not prove" that she relied on any mistaken beliefs that would have been dispelled by the posited disclosures; and (3) any reliance would have been unreasonable as a matter of law.

Again defendant shirks its burden as a party challenging the sufficiency of the evidence to support a particular finding—in this case the jury's implied finding that neither plaintiff nor the public was aware of, or adequately appreciated, the health risks of smoking. Defendant singles out two favorable passages of deposition testimony and uses them to assert that plaintiff "was aware of the material fact that she claims was not

disclosed to her—that smoking cigarettes can damage one's health." In the first plaintiff answered affirmatively the question whether "throughout the time that you smoked, you had *heard that there were risks* associated with smoking, *or* you had heard people say things about smoking and health; you just didn't want to believe them." (Italics added.) In the second she acknowledged that there was a warning on every pack she picked up after 1966. Neither of these passages constitutes a binding or compelling admission that when plaintiff began smoking in 1961, or at any particular time thereafter, she knew of, understood, or appreciated the dangers of cigarette smoking. In any event, citing favorable testimony is not enough; defendant must cite the evidence supporting a *contrary* finding—the finding presumptively made the by the jury—and show "how and why it is insufficient." (*Roemer v. Pappas*, *supra*, 203 Cal.App.3d at p. 208.)

Plaintiff testified, among other things, that when she began smoking at age 15 she did not "understand there were dangers about smoking cigarettes." Defendant disregards this particular question and answer, but goes on to assert that plaintiff's trial testimony "is simply not credible." It then singles out testimony in response to the question, "When were you first aware that cigarette smoking could cause lung cancer?" Plaintiff's actual response was, "I think my first complete awareness that cigarette smoking could cause lung cancer was when a doctor came in and told me that I had lung cancer." She testified that she was "baffled" by this information, which she "made them repeat to me several times." She continued: "I just know that I must have seen the warnings, but to be fully aware or believe that this really did cause this, it didn't register in my brain." She was inclined to believe, and preferred to believe, that her lung cancer was the result of asbestos exposure, and she repeatedly questioned doctors about this alternative possibility. So complete was her "denial," as she repeatedly described it, that even after her diagnosis she still sought ways to disbelieve it, in part to keep open the option of taking up smoking again some day. Thus when a friend brought to her attention a report that cigarettes contained ammonia—a substance to which plaintiff had a conditioned aversion based on a childhood trauma—plaintiff denounced the report as " 'some kind of propaganda against the tobacco company.' "

We see nothing in this testimony that permits us to substitute our own judgments of credibility for those of the jury. Based on this and other evidence, the jury was entitled to find that plaintiff, first because of her youth and inexperience and then because of her addiction, *did not believe* the package warnings but thought all information about the health risks of smoking was "propaganda" against the tobacco companies.

Nor will we debate the evidentiary minutiae over whether the *public* adequately appreciated the health risks of smoking to excuse defendant from a duty to disclose. Instead we will presume in support of the judgment that the jury found on substantial evidence that even if there was ample information in the public domain to convince reasonable observers of the hazards of smoking, defendant and its fellows deliberately interfered with the *assimilation* of that information, particularly by smokers and prospective smokers. It was this class to whom defendant presumably owed a primary duty of disclosure. Nonsmokers were far less directly affected by the issue.

At least one of the cases cited by defendant on this subject—and the only California one—actually supports an argument in favor of the judgment. In *Wawanesa Mutual Ins. Co. v. Matlock* (1997) 60 Cal.App.4th 583, 587, fn. 3, the court noted that tobacco had long had detractors but acknowledged that much of the opposition seemed to rest on concerns of morality or aesthetics, not on any demonstrated health hazard. The court cited—and defendant apparently placed in evidence here—King James I's famous 1604 "Counterblaste to Tobacco," in which he pronounced smoking "[a] custome loathsome to the eye, hatefull to the Nose, harmefull to the brain, daungerous to the Lungs, and in the blacke, stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomlesse." By the late nineteenth century, as the *Wawanesa* court observed, smoking had come to be associated with "general licentiousness" and "cheesy dens of iniquity." (60 Cal.App.4th at p. 587, fn. 3.) This history of moral opprobrium provided fertile ground for the tobacco companies' disinformation campaign, since it predisposed addicted smokers (and adolescent presmokers chafing under adult authority) to attribute criticism of smoking to puritanical prejudice rather than sound scientific evidence. It hardly establishes widespread knowledge among smokers or others

that, as a matter of scientific and medical fact, smoking poses severe risks to health.

