

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 DEPARTMENT 308 HON. CHARLES MC COY, JUDGE
4 RICHARD BOEKEN,)
5 PLAINTIFF,)
6)
) CASE NO. BC226593
7 VS.)
8 PHILIP MRRIS,)
 INCORPORATED, A)
9 CORPORATION; INTERNATIONAL)
 HOUSE OF PANCAKES)
10 INCORPORATED, A)
 CORPORATION.)
11)
 DEFENDANTS.)
12 _____)

13 REPORTER' S DAILY TRANSCRIPT OF PROCEEDINGS
14 TUESDAY, MAY 22ND, 2001
15 APPEARANCES:
16 (FOR PLAINTIFF) LAW OFFICES OF
 MICHAEL J. PIUZE
17 11755 WILSHIRE BLVD.
 SUITE 1170
18 LOS ANGELES, CA 90025
19 (FOR DEFENDANTS) ARNOLD & PORTER
 BY: MAURICE A. LEITER
20 JOHN CARLTON
 777 S. FIGUEROA ST.
21 44TH FLOOR
 LOS ANGELES, CA 90017
22
23 LISA C. RIDLEY
24 OFFICIAL REPORTER
 600 S. COMMONWEALTH AVE.
25 ROOM 308
 LOS ANGELES, CA 90005
26 VOLUME 40 OF
27 PAGES 6262 THROUGH 6320
28

1 LOS ANGELES, CALIFORNIA; TUESDAY, MAY 22ND, 2001

2 9:00 A.M

3 DEPARTMENT 308 HON. CHARLES MC COY, JUDGE

4

5 (THE FOLLOWING PROCEEDINGS
6 WERE HELD IN OPEN COURT OUT
7 OF THE PRESENCE OF THE JURY:)

8

9 THE COURT: WE HAVE SOME EXHIBITS WE NEED
10 TO TALK ABOUT?

11 MR. PIUZE: YES, FOR THE RECORD, JUST FOR
12 THE RECORD, JUST SO WE CAN IDENTIFY THIS, THE 1994
13 CONGRESSIONAL HEARING SHOWING CAMPBELL ON CANCER IS
14 9455.02. SO THAT'S THE EVIDENCE NUMBER ON THAT.

15 THE 1994 WAXMAN HEARING WHERE THE
16 SEVEN C. E. O. 'S SAID NICOTINE WASN'T ADDICTIVE
17 THAT'S 9455.01, TO IDENTIFY THAT.

18 THE 1976 PHILIP MORRIS EXECUTIVE
19 BOWLING TAPE IS 9456.01.

20 AND THE 1976 PHILIP MORRIS
21 SCIENTIST WAKEHAM TAPE IS 9456.02.

22 I THINK THOSE, BY STIPULATION, ARE
23 ALL IN EVIDENCE. BUT WE REALIZE THEY WON'T GO TO
24 THE JURY PER PRIORITY DISCUSSIONS.

25 MR. BOEKEN'S 1998 TAX RETURN IS
26 8004.08. AND THAT'S THE LAST ONE THAT HASN'T BEEN
27 IDENTIFIED. AND ALL OF THE TAX RETURNS WILL GO,
28 PER PRIOR AGREEMENT.

1 THANK YOU FOR LISTENING.

2 MR. LEITER: AND YOUR HONOR, A COUPLE
3 OTHER HOUSEKEEPING MATTERS --

4 MR. CARLTON: NOT PER PRIOR AGREEMENT, BY
5 PRIOR ORDER OF THE COURT, I JUST WANT THAT TO BE
6 CLEAR.

7 MR. PIUZE: OKAY, BY PRIOR ORDER OF THE
8 COURT, SO BE IT.

9 THE COURT: COUNSEL, COULD YOU REPEAT
10 THAT EXHIBIT NUMBER FOR THE 1998 TAX RETURN.

11 MR. PIUZE: 8004.08.

12 THE CLERK: AND THAT GOES IN.

13 MR. LEITER: AND THIS IS ALSO FOR THE
14 RECORD, YOUR HONOR, PLAINTIFF' S 10014 AND 10026
15 WERE GROUP EXHIBITS CONSISTING OF NEWSPAPER
16 ARTICLES PROPOSED BY PLAINTIFF. THAT STACK
17 INCLUDED SOME ARTICLES THAT WERE NOT SHOWN TO ANY
18 WITNESS AND SO WE HAVE AGREED TO WITHDRAW THE
19 ARTICLES THAT WERE NOT SHOWN OR USED IN THE TRIAL
20 AND I WOULD LIKE TO TAKE A SECOND AND READ THE
21 DATES AND PAPER INTO THE RECORD SO WE HAVE A CLEAR
22 RECORD.

23 THE CLERK: COUNSEL, WITH YOUR PERMISSION
24 TO INTERRUPT, 10026 WAS AN ERRONEOUS ADMISSION. IT
25 DOES NOT HAVE ANYTHING TO DO WITH THAT. IT HAS
26 BEEN CORRECTED.

27 MR. LEITER: SO THESE ARE ALL PART OF
28 10014.

1 THE CLERK: THAT IS CORRECT.

2 MR. LEITER: THESE ARE THE ARTICLES THAT
3 THE PARTIES HAVE AGREED TO WITHDRAW, "LOS ANGELES
4 TIMES" WEDNESDAY MARCH 14, 2001, "SAN DIEGO UNION
5 TRIBUNE," FEBRUARY 8 -- FEBRUARY 18, 2000.

6 "LOS ANGELES TIMES" JUNE 3RD, 2000.

7 "LOS ANGELES TIMES" APRIL 3, 1998.

8 "LOS ANGELES TIMES" FEBRUARY 6TH,
9 1998.

10 "LOS ANGELES TIMES" JUNE 23, 1998.

11 "LOS ANGELES TIMES" JANUARY 18,
12 1998.

13 "LOS ANGELES TIMES" MAY 8, 1998.

14 AND THAT COMPLETES THE LIST.

15 MR. PIUZE: AGREED.

16 MR. LEITER: AND ONE FINAL MATTER, YOUR
17 HONOR. WE HAVE FILED WITH THE CLERK THIS MORNING
18 PHILIP MORRIS' S OBJECTIONS WITH RESPECT TO CERTAIN
19 JURY INSTRUCTIONS THAT WERE PROPOSED AND REJECTED
20 BY THE COURT.

21 THE COURT: SHOWN TO COUNSEL?

22 MR. LEITER: YES.

23 THE COURT: VERY WELL.

24 MR. PIUZE: AND LAST ON THE PLAINTIFF' S
25 PART, JUST FOR THE RECORD, ON SPECIAL VERDICT
26 NUMBER 4, THERE' S A QUESTION 2, WHICH IS DID
27 DEFENDANT HAVE A DUTY TO DISCLOSE THE FACT TO
28 PLAINTIFF. WE DISCUSSED IT OFF THE RECORD.

1 DEFENDANT WANTS THAT, I DON'T. IT'S AN INTERESTING
2 INTELLECTUAL QUESTION. I AM JUST NOTING, FOR THE
3 RECORD, THAT PLAINTIFF DIDN'T WANT THAT PARTICULAR
4 QUESTION EVEN.

5 THE COURT: JUST FOR COUNSEL'S
6 INFORMATION, THE COURT HAS TAKEN THE SPECIAL
7 VERDICT FORMS AND STAPLED THEM TOGETHER WHERE
8 APPROPRIATE SO VERDICT FORM NUMBER 1 IS AN INTEGRAL
9 VERDICT. VERDICT 2 ONLY HAS ONE PAGE BUT WHEREVER
10 THEY REQUIRED STAPLING, THE COURT DID THAT.

11 MR. PIUZE: THANK YOU.

12 THE COURT: DO WE HAVE OUR FULL JURY?

13 THE COURT ATTENDANT: YES, WE DO.

14 THE COURT: IF THEY COULD BE BROUGHT IN.

15

16 (THE FOLLOWING PROCEEDINGS
17 WERE HELD IN OPEN COURT IN
18 THE PRESENCE OF THE JURY.)

19

20 THE COURT: GOOD MORNING, LADIES AND
21 GENTLEMEN. GOOD TO SEE ALL OF YOU.

22 GOOD MORNING, GOOD COUNSEL.

23 LADIES AND GENTLEMEN, WHAT I AM
24 GOING TO DO NOW IS READ YOU THE JURY INSTRUCTIONS.
25 THESE INSTRUCTIONS, WHICH I HAVE IN MY HAND, WILL
26 ULTIMATELY BE GIVEN TO YOU SO THAT ALL OF YOU CAN
27 LOOK AT THEM AND REFER TO THEM IN THE JURY ROOM AS
28 YOU GO THROUGH YOUR DELIBERATIONS.

1 THE LAW REQUIRES THAT I DO READ
2 THESE INSTRUCTIONS TO YOU.

3 SINCE THEY WILL BE GIVEN TO YOU,
4 YOU CAN TAKE NOTES IF YOU WANT, BUT THEY WILL BE
5 AVAILABLE TO YOU AS -- WHENEVER YOU WANT THEM

6

7 I N S T R U C T I O N S

8

9 THE COURT: LADIES AND GENTLEMEN:

10 IT IS NOW MY DUTY TO
11 INSTRUCT YOU ON THE LAW THAT APPLIES
12 TO THIS CASE. IT IS YOUR DUTY TO
13 FOLLOW THE LAW EVEN IF YOU DISAGREE
14 WITH IT. AS JURORS, IT IS YOUR DUTY
15 TO DETERMINE THE EFFECT AND VALUE OF
16 THE EVIDENCE AND TO DECIDE ALL
17 QUESTIONS OF FACT.

18 YOU MUST NOT BE INFLUENCED
19 BY SYMPATHY, PREJUDICE OR PASSION.

20 YOU MUST DECIDE ALL
21 QUESTIONS OF FACT IN THIS CASE FROM
22 THE EVIDENCE RECEIVED IN THIS TRIAL
23 AND NOT FROM ANY OTHER SOURCE.

24 YOU MUST NOT MAKE ANY
25 INDEPENDENT INVESTIGATION OF THE FACTS
26 OR THE LAW OR CONSIDER OR DISCUSSION
27 FACTS AS TO WHICH THERE IS NO
28 EVIDENCE.

1 THIS MEANS, FOR EXAMPLE,
2 THAT YOU MUST NOT CONDUCT EXPERIMENTS
3 OR CONSULT REFERENCE WORKS FOR
4 ADDITIONAL INFORMATION.

5 FOR EXAMPLE, IF YOU ARE
6 LOOKING FOR THE DEFINITION OF A WORD,
7 YOU CAN'T BRING IN A DICTIONARY AND
8 LOOK IT UP OR, OVER THE EVENING, GO
9 HOME AND LOOK UP SOME DEFINITION IN
10 THE DICTIONARY OR THE ENCYCLOPEDIA AND
11 SAY I HAVE THE ANSWER TO THAT BECAUSE
12 I LOOKED IT UP. IF YOU NEED THE
13 ANSWERS, IF YOU HAVE ANY QUESTIONS,
14 YOU SHOULD SUBMIT THOSE QUESTIONS TO
15 ME, INCLUDING QUESTIONS REGARDING
16 DEFINITION, AND I WILL GIVE YOU
17 ANSWERS TO THOSE QUESTIONS.

18 IF ANY MATTER IS REPEATED OR
19 STATED IN DIFFERENT WAYS IN MY
20 INSTRUCTIONS, NO EMPHASIS IS INTENDED.

21 DO NOT DRAW ANY INFERENCE
22 BECAUSE OF A REPETITION I MAY MAKE IN
23 THESE INSTRUCTIONS.

24 DO NOT SINGLE OUT ANY
25 INDIVIDUAL RULE OR INSTRUCTION AND
26 IGNORE THE OTHERS.

27 CONSIDER ALL THE
28 INSTRUCTIONS AS A WHOLE AND EACH IN

1 LIGHT OF ALL THE OTHERS.

2 AND THE ORDER IN WHICH THE
3 INSTRUCTIONS ARE GIVEN HAS NO
4 SIGNIFICANCE AS TO THEIR RELATIVE
5 IMPORTANCE.

6 NOW, I TOLD YOU THIS AT THE
7 BEGINNING OF THE TRIAL, I WILL TELL
8 YOU AGAIN NOW.

9 STATEMENTS OF COUNSEL ARE
10 NOT EVIDENCE. DO NOT SPECULATE AS TO
11 THE ANSWERS TO QUESTIONS TO WHICH
12 OBJECTIONS WERE SUSTAINED OR TO THE
13 REASONS FOR THE OBJECTIONS.

14 DO NOT CONSIDER ANY EVIDENCE
15 THAT WAS STRICKEN. STRICKEN EVIDENCE
16 MUST BE TREATED AS THOUGH YOU HAD
17 NEVER KNOWN OF IT. A SUGGESTION IN A
18 QUESTION IS NOT EVIDENCE UNLESS IT'S
19 ADOPTED BY THE ANSWER.

20 A QUESTION BY ITSELF IS NOT
21 EVIDENCE. OF COURSE. CONSIDER IT
22 ONLY IN LIGHT, ONLY TO THE EXTENT THAT
23 IT IS ADOPTED IN THE ANSWER GIVEN BY
24 THE WITNESS.

25 NOW, THE FACT THAT A
26 CORPORATION IS A PARTY MUST NOT
27 PREJUDICE YOU IN YOUR DELIBERATIONS OR
28 IN YOUR VERDICT.

1 DO NOT DISCRIMINATE BETWEEN
2 A CORPORATION AND NATURAL INDIVIDUALS.
3 EACH IS A PERSON IN THE EYES OF THE
4 LAW AND ENTITLED TO THE SAME FAIR AND
5 IMPARTIAL CONSIDERATION AND TO JUSTICE
6 BY THE SAME LEGAL STANDARDS.

7 NOW, THE PRONOUN FORM AS
8 USED IN THESE INSTRUCTIONS, IN OTHER
9 WORDS, HE, SHE OR IT, IF APPLICABLE,
10 AS SHOWN BY THE TEXT OF AN INSTRUCTION
11 AND THE EVIDENCE, APPLIES TO A
12 CORPORATION.

13 SO FOR EXAMPLE, IF IT SAYS
14 "IT" OR IT SAYS "HE" OR IT SAYS "SHE, "
15 WELL, SINCE ONE PARTY IS A PERSON, THE
16 OTHER PARTY IS A CORPORATION, THAT
17 "HE" OR "SHE" OR "IT" WOULD APPLY TO
18 THE CORPORATION AS WELL.

19 NOW, EVIDENCE MEANS
20 TESTIMONY, WRITINGS, MATERIAL OBJECTS
21 AND MATERIAL THINGS PRESENTED TO THE
22 SENSES AND OFFERED TO PROVE THE
23 EXISTENCE OR NONEXISTENCE OF A FACT.

24 EVIDENCE IS EITHER DIRECT OR
25 CIRCUMSTANTIAL.

26 DIRECT EVIDENCE PROVES A
27 FACT WITHOUT AN INFERENCE AND IF TRUE
28 CONCLUSIVELY ESTABLISHES THAT FACT.

1 CIRCUMSTANTIAL EVIDENCE
2 PROVES A FACT FROM WHICH AN INFERENCE
3 OF THE EXISTENCE OF ANOTHER FACT MAY
4 BE DRAWN.

5 AND AN INFERENCE IS A
6 DEDUCTION THAT MAKE LOGICALLY AND
7 REASONABLY BE DRAWN FROM ANOTHER FACT
8 OR GROUP OF FACTS ESTABLISHED BY THE
9 EVIDENCE.

10 NOW, THE LAW MAKES NO
11 DISTINCTION BETWEEN DIRECT AND
12 CIRCUMSTANTIAL EVIDENCE AS TO THE
13 DEGREE OF PROOF REQUIRED. EACH IS A
14 REASONABLE METHOD OF PROOF AND EACH IS
15 RESPECTED FOR SUCH CONVINCING FORCE AS
16 IT MAY CARRY.

17 NOW, YOU ARE NOT REQUIRED TO
18 DECIDE ANY ISSUE ACCORDING TO THE
19 TESTIMONY OF A NUMBER OF WITNESSES
20 WHICH DOES NOT CONVINCING YOU AS AGAINST
21 THE TESTIMONY OF A SMALLER NUMBER OR
22 OTHER EVIDENCE WHICH IS MORE
23 CONVINCING TO YOU.

24 THE TESTIMONY OF ONE WITNESS
25 WORTHY OF BELIEF IS SUFFICIENT TO
26 PROVE A FACT.

27 THIS DOES NOT MEAN THAT YOU
28 ARE FREE TO DISREGARD THE TESTIMONY OF

1 ANY WITNESS MERELY FROM CAPRICE OR
2 PREJUDICE OR FOR SOME DESIRE TO FAVOR
3 ONE SIDE OR THE OTHER.

4 IT DOES MEAN THAT YOU MUST
5 NOT DECIDE ANYTHING BY SIMPLY COUNTING
6 THE NUMBER OF WITNESSES WHO HAVE
7 TESTIFIED ON THE OPPOSING SIDES.

8 THE TEST, OF COURSE, IS NOT
9 THE NUMBER OF WITNESSES BUT THE
10 CONVINCING FORCE OF THE EVIDENCE.

11 NOW, IN DETERMINING WHAT
12 INFERENCES TO BE DRAWN FROM THE
13 EVIDENCE, YOU MAY CONSIDER, AMONG
14 OTHER THINGS, A PARTY'S FAILURE TO
15 EXPLAIN OR TO DENY SUCH EVIDENCE.

16 NOW, TESTIMONY HERE HAS BEEN
17 READ OR PLAYED ON A VIDEO TAPE FROM
18 DEPOSITIONS.

19 A DEPOSITION IS TESTIMONY
20 TAKEN UNDER OATH BEFORE TRIAL AND
21 PRESERVED IN WRITING.

22 YOU MUST CONSIDER THAT
23 TESTIMONY AS IF IT HAD BEEN GIVEN HERE
24 IN COURT.

25 NOW, YOU ARE THE SOLE AND
26 EXCLUSIVE JUDGES OF THE BELIEVABILITY
27 OF THE WITNESSES AND THE WEIGHT TO BE
28 GIVEN TO THE TESTIMONY OF EACH