Defendant likewise fails to carry its threshold burden on the subject of actual and reasonable reliance. Defendant states, "plaintiff effectively admitted that any disclosures by PM regarding the health risks of smoking would have been immaterial to her decision." But plaintiff plainly testified that she was unmoved by package warnings only because they failed to indicate *how* dangerous cigarette smoking was, and because she knew they did not originate from the companies. As plaintiff said, "[T]here's a lot of different degrees of danger. It's dangerous to walk across the street. When you're hooked on something and you have the need to have that, you don't—you don't listen to that type of warnings. [¶] *Maybe if the tobacco company had come out and said: 'Our product is dangerous.*' [¶] But I was listening and seeing things that the Surgeon General was saying that the tobacco companies were saying different." (Italics added.)

Defendant has failed to carry its burden of showing that there was "no evidence," or insufficient evidence, to support each finding necessary to the verdict on the fraudulent concealment theory.

VII.
NEGLIGENCE.

We do not address defendant's attack on the jury's finding of simple negligence because the judgment is amply supported by other theories of liability and nothing that occurred in connection with the negligence claim is reasonably likely to have affected the outcome as to those claims.

VIII.
PUNITIVE DAMAGES.

A. Sufficiency of Evidence.

Defendant contends that "There Is No 'Clear and Convincing' Evidence to Support the Predicate For Punitive Damages." This is another challenge to the sufficiency of the evidence, and once again defendant has failed to carry its burden on appeal.

The jury may award punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (*Id*., subd. (c)(1).) " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Id*., subd. (c)(2).) " 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (*Id*., subd. (c)(3).)

We assume that the correct standard for review of a finding of oppression, fraud, or malice is as stated in *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60, i.e., whether evidence of sufficient substantiality was presented that a reasonable jury "could find [that] the plaintiff ha[d] presented clear and convincing evidence on the disputed issue." (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287 ["all we are required to find is substantial evidence to support a determination by clear and convincing evidence"]; cf. *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576 ["clear and convincing evidence" standard guides only trial court and does not affect reviewing court, which continues to apply the substantial evidence standard]; *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 911.) Under this standard, however, defendant still bears the burden of fairly summarizing the evidence *favoring* the challenged finding and affirmatively demonstrating its insufficiency. (See *Roemer v. Pappas, supra*, 203 Cal.App.3d at p. 208). Defendant's presentation fails to fairly characterize the most damaging evidence or address its effect.

Defendant first seeks to categorically exclude two bodies of evidence from consideration in support of the punitive damage award. First, it disingenuously asserts that conduct after July 1, 1969, cannot be considered in light of the federal preemption "with limited exceptions" of claims based on conduct after that time. The primary "limited exception" is that the 1969 Act does not affect state law claims for fraud.

(*Cipollone, supra*, 505 U.S. at p. 528.) Next defendant asserts that conduct immunized by section 1714.45 should not be considered in support of a punitive damages award. Such an argument would merit analysis only if defendant raised a concrete possibility that the verdict was infected by consideration of conduct within the specified period. Insofar as defendant contends that the 11-year "immunity window" created by section 1714.45 retroactively and irrevocably deprived conduct predating that window of its potency to support a punitive damages award now that the immunity has been repealed, we reject the contention as lacking any discernible support in law, logic, fairness, or public policy.

Defendant then turns to a critique of the trial court's opinion explaining its denial of defendant's motion to set aside the punitive damages award. The court found the evidence "fully sufficient" to support express or implied jury findings that defendant willfully and consciously marketed its cigarettes to teenagers, violated promises and representations to the public by concealing and suppressing information known to it concerning the addictive and harmful properties of its product, and "affirmatively misled the American public by advertising that there was genuine and legitimate controversy in the scientific community on the subject of smoker health, when in fact there was no such controversy." It is in response to these points that defendant largely abandons any attempt to fairly summarize or address the evidence underlying the judgment.

Defendant asserts that the finding of "targeting of teenagers" rested on the rationale that "Most people who become cigarette smokers begin smoking by age 19, so cigarette companies must target teenagers." This is not a fair characterization of the record or of the trial court's opinion. Defendant attacks various documents cited by the trial court on the ground that they were not shown to have been *authored* by a corporate officer, director, or managing agent. But even if we accept this premise—which again, is not demonstrated but simply asserted as a fact—the primary relevance of these materials was not to show conduct by their authors but as admissions of corporate conduct and circumstantial evidence of the mental state of corporate officers, directors, and

managers.[10] As defendant concedes, the particular document it most vigorously attacks was a draft presentation to defendant's *Board of Directors*. It was not deprived of all evidentiary force by its "draft" status. A "draft" is defined and understood as " [a] preliminary sketch or rough form of a writing or document, from which the final or fair copy is made." (4 Oxford English Dict. (2d ed. 1989) p. 1008.) From the existence of a draft, the existence of a "final fair copy" may be reasonably *inferred*. And where a draft document is relevant for its *central theme* (rather than some incidental feature), it may be inferred that the theme survived into any final version.