1 WITNESS.

2 IN DETERMINING THE

3 BELIEVABILITY OF A WITNESS, YOU MAY

4 CONSIDER ANY MATTER THAT HAS A

5 TENDENCY IN REASON TO PROVE OR

6 DISPROVE THE TRUTHFULNESS OF THE

7 TESTIMONY OF THE WITNESS, INCLUDING,

8 BUT NOT LIMITED TO THE Demeanor AND

9 MANNER OF THE WITNESS WHILE

10 TESTIFYING;

11 THE CHARACTER AND QUALITY OF

12 THE TESTIMONY;

13 THE EXTENT OF THE CAPACITY

14 OF THE WITNESS TO PERCEIVE OR

15 RECOLLECT OR COMMUNICATE ANY MATTER

16 ABOUT WHICH THE WITNESS HAS TESTIFIED;

17 THE OPPORTUNITY OF THE

18 WITNESS TO PERCEIVE ANY MATTER ABOUT

19 WHICH THE WITNESS HAS TESTIFIED;

20 THE EXISTENCE OR

21 NONEXISTENCE OF A BIAS, INTEREST OR

22 OTHER MOTIVE;

23 A STATEMENT PREVIOUSLY MADE

24 BY THE WITNESS THAT IS CONSISTENT OR

25 INCONSISTENT WITH THE TESTIMONY OF THE

26 WITNESS HERE IN COURT;

27 THE EXISTENCE OR

28 NONEXISTENCE OF ANY FACT TESTIFIED TO

1 BY THE WITNESS;
2 THE ATTITUDE OF THE WITNESS
3 TOWARD THIS ACTION OR TOWARD THE
4 GIVING OF TESTIMONY.
5 NOW, DISCREPANCIES IN A
6 WITNESS' S TESTIMONY OR BETWEEN SUCH
7 WITNESS' S TESTIMONY AND THAT OF OTHER
8 WITNESSES, IF THERE WERE ANY, DO NOT
9 NECESSARILY MEAN THAT ANY SUCH WITNESS
10 SHOULD BE DISCREDITED.
11 FAILURE OF RECOLLECTION IS
12 COMMON. INNOCENT MISRECOLLECTION IS
13 NOT UNCOMMON. TWO PERSONS WITNESSING
14 AN INCIDENT OR TRANSACTION OFTEN WILL
15 SEE OR HEAR IT DIFFERENTLY.
16 WHETHER A DISCREPANCY
17 PERTAINS TO AN IMPORTANT MATTER OR
18 ONLY TO SOMETHING TRIVIAL SHOULD BE
19 CONSIDERED BY YOU.
20 NOW, A WITNESS FALSE IN ONE
21 PART OF HIS OR HER TESTIMONY IS TO BE
22 DISTRUSTED IN OTHERS.
23 YOU MAY REJECT THE ENTIRE
24 TESTIMONY OF A WITNESS WHO WILLFULLY
25 HAS TESTIFIED FALSELY ON A MATERIAL
26 POINT, UNLESS, FROM ALL THE EVIDENCE,
27 YOU BELIEVE THAT THE PROBABILITY OF
28 TRUTH FAVORS HIS OR HER TESTIMONY IN

1 OTHER PARTICULARS.

2 NOW, LET ME TALK A LITTLE
3 BIT ABOUT EXPERT WITNESSES.

4 WITNESSES WHO HAVE SPECIAL
5 KNOWLEDGE, SKILL, EXPERIENCE, TRAINING
6 OR EDUCATION IN A PARTICULAR SUBJECT
7 HAVE TESTIFIED TO CERTAIN OPINIONS
8 HERE IN THIS TRIAL.

9 ANY SUCH WITNESS IS REFERRED
10 TO AS AN EXPERT WITNESS.

11 IN DETERMINING WHAT WEIGHT
12 TO GIVE ANY SUCH OPINION, YOU SHOULD
13 CONSIDER THE QUALIFICATIONS AND
14 BELIEVABILITY OF THE WITNESS, THE
15 FACTS OR MATERIALS UPON WHICH EACH
16 OPINION IS BASED, AND THE REASONS FOR
17 EACH OPINION.

18 AN OPINION IS ONLY AS GOOD
19 AS THE FACTS AND REASONS ON WHICH IT
20 IS BASED. IF YOU FIND THAT ANY SUCH
21 FACT HAS NOT BEEN PROVED OR HAS BEEN
22 DISPROVED, YOU MUST CONSIDER THAT IN
23 DETERMINING THE VALUE OF THE OPINION.

24 LIKEWISE, YOU MUST CONSIDER
25 THE STRENGTHS AND THE WEAKNESSES OF
26 THE REASONS ON WHICH THE OPINION IS
27 BASED.

28 YOU ARE NOT BOUND BY AN

1 OPINION. GIVE EACH OPINION THE WEIGHT
2 YOU FIND IT DESERVES. HOWEVER, YOU
3 MAY NOT ARBITRARILY OR UNREASONABLY
4 DISREGARD THE EXPERT OPINION TESTIMONY
5 IN THIS CASE.

6 NOW, IN RESOLVING THE
7 CONFLICT IN THE TESTIMONY OF EXPERT
8 WITNESSES, IF THERE WAS ANY, YOU
9 SHOULD WEIGH THE OPINION OF ONE EXPERT
10 AGAINST THAT OF THE OTHER.

11 IN DOING THIS, YOU SHOULD
12 CONSIDER THE QUALIFICATIONS AND
13 BELIEVABILITY OF EACH WITNESS AND THE
14 REASONS FOR EACH OPINION AND THE
15 MATTER UPON WHICH THOSE OPINIONS WERE
16 BASED.

17 NOW, THERE WERE, ON MANY
18 OCCASIONS, WHEN THE EXPERTS WERE
19 EXAMINED, HYPOTHETICAL QUESTIONS WERE
20 ASKED OF THEM

21 A HYPOTHETICAL QUESTION IS A
22 QUESTION IN WHICH AN EXPERT WITNESS IS
23 ASKED TO ASSUME THAT CERTAIN FACTS ARE
24 TRUE AND TO GIVE AN OPINION BASED ON
25 THAT ASSUMPTION.

26 IF ANY FACT ASSUMED IN SUCH
27 A QUESTION HAS NOT BEEN ESTABLISHED BY
28 THE EVIDENCE, YOU SHOULD DETERMINE THE

1 EFFECT OF THAT OMISSION UPON THE VALUE
2 OF THE OPINION AS TO THAT FACT.

3 NOW, LET ME SHIFT GEARS AND
4 TALK TO YOU ABOUT THE BURDEN OF PROOF
5 OR BURDENS OF PROOF IN THIS CASE.

6 PLAINTIFF IS SEEKING DAMAGES
7 BASED ON CLAIMS OF STRICT PRODUCTS
8 LIABILITY, NEGLIGENCE, INTENTIONAL
9 MISREPRESENTATION AND FRAUDULENT
10 CONCEALMENT.

11 PLAINTIFF HAS THE BURDEN OF
12 PROVING BY A PREPONDERANCE OF THE
13 EVIDENCE ALL OF THE FACTS NECESSARY TO
14 ESTABLISH THE ESSENTIAL ELEMENTS OF
15 EACH SEPARATE CLAIM

16 THE ESSENTIAL ELEMENTS OF
17 EACH SEPARATE CLAIM ARE SET FORTH
18 ELSEWHERE IN THESE INSTRUCTIONS. IN
19 ADDITION TO THESE ESSENTIAL ELEMENTS,
20 PLAINTIFF HAS THE BURDEN OF PROVING BY
21 A PREPONDERANCE OF THE EVIDENCE ALL OF
22 THE FACTS NECESSARY TO ESTABLISH THE
23 NATURE AND EXTENT OF THE DAMAGES
24 CLAIMED TO HAVE BEEN SUFFERED, THE
25 ELEMENTS OF PLAINTIFF'S DAMAGES AND
26 THE AMOUNT THEREOF.

27 THE DEFENDANT MAY HAVE THE
28 BURDEN OF PROVING BY A PREPONDERANCE

1 OF THE EVIDENCE AN ISSUE IN CONNECTION
2 WITH THE CLAIM OF STRICT PRODUCTS
3 LIABILITY AS I WILL DESCRIBE LATER IN
4 THESE INSTRUCTIONS.

5 NOW, PREPONDERANCE OF THE
6 EVIDENCE MEANS EVIDENCE THAT HAS MORE
7 CONVINCING FORCE THAN THAT OPPOSED TO
8 IT.

9 IF THE EVIDENCE IS SO EVENLY
10 BALANCED THAT YOU ARE UNABLE TO SAY
11 THE EVIDENCE ON EITHER SIDE OF AN
12 ISSUE PREPONDERATES, YOUR FINDING ON
13 THAT ISSUE MUST BE AGAINST THE PARTY
14 WHO HAD THE BURDEN OF PROVING IT.

15 YOU SHOULD CONSIDER ALL OF
16 THE EVIDENCE BEARING ON EVERY ISSUE,
17 REGARDLESS OF WHO PRODUCED IT HERE IN
18 COURT.

19 NOW, LET'S TALK ABOUT
20 PRODUCTS LIABILITY.

21 THE PLAINTIFF SEEKS TO
22 RECOVER DAMAGES BASED UPON A CLAIM OF
23 A DEFECTIVE PRODUCT.

24 A PRODUCT MAY BE DEFECTIVE
25 BECAUSE OF A DEFECT IN DESIGN OR A
26 FAILURE TO ADEQUATELY WARN THE
27 CONSUMER PRIOR TO JULY 1, 1969 OF A
28 HAZARD INVOLVED IN THE FORESEEABLE USE

1 OF THE PRODUCT.

2 NOW, THE ESSENTIAL ELEMENTS
3 OF A CLAIM, BASED UPON AN ALLEGED
4 DESIGN DEFECT ARE:

5 ONE, THE DEFENDANT WAS THE
6 MANUFACTURER OF A PRODUCT; NAMELY,
7 CIGARETTES IN THIS CASE.

8 TWO, THE PRODUCT POSSESSED A
9 DEFECT IN ITS DESIGN.

10 THREE, THE DEFECT IN DESIGN
11 EXISTED AT THE TIME IT LEFT THE
12 DEFENDANT'S POSSESSION.

13 FOUR, THE DEFECT IN DESIGN
14 WAS A CAUSE OF INJURY TO THE
15 PLAINTIFF.

16 AND FIVE, PLAINTIFF'S INJURY
17 RESULTED FROM A USE OF THE PRODUCT
18 THAT WAS REASONABLY FORESEEABLE BY THE
19 DEFENDANT.