Defendant offers the notion that marketing its products to "teenagers" does not establish reprehensible conduct because 18 and 19-year olds are "teenagers" who may lawfully purchase and consume cigarettes. The argument is unsound. Moreover none of the documents cited by the trial court limits itself to 18 and 19-year olds. They discuss smoking habits and "market penetration" among children as young as 12 without the slightest acknowledgment of legal niceties such as defendant now asserts. One document reviews the history of Marlboro's success and the business risks posed by a coming decline in the number of teenagers, and includes the statement, "Because of our high share of the market among the *youngest* smokers, Philip Morris will suffer more than the other companies . . . ." (Italics added.)

Defendant asserts that its attempts to prevent the official classification of nicotine as a "drug" cannot support an award of punitive damages. Defendant directs us to no indication that plaintiff, the trial court, or the jury placed any reliance on such conduct. It is true that plaintiff played a videotaped excerpt from testimony before Congress in

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10 The documents cited by the trial court amply showed knowledge by defendant that its Marlboro cigarettes were particularly successful among children. Another document shows that this was no accident, but the deliberate result of symbols consciously manipulating the adolescent mentality: "Marlboro's traditional area of strength has, of course, been young people because the principal message its imagery delivers is independence. For young people who are always being told what to do, the Marlboro man says, 'I'm in charge of my life. [¶] . . . . [¶] [T]he maturity of the Marlboro man makes him representative of the ideal smoker—self confident and secure."

which a Philip Morris executive apparently stated that he did not believe nicotine to be addictive. Elsewhere in its brief defendant contends that this evidence was inadmissible. We do not decide the question because we do not think there is any significant possibility that it affected the outcome.

Defendant contends that its failure to disclose that cigarettes are addictive does not support a punitive award because "it is, at bottom, a quibble over definitions." If so, it is a quibble of which the tobacco industry is the chief author and beneficiary. The question is not whether the term "addictive" applies to cigarettes in some narrow medical sense but whether a reasonable effort should have been made to bring home to defendant's mostly teenage "starters" market the extreme difficulty they were likely to encounter in any future attempt to stop smoking. To borrow language used in 1965 congressional hearings, "For many people, the choice to smoke, once it has been made, may as a practical matter be irrevocable." (Cigarette Labeling and Advertising Hearings before Sen. Com. on Commerce on Sen. Nos. 559 and 547, 89th Cong., 1st Sess., at p. 500 (1965).)

We have examined defendant's remaining points concerning the evidence of oppression, fraud, or malice, and find them to be insufficient to carry defendant's burden of showing that the finding on that subject was marred by error.

B. Size of Award.

Defendant contends that the punitive damages award is excessive for two interrelated reasons: first, that it was the product of passion and prejudice, and second, that the objective factors by which such an award is reviewed on appeal all point toward a finding that it exceeds the amount necessary and proper to punish and deter. Defendant invokes California authorities applying the statutory and common law of this state, and federal authorities holding that punitive damage awards implicate constitutional concerns.

Under California law, a punitive damage award may be reversed as excessive "only if the entire record, viewed most favorably to the judgment, indicates the award was the result of passion and prejudice." (*Stevens v. Owens-Corning Fiberglas Corp.*,

supra, 49 Cal.App.4th 1645, 1658.) "The purpose of punitive damages is a public one—to punish wrongdoing and deter future misconduct by either the defendant or other potential wrongdoers. The essential question for the jury, the trial court, and the appellate courts is whether the amount of the award substantially serves the public interest in punishment and deterrence. The California Supreme Court has established three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are reasonable in relation to actual damages; and (3) the defendant's financial condition. [Citations.] The wealthier the wrongdoer, the larger the punitive damage award must be to meet the goals of punishment and deterrence. [Citations.]" (*Ibid*.)