20 A PRODUCT IS DEFECTIVE IN
21 DESIGN EITHER IF IT FAILS TO PERFORM
22 AS SAFELY AS AN ORDINARY CONSUMER
23 WOULD EXPECT WHEN USED IN AN INTENDED
24 OR REASONABLY FORESEEABLE MANNER OR,
25 IF THERE IS A RISK OF DANGER INHERENT
26 IN THE DESIGN WHICH OUTWEIGHS THE
27 BENEFITS OF THAT DESIGN.

28 IF PLAINTIFF PROVES THAT THE

1 RISK OF DANGER INHERENT IN THE DESIGN
2 OUTWEIGHS THE BENEFITS OF THAT DESIGN,
3 DEFENDANT' S BURDEN OF PROOF IS TO
4 PROVE BY A PREPONDERANCE OF THE
5 EVIDENCE THAT THE BENEFITS OF THE
6 PRODUCTS, AS A WHOLE, OUTWEIGH THE
7 DANGER INHERENT IN SUCH DESIGN.

8 IN DETERMINING WHETHER THE
9 BENEFITS OF THE DESIGN OUTWEIGH SUCH
10 RISKS, YOU MAY CONSIDER, AMONG OTHER
11 THINGS, THE GRAVITY OF THE DANGER
12 POSED BY THE DESIGN, THE LIKELIHOOD
13 THAT SUCH DANGER COULD CAUSE DAMAGE,
14 THE MECHANICAL FEASIBILITY OF A SAFER
15 ALTERNATIVE DESIGN AT THE TIME OF
16 MANUFACTURE, THE EXISTENCE OR
17 NONEXISTENCE OF WARNINGS, THE
18 FINANCIAL COST OF AN IMPROVED DESIGN
19 AND THE ADVERSE CONSEQUENCES TO THE
20 PRODUCT AND THE CONSUMER THAT WOULD
21 RESULT FROM AN ALTERNATIVE DESIGN.

22 NOW, LET ME TALK A MOMENT
23 ABOUT FAILURE, ALLEGED FAILURE TO
24 WARN.

25 THE ESSENTIAL ELEMENTS OF A
26 CLAIM BASED UPON AN ALLEGED DEFECT
27 FROM FAILURE TO WARN ARE, ONE, THE
28 DEFENDANT WAS THE MANUFACTURER OF A

1 PRODUCT; NAMELY, CIGARETTES.

2 TWO, THE PRODUCT WAS
3 DEFECTIVE.

4 THREE, THE PRODUCT DEFECT
5 WAS A CAUSE OF INJURY TO THE PLAINTIFF
6 AND;

7 FOUR, PLAINTIFF'S INJURY
8 RESULTED FROM A USE OF THE PRODUCT
9 THAT WAS REASONABLY FORESEEABLE TO THE
10 DEFENDANT.

11 NOW, IN THIS CASE, A PRODUCT
12 IS DEFECTIVE IF THE MANUFACTURER OF A
13 PRODUCT HAS A DUTY TO WARN OF DANGERS
14 AND FAILS TO PROVIDE AN ADEQUATE
15 WARNING OF THOSE DANGERS PRIOR TO JULY
16 1, 1969, A DATE ESTABLISHED BY LAW IN
17 THIS CASE.

18 YOU ARE NOT TO CONCERN
19 YOURSELVES FOR THE REASONS FOR THE
20 DATE WHEN IT IS USED IN THESE
21 INSTRUCTIONS BUT MUST ADHERE TO IT IN
22 RENDERING YOUR VERDICT.

23 A CIGARETTE MANUFACTURER HAS
24 A DUTY TO WARN PRIOR TO JULY 1, 1969
25 IF, ONE, THE USE OF THE PRODUCT IN A
26 MANNER THAT IS REASONABLY FORESEEABLE
27 BY THE MANUFACTURER INVOLVES A
28 SUBSTANTIAL DANGER THAT WOULD NOT BE

1 READILY RECOGNIZED BY THE ORDINARY
2 USER OF THE PRODUCT AND; TWO, THIS
3 DANGER WAS KNOWN OR KNOWABLE IN LIGHT
4 OF THE GENERALLY RECOGNIZED AND
5 PREVAILING BEST SCIENTIFIC AND MEDICAL
6 KNOWLEDGE AVAILABLE AT THE TIME OF THE
7 MANUFACTURE AND DISTRIBUTION.

8 A CIGARETTE MANUFACTURER HAS
9 A DUTY, PRIOR TO JULY 1, 1969, TO
10 PROVIDE AN ADEQUATE WARNING TO THE
11 USER ON HOW TO USE THE PRODUCT IF A
12 REASONABLY FORESEEABLE USE OF THE
13 PRODUCT INVOLVES A SUBSTANTIAL DANGER
14 OF WHICH THE MANUFACTURER EITHER IS
15 AWARE OR SHOULD BE AWARE AND THAT IT
16 WOULD NOT BE READILY RECOGNIZED BY THE
17 ORDINARY CONSUMER.

18 THE PLAINTIFF ALSO SEEKS TO
19 RECOVER DAMAGES BASED UPON A CLAIM OF
20 NEGLIGENCE BY THE MANUFACTURER OF A
21 PRODUCT. SO HERE ARE THE ELEMENTS OF
22 A CLAIM FOR NEGLIGENCE.

23 ONE, THE DEFENDANT WAS A
24 MANUFACTURER OF A PRODUCT.

25 TWO, THE DEFENDANT WAS
26 NEGLIGENT.

27 AND THREE, THE NEGLIGENCE OF
28 THE DEFENDANT WAS A CAUSE OF INJURY OR

1 DAMAGE TO THE PLAINTIFF.
2 FOR THE PERIOD PRIOR TO JULY
3 1, 1969, ONE WHO SUPPLIES A PRODUCT
4 DIRECTLY OR THROUGH A THIRD PERSON TO
5 ANOTHER TO USE, WHICH THE SUPPLIER
6 KNOWS OR HAS A REASON TO KNOW IS
7 DANGEROUS OR IS LIKELY TO BE DANGEROUS
8 FOR THE USE FOR WHICH IT IS SUPPLIED,
9 HAS A DUTY TO USE REASONABLE CARE TO
10 GIVE WARNING OF THE DANGEROUS
11 CONDITION OF THE PRODUCT OR OF FACTS
12 WHICH MAKE IT LIKELY TO BE DANGEROUS
13 TO THOSE WHOM THE SUPPLIER SHOULD
14 EXPECT TO USE THE PRODUCT OR BE
15 ENDANGERED BY ITS PROBABLY USE, IF THE
16 SUPPLIER HAS REASON TO BELIEVE THAT
17 THEY WILL NOT REALIZE ITS DANGEROUS
18 CONDITION.

19 A FAILURE TO FULFILL THAT
20 DUTY IS NEGLIGENCE.

21 THIS RULE APPLIES TO A
22 MANUFACTURER OF A PRODUCT.

23 THE MANUFACTURER OF A
24 PRODUCT THAT IS REASONABLY CERTAIN TO
25 BE DANGEROUS, IF NEGLIGENTLY MADE, HAS
26 A DUTY TO EXERCISE REASONABLE CARE IN
27 THE DESIGN AND TESTING OF THE PRODUCT.

28 A FAILURE TO FULFILL THAT

1 DUTY IS NEGLIGENCE.

2 NOW, NEGLIGENCE IS THE DOING
3 OF SOMETHING WHICH A REASONABLY
4 PRUDENT PERSON WOULD NOT DO OR THE
5 FAILURE TO DO SOMETHING WHICH A
6 REASONABLY PRUDENT PERSON WOULD DO
7 UNDER THE CIRCUMSTANCES WHICH ARE
8 SIMILAR TO THOSE SHOWN BY THE EVIDENCE
9 HERE IN THIS CASE.

10 IT IS THE FAILURE TO USE
11 ORDINARY OR REASONABLE CARE.

12 ORDINARY OR REASONABLE CARE
13 IS THAT CARE WHICH PERSON'S OF
14 ORDINARY PRUDENCE WOULD USE IN ORDER
15 TO AVOID INJURY TO THEMSELVES OR
16 OTHERS UNDER CIRCUMSTANCES SIMILAR TO
17 THOSE SHOWN BY THE EVIDENCE HERE.

18 YOU WILL NOTE THAT THE
19 PERSON WHOSE CONDUCT WE SET UP AS A
20 STANDARD IS NOT THE EXTRAORDINARILY
21 CAUTIOUS INDIVIDUAL, NOR THE
22 EXCEPTIONALLY SKILLFUL ONE, BUT A
23 PERSON OF REASONABLE AND ORDINARY
24 PRUDENCE.

25 ONE TEST THAT IS HELPFUL IN
26 DETERMINING WHETHER OR NOT A PERSON
27 WAS NEGLIGENT IS TO ASK AND ANSWER THE
28 QUESTION, WHETHER OR NOT, IF A PERSON

1 OF ORDINARY PRUDENCE HAD BEEN IN THE
2 SAME POSITION AND POSSESSED THE SAME
3 KNOWLEDGE, HE OR SHE WOULD HAVE
4 FORESEEN OR ANTICIPATED THAT SOMEONE
5 MIGHT HAVE BEEN INJURED BY OR AS A
6 RESULT OF HIS OR HER INACTION OR
7 ACTION.

8 IF THE ANSWER TO THAT
9 QUESTION IS YES, AND IF THE ACTION OR
10 INACTION REASONABLY COULD HAVE BEEN
11 AVOIDED, THEN NOT TO AVOID IT WOULD BE
12 NEGLIGENCE.

13 NOW, THE AMOUNT OF CAUTION
14 REQUIRED OF A PERSON IN THE EXERCISE
15 OF ORDINARY CARE DEPENDS ON THE
16 CONDITIONS THAT ARE APPARENT OR THAT
17 SHOULD BE APPARENT TO A REASONABLY
18 PRUDENT PERSON UNDER CIRCUMSTANCES
19 SIMILAR TO THOSE SHOWN BY THE
20 EVIDENCE.

21 EVERY PERSON WHO IS
22 EXERCISING ORDINARY CARE HAS A RIGHT
23 TO ASSUME THAT EVERY OTHER PERSON WILL
24 PERFORM HIS OR HER DUTY IN THE ABSENCE
25 OF REASONABLE CAUSE FOR THINKING
26 OTHERWISE.

27 A PERSON WHO IS EXERCISING
28 ORDINARY CARE HAS A RIGHT TO ASSUME

1 THAT OTHER PERSONS ARE ORDINARILY
2 INTELLIGENT AND POSSESSED OF NORMAL
3 SIGHT AND HEARING, IN THE ABSENCE OF A
4 REASONABLE CAUSE FOR THINKING
5 OTHERWISE.

6 NOW, LET ME SHIFT GEARS JUST
7 FOR A SECOND AND TALK ABOUT CAUSE.

8 THE LAW DEFINES CAUSE IN ITS
9 OWN PARTICULAR WAY.

10 A CAUSE OF INJURY, DAMAGE,
11 LOSS OR HARM IS SOMETHING THAT IS A
12 SUBSTANTIAL FACTOR IN BRINGING ABOUT
13 AN INJURY, DAMAGE, LOSS OR HARM

14 THERE MAY BE MORE THAN ONE
15 CAUSE OF AN INJURY. WHEN NEGLIGENT OR
16 WRONGFUL CONDUCT OF TWO OR MORE
17 PERSONS OR NEGLIGENT OR WRONGFUL
18 CONDUCT AND A DEFECTIVE PRODUCT
19 CONTRIBUTE CONCURRENTLY AS CAUSES OF
20 AN INJURY, THE CONDUCT OF EACH IS A
21 CAUSE OF THE INJURY, REGARDLESS OF THE
22 EXTENT TO WHICH EACH CONTRIBUTES TO
23 THE INJURY.

24 A CAUSE IS CONCURRENT IF IT
25 WAS OPERATIVE AT THE MOMENT OF INJURY
26 AND ACTED WITH ANOTHER CAUSE TO
27 PRODUCE THE INJURY.

28 IT IS NO DEFENSE THAT THE

1 NEGLIGENT OR WRONGFUL CONDUCT OF A
2 PERSON NOT JOINED AS A PARTY WAS ALSO
3 A CAUSE OF THE INJURY.

4 NOW, PLAINTIFF ALSO SEEKS TO
5 RECOVER DAMAGES BASED UPON A CLAIM OF
6 FRAUD. CONDUCT MAY BE FRAUDULENT
7 BECAUSE OF AN INTENTIONAL
8 MISREPRESENTATION, CONCEALMENT, A
9 FALSE PROMISE OR A NEGLIGENT
10 MISREPRESENTATION.

11 THE ESSENTIAL ELEMENTS OF
12 FRAUD BY INTENTIONAL MISREPRESENTATION
13 ARE:

14 ONE, THE DEFENDANT MUST HAVE
15 MADE A REPRESENTATION AS TO A PAST OR
16 EXISTING MATERIAL FACT;

17 TWO, THE REPRESENTATION MUST
18 HAVE BEEN FALSE;

19 THREE, THE DEFENDANT MUST
20 HAVE KNOWN THAT THE REPRESENTATION WAS
21 FALSE WHEN MADE OR MUST HAVE MADE THE
22 REPRESENTATION RECKLESSLY WITHOUT
23 KNOWING WHETHER IT WAS TRUE OR FALSE;

24 FOUR, THE DEFENDANT MUST
25 HAVE MADE THE REPRESENTATION WITH AN
26 INTENT TO DEFRAUD THE PLAINTIFF. THAT
27 IS, HE OR SHE MUST HAVE MADE THE
28 REPRESENTATION FOR THE PURPOSE OF

1 INDUCING THE PLAINTIFF TO RELY UPON IT
2 AND TO ACT OR TO REFRAIN FROM ACTING
3 IN RELIANCE UPON IT.

4 FIVE, THE PLAINTIFF MUST
5 HAVE BEEN UNAWARE OF THE FALSITY OF
6 THE REPRESENTATION, MUST HAVE ACTED IN
7 RELIANCE UPON THE TRUTH OF THE
8 REPRESENTATION, AND MUST HAVE BEEN
9 JUSTIFIED IN RELYING UPON THAT
10 REPRESENTATION.

11 AND SIXTH, FINALLY, AS A
12 RESULT OF THE RELIANCE UPON THE TRUTH
13 OF THE REPRESENTATION, THE PLAINTIFF
14 MUST HAVE SUSTAINED DAMAGE.

15 NOW, ORDINARILY, EXPRESSIONS
16 OF OPINION ARE NOT TREATED AS
17 REPRESENTATIONS OF FACT UPON WHICH TO
18 BASE ACTIONABLE FRAUD.

19 HOWEVER, WHEN ONE PARTY
20 POSSESSES OR HOLDS HIMSELF OR HERSELF
21 OUT AS POSSESSING SUPERIOR KNOWLEDGE
22 OR SPECIAL INFORMATION REGARDING THE
23 SUBJECT OF A REPRESENTATION, AND THE
24 OTHER PARTY IS SO SITUATED THAT HE OR
25 SHE MAY REASONABLY RELY UPON SUCH
26 SUPPOSED SUPERIOR KNOWLEDGE OR SPECIAL
27 INFORMATION, A REPRESENTATION MADE BY
28 THE PARTY POSSESSING OR HOLDING

1 HIMSELF OR HERSELF OUT AS POSSESSING
2 SUCH KNOWLEDGE OR INFORMATION WILL BE
3 TREATED AS A REPRESENTATION OF FACT,
4 ALTHOUGH, IF MADE BY ANY OTHER PERSON,
5 IT MIGHT BE REGARDED AS AN EXPRESSION
6 OF OPINION.

7 WHEN A PARTY STATES AN
8 OPINION AS A FACT IN SUCH A MANNER
9 THAT IT IS REASONABLE TO RELY UPON AND
10 ACT UPON IT AS A FACT, IT MAY BE
11 TREATED AS A REPRESENTATION OF FACT.

12 NOW, LET ME SHIFT GEARS AND
13 TALK ABOUT FRAUD BY CONCEALMENT.

14 THE ESSENTIAL ELEMENTS OF A
15 CLAIM OF FRAUD BY CONCEALMENT ARE,
16 ONE, THE DEFENDANT MUST HAVE CONCEALED
17 OR SUPPRESSED A MATERIAL FACT PRIOR TO
18 JULY 1, 1969.

19 TWO, THE DEFENDANT MUST HAVE
20 BEEN UNDER A DUTY TO DISCLOSE THE FACT
21 TO THE PLAINTIFF.

22 THREE, THE DEFENDANT MUST
23 HAVE INTENTIONALLY CONCEALED OR
24 SUPPRESSED THE FACT WITH THE INTENT TO
25 DEFRAUD THE PLAINTIFF.

26 FOUR, THE PLAINTIFF MUST
27 HAVE BEEN UNAWARE OF THE FACT AND
28 WOULD NOT HAVE ACTED AS HE OR SHE DID

1 IF HE OR SHE HAD KNOWN THE CONCEALED
2 OR SUPPRESSED FACT.

3 AND, FINALLY, FIVE, THE
4 CONCEALMENT OR SUPPRESSION OF THE FACT
5 MUST HAVE CAUSED THE PLAINTIFF TO
6 SUFFER DAMAGE.

7 NOW, EXCEPT AS YOU MAY
8 OTHERWISE BE INSTRUCTED, WHERE
9 MATERIAL FACTS ARE KNOWN TO ONE PARTY
10 AND NOT TO THE OTHER, FAILURE TO
11 DISCLOSE THEM IS NOT ACTIONABLE FRAUD
12 UNLESS THERE IS SOME RELATIONSHIP
13 BETWEEN THE PARTIES WHICH GIVES RISE
14 TO A DUTY TO DISCLOSE SUCH KNOWN FACTS
15 PRIOR TO JULY 1, 1969.

16 A DUTY TO DISCLOSE KNOWN
17 FACTS ARISES WHERE ONE PARTY KNOWS OF
18 MATERIAL FACTS AND ALSO KNOWS THAT
19 SUCH FACTS ARE NEITHER KNOWN NOR
20 READILY ACCESSIBLE TO THE OTHER PARTY.

21 NOW, INTENTIONAL CONCEALMENT
22 EXISTS WHERE A PARTY, WHILE UNDER NO
23 DUTY TO SPEAK, NEVERTHELESS, DOES SO,
24 BUT DOES NOT SPEAK HONESTLY OR MAKES
25 MISLEADING STATEMENTS OR SUPPRESSES
26 FACTS WHICH MATERIALLY QUALIFY THOSE
27 THAT ARE STATED.

28 NOW, LET ME SHIFT GEARS AND

1 TALK ABOUT FALSE PROMISE.

2 THE ESSENTIAL ELEMENTS OF A
3 CLAIM OF FRAUD BY FALSE PROMISE ARE,
4 ONE, THE DEFENDANT MUST HAVE MADE A
5 PROMISE AS TO A MATERIAL MATTER AND,
6 AT THE TIME IT WAS MADE, HE OR SHE
7 MUST HAVE INTENDED NOT TO PERFORM IT.