In addition, "The Due Process Clause of the Fourteenth Amendment [to the United States Constitution] prohibits a State from imposing a ' "grossly excessive" ' punishment on a tortfeasor." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 562 (*BMW*).) This constraint apparently rests on issues of notice. (*Id.* at p. 574 ["Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."].) It is at least arguable, and we assume for purposes of our analysis, that in assessing whether an award comports with these constitutional principles, we must review the trial court's determination de novo. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, ___ [121 S.Ct. 1678, 1683, 1685-1686] (*Cooper Industries*).)**11** The factors to be considered are

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11 *Cooper Industries* held that a federal appellate court had to address the excessiveness issue de novo where the district court had refused to set aside an award of punitive damages. The court indicated that an "abuse of discretion" standard would be consistent with due process if the award under scrutiny was made under, and in compliance with, a state law fixing a *statutory ceiling* for punitive damage awards. (*Cooper Industries*, *supra*, [121 S.Ct. at p. 1684, fn. 6], citing *BMW*, *supra*, 517 U.S. at pp. 614-619 [app. to dis. opn. of Ginsburg, J.].) Later the court indicated that de novo review might not be required where state law "tied the award of punitive damages more tightly to the jury's

(1) the degree of the defendant's culpability, i.e., the reprehensibility of his or her conduct, (2) the ratio between the punitive award and the harm to the victim caused by the defendant's actions, and (3) the sanctions imposed in other cases for comparable misconduct. (*Cooper Industries*, *supra*, 121 S.Ct. at pp. 1685-1686, 1688; see *BMW, supra*, 517 U.S. at p. 575.)

Addressing the constitutional issues first, we do find defendant's conduct as reflected in the present record reprehensible. The record reflects that defendant touted to children what it knew to be an addictive and cumulatively toxic product while doing everything it could to prevent addicts and prospective addicts from appreciating the true nature and effects of that product. The expected and intended result of this conduct was that millions of youngsters were persuaded to, and did, enslave themselves to a habit that was likely to, and did, bring many of them to an early loss of the enjoyment of life, illness, and death. We agree with the jury and the trial court that only a very substantial award was sufficient to reflect the moral opprobrium in which defendant's conduct can and should be held.

Nor do we find the award "grossly excessive" by virtue of the 17:1 ratio between punitive damages and compensatory damages. While acknowledging the absence of any "bright line" mathematical test, defendant cites dictum from *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24, to imply that a 4:1 ratio between compensatory and punitive damages may approach some sort of per se constitutional line. The court's concern was fueled by two points defendant neglects: the award was also "200 times the out-of-pocket expenses" incurred by the plaintiff and "much in excess of the fine that could be imposed for insurance fraud." (*Ibid*.) Moreover, in *TXO Production Corp. v.*

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finding of compensatory damages." (*Cooper Industries*, *supra*, [121 S.Ct. at p. 1687, fn. 13].) "This might be the case, for example, if the State's scheme constrained a jury to award only the exact amount of punitive damages it determined were necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages (e.g., treble damages)." (*Ibid*.) We assume for present purposes that California has no comparable statutory ceiling, and that de novo appellate review is therefore mandated under *Cooper Industries*.

Alliance Resources Corp. (1993) 509 U.S. 443, the court sustained a punitive award of $10 million, *526 times* the $19,000 actual damages award. (*Id.* at p. 453). The "shock" of this disparity, observed the court, "dissipates when one considers the *potential* loss to [the plaintiff] . . . had petitioner succeeded in its illicit scheme." (*Id.* at p. 462, italics added.) The court held that even if the potential losses were fixed as low as $1 million—resulting in a 10:1 ratio of punitive to potential damages—the disparity would not " 'jar one's constitutional sensibilities.' " (*Id.* at p. 462, quoting *Haslip*, 499 U.S. at p. 18.)

Defendant notes that the court in *BMW* considered, as a guideline to the soundness of the punitive award, *statutory* penalties for the misconduct at issue. The same is true, as we have observed, in *Pacific Mutual*. Seeking support in this approach here, defendant cites California statutes imposing penalties of no more than $6,000 for furnishing tobacco products to persons under 18. (Bus. & Prof. Code, § 22958 [civil penalty from $200 for first offense to $6,000 for fifth offense]; Pen. Code, § 308 [penal fine of $200 for first offense up to $1,000 for third offense].) Defendant also cites the 1969 Act, which allows penalties up to $10,000 for violating its provisions. (15 U.S.C. § 1337.) We think the argument under the state statutes backfires. Assuming plaintiff smoked for three years before reaching the age of 18, and assuming defendant (by its own analogy) furnished cigarettes to her every day of that time, its conduct would seemingly constitute nearly 1100 violations of the two California statutes cited. Assessing the maximum civil penalty of $6,000 would yield a total penalty of $6.6 million dollars. The penalty would be much higher if the statute were viewed as permitting each *cigarette* furnished to serve as the predicate for a distinct violation. Furthermore, defendant overlooks the exposure of every person in this state to civil penalties of $2,500 per violation for any act of "unfair competition" (Bus. & Prof. Code, § 17206), which includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" (*id.*, § 17200). This statute could seemingly be applied, by analogy to defendant's argument, to sales of cigarettes to plaintiff not only when she was a minor but throughout her 35-year smoking history.

Moreover, as we have noted, the Supreme Court's interest in examining statutory

penalties stems from concerns about *notice* as it bears on the fundamental fairness, or unfairness, in imposing a specific award. Defendant has long known that it was at risk for civil liability based upon its products, and we may readily infer that it also knew it was at risk for liability under traditional common-law concepts like fraud, which at the time of most of the relevant conduct would support virtually unlimited punitive damage awards. The trial court quoted from a 1980 internal document reporting that defendant's attorneys had been saying that " 'the entire matter of addiction is the most potent weapon a prosecuting [*sic*] attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as " free choice" if the person was "addicted." ' " Defendant obviously knew that the risks of pursuing its course were very high indeed. It nonetheless pursued that course. That it can be compelled to disgorge a tiny fraction of the resulting profits as a punitive award does not offend our conscience, constitutional or otherwise. We detect no constitutional infirmity in the award.

Turning to state-law review for "passion or prejudice," we observe that in addition to the reprehensibility we have already discussed, defendant's vast financial resources, presumably built largely on the very conduct here at issue, justified a very large award. The trial court stated, and defendant does not contest, that defendant's net worth at the time of the award was over $3.4 billion. As the court noted, a $25 million award represents less than 3/4 of one percent of that sum. Defendant asserts that this factor does not answer a federal constitutional objection, but we do not cite it in that context. The award is of sufficient size to "sting," without posing any danger that it will "kill." (*Troensegaard v. Silvercrest Industries, Inc., supra,* 175 Cal.App.3d 218 at p. 227.)

Defendant contends that the award is excessive in light of the potential for other actions like this one in which punitive damages may also be awarded, magnifying the deterrent effect. Multiplicity of awards is a factor that may be weighed, and on proper presentation presumably should or must be weighed, in fixing a punitive damage award. "Punitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter." (*Stevens v. Owens-Corning Fiberglas Corp., supra,* 49 Cal.App.4th at p. 1661.) "The likelihood of

future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Ibid*.; accord, *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952, 969, disapproved on other grounds in *Adams v. Murakami* (1991) 54 Cal.3d 105, 115-116; see *Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 667; Rest.2d Torts, § 908, com. *e*; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1328, p. 786.)

In its careful evaluation of punitive damages here, the trial court expressly cited the possibility of future awards as one reason to reduce the jury's award from $50 million to $25 million. The court predicted that numerous suits would be filed against defendant, that the costs of defense and any resulting judgments would be substantial, that punitive damages "undoubtedly will be requested and may well be awarded in many such suits," and that this reinforced the court's conclusion "that $25 million is enough to punish and deter in the present context." Defendant's argument is that the award should have been reduced even further. We can find no fault in the trial court's reasoning on this point. The extent to which other plaintiffs may succeed remains to be seen. To predict the success rate of such future litigation would be purely speculative, and the trial court might have been justified in refusing to give that factor any weight whatsoever. As it stands, defendant has shown nothing more than "the mere possibility of a future award in a different case," which of itself "is not a ground for [further reducing] the award in this case . . . . If [defendant] should be confronted with the possibility of an award in another case for the same conduct, it may raise the issue in that case." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 812; *Stevens v. Owens-Corning Fiberglas Corp.*, *supra*, 49 Cal.App.4th at pp. 1661-1662; *Vossler v. Richards Manufacturing Co.*, *supra*, 143 Cal.App.3d at pp. 968-969.)

Insofar as the award is challenged under California law, we cannot say that, as reduced by the trial court, it is the product of passion and prejudice. Reviewing it de novo under federal constitutional principles, we cannot say that it was "grossly excessive."

DISPOSITION

The judgment is affirmed.

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Sepulveda, J.

We concur:

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Reardon, P.J.

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Kay, J.

Trial Court:	San Francisco County Superior Court
Trial Judge:	Honorable John Munter
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