8 TWO, THE DEFENDANT MUST HAVE
9 MADE THE PROMISE WITH AN INTENT TO
10 DEFRAUD THE PLAINTIFF, THAT IS, HE OR
11 SHE MUST HAVE MADE THE PROMISE FOR THE
12 PURPOSE OF INDUCING PLAINTIFF TO RELY
13 UPON IT AND TO ACT OR REFRAIN FROM
14 ACTING IN RELIANCE UPON IT.

15 THREE, THE PLAINTIFF MUST
16 HAVE BEEN UNAWARE OF THE DEFENDANT'S
17 INTENTION NOT TO PERFORM THE PROMISE,
18 HE OR SHE MUST HAVE ACTED IN RELIANCE
19 UPON THE PROMISE AND MUST HAVE BEEN
20 JUSTIFIED IN RELYING UPON THE PROMISE
21 MADE BY THE DEFENDANT.

22 AND FOUR, FINALLY, AS A
23 RESULT OF RELIANCE UPON DEFENDANT'S
24 PROMISE, THE PLAINTIFF MUST HAVE
25 SUSTAINED DAMAGE.

26 NOW, YOU MAY CONSIDER THE
27 CONDUCT OF A PARTY MAKING A PROMISE
28 EITHER BEFORE OR AFTER THE PROMISE WAS

1 MADE IN DETERMINING WHETHER THERE WAS
2 AN INTENTION NOT TO PERFORM THE
3 PROMISE WHEN MADE.

4 NOW LET ME TALK ABOUT
5 NEGLIGENT MISREPRESENTATION.

6 THE ESSENTIAL ELEMENTS OF A
7 CLAIM OF FRAUD BY NEGLIGENT
8 MISREPRESENTATION ARE:

9 ONE, THE DEFENDANT MUST HAVE
10 MADE A REPRESENTATION AS TO A PAST OR
11 EXISTING MATERIAL FACT.

12 TWO, THE REPRESENTATION MUST
13 HAVE BEEN UNTRUE.

14 THREE, REGARDLESS OF HIS OR
15 HER ACTUAL BELIEF, THE DEFENDANT MUST
16 HAVE MADE THE REPRESENTATION WITHOUT
17 ANY REASONABLE GROUND FOR BELIEVING IT
18 TO BE TRUE.

19 FOUR, THE REPRESENTATION
20 MUST HAVE BEEN MADE WITH THE INTENT TO
21 INDUCE PLAINTIFF TO RELY UPON IT.

22 FIVE, THE PLAINTIFF MUST
23 HAVE BEEN UNAWARE OF THE FALSITY OF
24 THE REPRESENTATION, MUST HAVE ACTED IN
25 RELIANCE UPON THE TRUTH OF THE
26 REPRESENTATION AND MUST HAVE BEEN
27 JUSTIFIED IN RELYING UPON THE
28 REPRESENTATION.

1 AND SIX, FINALLY, AS A
2 RESULT OF THE RELIANCE UPON THE TRUTH
3 OF THE REPRESENTATION, THE PLAINTIFF
4 MUST HAVE SUSTAINED DAMAGE.

5 NOW, ONE WHO MAKES A
6 MISREPRESENTATION OR FALSE PROMISE OR
7 CONCEALS A MATERIAL FACT WITH THE
8 INTENT TO DEFRAUD THE PUBLIC OR A
9 PARTICULAR CLASS OF PERSONS IS DEEMED
10 TO HAVE INTENDED TO DEFRAUD EVERY
11 INDIVIDUAL IN THAT CATEGORY WHO WAS
12 ACTUALLY MISLEAD THEREBY.

13 NOW, A PARTY CLAIMING TO
14 HAVE BEEN DEFRAUDED BY A FALSE
15 REPRESENTATION OR PROMISE MUST HAVE
16 RELIED UPON THE REPRESENTATION OR
17 PROMISE, THAT IS, THE REPRESENTATION
18 OR PROMISE MUST HAVE BEEN A CAUSE OF
19 PLAINTIFF'S CONDUCT IN ENTERING INTO
20 THE TRANSACTION, AND WITHOUT SUCH
21 REPRESENTATION OR PROMISE, PLAINTIFF
22 WOULD NOT HAVE ENTERED INTO SUCH
23 TRANSACTION.

24 THE FRAUD, IF ANY, NEED NOT
25 BE THE SOLE CAUSE, IF IT APPEARS THAT
26 RELIANCE UPON THE REPRESENTATION OR
27 PROMISE SUBSTANTIALLY INFLUENCED SUCH
28 PARTY'S ACTION, EVEN THOUGH OTHER

1 INFLUENCES OPERATED AS WELL.
2 NOW, A PARTY CLAIMING TO
3 HAVE BEEN DEFRAUDED BY A FALSE
4 REPRESENTATION OR PROMISE MUST NOT
5 ONLY HAVE ACTED IN RELIANCE ON IT, BUT
6 MUST HAVE BEEN JUSTIFIED IN SUCH
7 RELIANCE, THAT IS, THE SITUATION MUST
8 HAVE BEEN SUCH AS TO MAKE IT
9 REASONABLE IN THE LIGHT OF THE
10 CIRCUMSTANCES AND PLAINTIFF' S
11 INTENTIONS, EXPERIENCE AND KNOWLEDGE
12 TO ACCEPT THE REPRESENTATION OR
13 PROMISE WITHOUT MAKING AN INDEPENDENT
14 INQUIRY OR INVESTIGATION.

15 IF A PARTY CLAIMING TO HAVE
16 BEEN DEFRAUDED MAKES AN INDEPENDENT
17 INVESTIGATION OF THE SUBJECT MATTER OF
18 THE ALLEGED FALSE REPRESENTATION OR
19 PROMISE, AND THE DECISION TO ENGAGE IN
20 THE TRANSACTION IS THE RESULT OF HIS
21 OR HER INDEPENDENT INVESTIGATION AND
22 NOT HIS OR HER RELIANCE UPON THE
23 REPRESENTATION OR PROMISE, HE OR SHE
24 IS NOT ENTITLED TO RECOVER.

25 NOW, LET ME SHIFT GEARS.
26 PHILIP MORRIS IS A
27 CORPORATION, AND AS SUCH, CAN ONLY ACT
28 THROUGH ITS OFFICERS AND EMPLOYEES.

1 ANY ACT OR OMISSION OF AN
2 OFFICER OR EMPLOYEE WITHIN THE SCOPE
3 OF AUTHORITY OR EMPLOYMENT IS, IN LAW,
4 THE ACT OR OMISSION OF THE
5 CORPORATION.

6 NOW, LET ME TALK FOR A
7 LITTLE BIT ABOUT CONSPIRACY.

8 A CONSPIRACY IS AN AGREEMENT
9 ENTERED INTO BY TWO OR MORE PERSONS
10 WITH THE INTENT TO AGREE OR CONSPIRE
11 AND THE INTENT TO COMMIT WRONGFUL
12 ACTS.

13 MEMBERSHIP OR PARTICIPATION
14 IN A CONSPIRACY TO COMMIT A WRONGFUL
15 ACT IS, BY ITSELF, NOT A BASIS FOR
16 LIABILITY.

17 CONSPIRATORS HAVE NO
18 LIABILITY UNLESS A WRONGFUL ACT IS
19 COMMITTED BY ONE OR MORE OF THE
20 CONSPIRATORS IN FURTHERANCE OF THE
21 CONSPIRACY CAUSING ANOTHER PARTY TO
22 SUSTAIN INJURY, DAMAGE, LOSS OR HARM

23 THE LIABILITY OF ANY ALLEGED
24 CONSPIRATOR TO PLAINTIFF SHALL BE
25 DETERMINED BY YOU IN ACCORDANCE WITH
26 THE FOLLOWING INSTRUCTIONS.

27 EACH MEMBER OF A CONSPIRACY
28 IS LIABLE FOR EACH ACT AND BOUND BY

1 EACH DECLARATION OF EVERY OTHER MEMBER
2 OF THE CONSPIRACY IF SUCH ACT OR
3 DECLARATION IS IN FURTHERANCE OF THE
4 OBJECT OF A CONSPIRACY.

5 THE ACT OF ONE CONSPIRATOR
6 PURSUANT TO OR IN FURTHERANCE OF THE
7 COMMON DESIGN OF THE CONSPIRACY IS THE
8 ACT OF ALL THE CONSPIRATORS.

9 A MEMBER OF A CONSPIRACY IS
10 NOT ONLY LIABLE FOR THE PARTICULAR
11 WRONGFUL ACT THAT, TO HIS OR HER
12 KNOWLEDGE, HIS OR HER CONFEDERATE
13 AGREED TO AND DID COMMIT, BUT IS ALSO
14 LIABLE FOR THE NATURE AND PROBABLE
15 CONSEQUENCES OF ANY WRONGFUL ACT OF A
16 CO-CONSPIRATOR TO FURTHER THE OBJECT
17 OF THE CONSPIRACY, EVEN THOUGH SUCH
18 ACT WAS NOT INTENDED AS PART OF THE
19 AGREED UPON OBJECTIVE AND EVEN THOUGH
20 HE OR SHE WAS NOT PRESENT AT THE TIME
21 OF THE COMMISSION OF SUCH ACT.

22 YOU MUST DETERMINE WHETHER
23 THE DEFENDANT WAS THE -- WAS A MEMBER
24 OF A CONSPIRACY TO COMMIT THE
25 ORIGINALLY AGREED UPON WRONGFUL ACT OR
26 ACTS, AND IF SO, WHETHER THE ACT
27 ALLEGED WAS PERPETRATED BY A
28 CO-CONSPIRATOR IN FURTHERANCE OF SUCH

1 CONSPIRACY AND WAS A NATURE AND
2 PROBABLY CONSEQUENCE OF THE AGREED
3 UPON OBJECTIVE OF THE CONSPIRACY.

4 NOW, THE FORMATION AND
5 EXISTENCE OF A CONSPIRACY MAY BE
6 INFERRED FROM ALL THE CIRCUMSTANCES
7 TENDING TO SHOW THE COMMON INTENT AND
8 MAY BE PROVED IN THE SAME WAY AS ANY
9 OTHER FACT MAY BE PROVED, EITHER BY
10 DIRECT TESTIMONY OF THE FACT OR BY
11 CIRCUMSTANTIAL EVIDENCE OR BY BOTH
12 DIRECT AND CIRCUMSTANTIAL EVIDENCE.

13 IT IS NOT NECESSARY TO SHOW
14 A MEETING OF THE ALLEGED CONSPIRATORS
15 OR THE MAKING OF AN EXPRESS OR FORMAL
16 AGREEMENT.

17 NOW, EVIDENCE THAT A PERSON
18 WAS IN THE COMPANY OF OR ASSOCIATED
19 WITH ONE OR MORE OTHER PERSONS ALLEGED
20 OR PROVED TO HAVE BEEN MEMBERS OF A
21 CONSPIRACY IS NOT, IN ITSELF, SUCH TO
22 PROVE THAT SUCH PERSON WAS A MEMBER OF
23 THE ALLEGED CONSPIRACY.

24 UNDER THE LAW, A
25 CORPORATION, INCLUDING ALL OF ITS
26 EMPLOYEES, IS A SINGLE PERSON.

27 SINCE A CONSPIRACY REQUIRES
28 AN AGREEMENT ENTERED INTO BETWEEN TWO

1 OR MORE PERSONS, A CORPORATION CANNOT
2 BE FOUND TO HAVE CONSPIRED WITH ITSELF
3 OR WITH ITS OWN EMPLOYEES. IT CAN
4 ONLY CONSPIRE WITH SOMEONE ELSE,
5 INCLUDING ANOTHER CORPORATION.

6 WHERE A CONSPIRATOR COMMITS
7 AN ACT WHICH IS NEITHER IN FURTHERANCE
8 OF THE OBJECT OF THE CONSPIRACY NOR
9 THE NATURE AND PROBABLE CONSEQUENCE OF
10 AN ATTEMPT TO ATTAIN THAT OBJECT, HE
11 OR SHE ALONE IS RESPONSIBLE FOR AND IS
12 BOUND BY THAT ACT AND NO
13 RESPONSIBILITY THEREFORE ATTACHES TO
14 ANY OF HIS OR HER CONFEDERATES.

15 THE ACT OR DECLARATION OF A
16 PERSON WHO IS NOT A MEMBER OF A
17 CONSPIRACY IS NOT BINDING UPON THE
18 MEMBERS OF THE CONSPIRACY, EVEN IF THE
19 ACT OR DECLARATION TENDED TO PROMOTE
20 THE OBJECT OF THE CONSPIRACY.

21 NOW, EVIDENCE OF THE
22 COMMISSION OF AN ACT WHICH FURTHERED
23 THE PURPOSE OF AN ALLEGED CONSPIRACY
24 IS NOT, IN ITSELF, SUFFICIENT TO PROVE
25 THAT THE PERSON COMMITTED THE ACT, WAS
26 A MEMBER OF SUCH CONSPIRACY.

27 NO ACT OR DECLARATION OF A
28 CONSPIRATOR COMMITTED OR MADE AFTER

1 THE CONSPIRACY HAS BEEN TERMINATED IS
2 BINDING UPON CO-CONSPIRATORS AND THEY
3 ARE NOT LIABLE FOR ANY SUCH ACT.

4 NOW, EVIDENCE OF A STATEMENT
5 MADE BY ONE ALLEGED CONSPIRATOR, OTHER
6 THAN AT THIS TRIAL, SHALL NOT BE
7 CONSIDERED BY YOU AS AGAINST ANOTHER
8 ALLEGED CONSPIRATOR UNLESS YOU FIND,
9 BY A PREPONDERANCE OF THE EVIDENCE,
10 THAT OTHER EVIDENCE INDEPENDENT OF THE
11 STATEMENT HAS ESTABLISHED THE
12 EXISTENCE OF A CONSPIRACY TO COMMIT A
13 WRONGFUL ACT AT THE TIME SUCH
14 STATEMENT WAS MADE.

15 TWO, THE STATEMENT WAS MADE
16 WHILE THE PERSON MAKING THE STATEMENT
17 WAS PARTICIPATING IN THE CONSPIRACY
18 AND THAT THE PERSON AGAINST WHOM IT
19 WAS OFFERED WAS PARTICIPATING IN THE
20 CONSPIRACY BEFORE OR DURING THAT TIME
21 AND, THREE, SUCH STATEMENT WAS MADE IN
22 FURTHERANCE OF THE OBJECTIVE OF THE
23 CONSPIRACY.

24 NOW, THE WORD "STATEMENT" AS
25 USED IN THIS INSTRUCTION INCLUDES ANY
26 ORAL OR WRITTEN VERBAL EXPRESSION OR
27 THE NONVERBAL CONDUCT OF SUCH A PERSON
28 INTENDED BY THAT PERSON AS A

1 SUBSTITUTE FOR ORAL OR WRITTEN VERBAL
2 EXPRESSION.

3 OKAY, FROM CONSPIRACY I WANT
4 TO NOW CHANGE GEARS AND TALK TO YOU
5 ABOUT DAMAGES.

6 THE TOTAL AMOUNT OF
7 PLAINTIFF'S DAMAGES, ECONOMIC AND
8 NON-ECONOMIC, IS THE AMOUNT THAT WILL
9 REASONABLY COMPENSATE PLAINTIFF FOR
10 EACH OF THE FOLLOWING ELEMENTS OF
11 CLAIMED LOSS OR HARM, PROVIDED THAT
12 YOU FIND THAT SUCH LOSS OR HARM WAS OR
13 WILL BE SUFFERED BY PLAINTIFF AND WAS
14 OR WILL BE CAUSED BY THE ACT OR
15 OMISSION UPON WHICH YOU BASE YOUR
16 FINDING OF LIABILITY OF THE DEFENDANT,
17 IF YOU SO FIND.

18 THE TERM "ECONOMIC DAMAGES, "
19 MEANS OBJECTIVELY VERIFIABLE, MONETARY
20 LOSSES, INCLUDING MEDICAL EXPENSES,
21 LOSS OF EARNINGS OR LOSS OF EMPLOYMENT
22 AND LOSS OF BUSINESS OR EMPLOYMENT
23 OPPORTUNITY.

24 THE TERM "NON-ECONOMIC
25 DAMAGES" MEANS SUBJECTIVE,
26 NON-MONETARY LOSSES, INCLUDING BUT NOT
27 LIMITED TO PAIN, SUFFERING,
28 INCONVENIENCE, MENTAL SUFFERING AND

1 EMOTIONAL DISTRESS.

2 THE AMOUNT OF SUCH AWARD,
3 INCLUDING ECONOMIC AND NON-ECONOMIC
4 DAMAGES, SHALL INCLUDE THE REASONABLE
5 VALUE OF MEDICAL, HOSPITAL AND NURSING
6 CARE SERVICES AND SUPPLIES REASONABLY
7 REQUIRED AND ACTUALLY GIVEN IN THE
8 TREATMENT OF THE PLAINTIFF TO THE
9 PRESENT TIME.

10 THIS IS ECONOMIC DAMAGE.

11 THE REASONABLE VALUE OF
12 WORKING TIME LOST TO DATE. IN
13 DETERMINING THIS AMOUNT, YOU SHOULD
14 CONSIDER EVIDENCE OF PLAINTIFF'S
15 EARNINGS AND EARNING CAPACITY, HOW HE
16 ORDINARILY OCCUPIED HIMSELF, AND FIND
17 WHAT WAS REASONABLY CERTAIN TO HAVE
18 BEEN EARNED IN THE TIME LOST, IF THERE
19 HAD BEEN NO INJURY.

20 ONE'S ABILITY TO WORK MAY
21 HAVE A MONETARY VALUE, EVEN THOUGH
22 THAT PERSON IS NOT EMPLOYED BY
23 ANOTHER.

24 THIS ALSO IS ECONOMIC
25 DAMAGE.

26 THE PRESENT CASH VALUE OF
27 EARNING CAPACITY REASONABLY CERTAIN TO
28 BE LOST IN THE FUTURE AS A RESULT OF

1 THE INJURY IN QUESTION.
2 THIS ALSO IS ECONOMIC
3 DAMAGE.
4 REASONABLE COMPENSATION FOR
5 ANY PAIN, DISCOMFORT, FEARS, ANXIETY
6 AND OTHER MENTAL AND EMOTIONAL
7 DISTRESS SUFFERED BY THE PLAINTIFF AND
8 OF WHICH INJURY WAS A CAUSE AND FOR
9 SIMILAR SUFFERING REASONABLY CERTAIN
10 TO BE EXPERIENCED IN THE FUTURE FROM
11 THE SAME CAUSE, NO DEFINITE STANDARD
12 OR METHOD OF CALCULATION IS PRESCRIBED
13 BY LAW BY WHICH TO FIX REASONABLE
14 COMPENSATION FOR PAIN AND SUFFERING,
15 NOR IS THE OPINION OF ANY WITNESS
16 REQUIRED AS TO THE AMOUNT OF SUCH
17 REASONABLE COMPENSATION.
18 FURTHERMORE, THE ARGUMENTS
19 OF COUNSEL AS TO THE AMOUNT OF DAMAGES
20 IS NOT EVIDENCE OF REASONABLE
21 COMPENSATION IN THIS CATEGORY.
22 IN MAKING AN AWARD FOR PAIN
23 AND SUFFERING, YOU SHALL EXERCISE YOUR
24 AUTHORITY WITH CALM AND REASONABLE
25 JUDGMENT AND THE DAMAGES YOU FIX SHALL
26 BE JUST AND REASONABLE IN THE LIGHT OF
27 ALL THE EVIDENCE.
28 THIS IS NON-ECONOMIC DAMAGE.

1 IF YOU CONCLUDE THAT THE
2 PLAINTIFF IS ENTITLED TO RECOVER
3 COMPENSATION FOR FUTURE NON-ECONOMIC
4 DAMAGES, YOU MUST DETERMINE THAT
5 AMOUNT IN CURRENT DOLLARS, THAT IS,
6 THE AMOUNT PAID AT THE TIME OF
7 JUDGMENT THAT WILL COMPENSATE A
8 PLAINTIFF FOR FUTURE PAIN AND
9 SUFFERING.

10 THE PRECISE METHOD USED IN
11 DETERMINING FUTURE ECONOMIC LOSSES
12 NEED NOT BE FOLLOWED BY YOU IN YOUR
13 DETERMINATION OF FUTURE NON-ECONOMIC
14 DAMAGES.

15 NOW, YOU ARE NOT PERMITTED
16 TO AWARD A PARTY SPECULATIVE DAMAGES,
17 WHICH MEANS COMPENSATION FOR FUTURE
18 LOSS OR HARM WHICH, ALTHOUGH POSSIBLE,
19 IS CONJECTURAL OR NOT REASONABLY
20 CERTAIN.

21 HOWEVER, IF YOU DETERMINE
22 THAT A PARTY IS ENTITLED TO RECOVER,
23 YOU SHOULD COMPENSATE A PARTY FOR LOSS
24 OR HARM CAUSED BY THE INJURY IN
25 QUESTION WHICH IS REASONABLY CERTAIN
26 TO BE SUFFERED IN THE FUTURE.

27 THE AMOUNT OF DAMAGES
28 CLAIMED IN THE ARGUMENT OF COUNSEL

1 MUST NOT BE CONSIDERED BY YOU AS
2 EVIDENCE OF REASONABLE COMPENSATION.

3 NOW, ACCORDING TO A TABLE OF
4 MORTALITY, THE LIFE EXPECTANCY OF A
5 MALE PERSON AGED 56 YEARS IS 21.4
6 ADDITIONAL YEARS.

7 THIS FIGURE IS NOT
8 CONCLUSIVE. IT IS AN AVERAGE LIFE
9 EXPECTANCY OF PERSONS WHO HAVE REACHED
10 THAT AGE.

11 THIS FIGURE MAYBE CONSIDERED
12 BY YOU IN CONNECTION WITH OTHER
13 EVIDENCE RELATING TO THE PROBABLE LIFE
14 EXPECTANCY OF THE PLAINTIFF, INCLUDING
15 EVIDENCE OF OCCUPATION, HEALTH, HABITS
16 AND OTHER ACTIVITIES, BEARING IN MIND
17 THAT MANY PERSONS LIVE LONGER AND MANY
18 DIE SOONER THAN THE AVERAGE.

19 NOW, ANY AWARD OF FUTURE
20 ECONOMIC LOSS MUST BE ONLY FOR ITS
21 PRESENT CASH VALUE.

22 PRESENT CASH VALUE IS THE
23 PRESENT SUM OF MONEY WHICH, TOGETHER
24 WITH THE INVESTMENT RETURN THEREON,
25 WHEN INVESTED SO AS TO YIELD THE
26 HIGHEST RATE OF RETURN, CONSISTENT
27 WITH REASONABLE SECURITY, WILL PAY THE
28 EQUIVALENT OF LOST FUTURE BENEFITS AT

1 THE TIMES, IN THE AMOUNTS AND FOR THE
2 PERIOD THAT YOU FIND SUCH FUTURE
3 BENEFITS WOULD HAVE BEEN RECEIVED.

4 THE PRESENT CASH VALUE WILL,
5 OF COURSE, BE LESS THAN THE AMOUNT YOU
6 FIND TO BE THE LOSS OF SUCH FUTURE
7 BENEFITS.

8 NOW, LET ME SHIFT GEARS AND
9 TALK ABOUT PUNITIVE DAMAGES.

10 IF YOU FIND THAT PLAINTIFF
11 SUFFERED ACTUAL INJURY, HARM OR DAMAGE
12 CAUSED BY DEFENDANT, YOU MAY THEN
13 CONSIDER WHETHER YOU SHOULD AWARD
14 PUNITIVE DAMAGES AGAINST DEFENDANT FOR
15 THE SAKE OF EXAMPLE AND BY WAY OF
16 PUNISHMENT.

17 YOU MAY, IN YOUR DISCRETION,
18 AWARD SUCH DAMAGES IF, BUT ONLY IF,
19 YOU FIND BY CLEAR AND CONVINCING
20 EVIDENCE THAT SAID DEFENDANT WAS
21 GUILTY OF OPPRESSION, FRAUD OR MALICE
22 IN THE CONDUCT ON WHICH YOU BASE YOUR
23 FINDINGS OF LIABILITY.

24 MALICE MEANS CONDUCT WHICH
25 IS INTENDED BY THE DEFENDANT TO CAUSE
26 INJURY TO THE PLAINTIFF OR DESPICABLE
27 CONDUCT WHICH IS CARRIED ON BY THE
28 DEFENDANT WITH A WILLFUL AND CONSCIOUS

1 DISREGARD FOR THE RIGHTS OR SAFETY OF
2 OTHERS.

3 A PERSON ACTS WITH CONSCIOUS
4 DISREGARD OF THE RIGHTS OR SAFETY OF
5 OTHERS WHEN HE OR SHE IS AWARE OF THE
6 PROBABLE DANGEROUS CONSEQUENCES OF HIS
7 OR HER CONDUCT AND WILLFULLY AND
8 DELIBERATELY FAILS TO AVOID THOSE
9 CONSEQUENCES.

10 OPPRESSION MEANS DESPICABLE
11 CONDUCT THAT SUBJECTS A PERSON TO
12 CRUEL AND UNJUST HARDSHIP IN CONSCIOUS
13 DISREGARD OF THAT PERSON' S RIGHTS.

14 DESPICABLE CONDUCT IS
15 CONDUCT WHICH IS SO VILE, BASE,
16 CONTEMPTIBLE, MISERABLE, WRETCHED OR
17 LOATHSOME THAT IT WOULD BE LOOKED DOWN
18 UPON AND DESPISED BY ORDINARY, DECENT
19 PEOPLE.

20 FRAUD MEANS AN INTENTIONAL
21 MISREPRESENTATION, DECEIT OR
22 CONCEALMENT OF A MATERIAL FACT KNOWN
23 TO THE DEFENDANT WITH THE ATTENTION
24 UPON THE PART OF THE DEFENDANT OF
25 THEREBY DEPRIVING A PERSON OF PROPERTY
26 OR LEGAL RIGHTS OR OTHERWISE CAUSING
27 INJURY.

28 THE LAW PROVIDES NO FIXED

1 STANDARDS AS TO THE AMOUNT OF SUCH
2 PUNITIVE DAMAGES BUT LEAVES THE AMOUNT
3 TO THE JURY'S SOUND DISCRETION,
4 EXERCISED WITHOUT PASSION OR
5 PREJUDICE.

6 IN ARRIVING AT ANY AWARD OF
7 PUNITIVE DAMAGES, YOU ARE TO CONSIDER
8 THE FOLLOWING: ONE, THE
9 REPREHENSIBILITY OF THE CONDUCT OF
10 THE DEFENDANT.

11 TWO, THE AMOUNT OF PUNITIVE
12 DAMAGES WHICH WILL HAVE A DETERRENT
13 EFFECT ON THE DEFENDANT IN LIGHT OF
14 DEFENDANT'S FINANCIAL CONDITION.

15 THREE, THAT THE PUNITIVE
16 DAMAGES MUST BEAR A REASONABLE
17 RELATION TO THE INJURY, HARM OR DAMAGE
18 ACTUALLY SUFFERED BY THE PLAINTIFF.

19 IF YOU FIND THAT PLAINTIFF
20 IS ENTITLED TO AN AWARD OF PUNITIVE
21 DAMAGES AGAINST DEFENDANT, YOU SHALL
22 STATE THE AMOUNT OF PUNITIVE DAMAGES
23 SEPARATELY IN YOUR VERDICT.

24 NOW, THE PLAINTIFF HAS THE
25 BURDEN OF PROVING BY CLEAR AND
26 CONVINCING EVIDENCE ALL OF THE FACTS
27 NECESSARY TO ESTABLISH FRAUD, MALICE
28 OR OPPRESSION.

1 CLEAR AND CONVINCING
2 EVIDENCE MEANS EVIDENCE OF SUCH
3 CONVINCING FORCE THAT IT DEMONSTRATES,
4 IN CONTRAST TO THE OPPOSING EVIDENCE,
5 A HIGH PROBABILITY OF THE TRUTH OF THE
6 FACTS FOR WHICH IT IS OFFERED AS
7 PROOF.

8 SUCH EVIDENCE REQUIRES A
9 HIGHER STANDARD OF PROOF THAN PROOF BY
10 A PREPONDERANCE OF THE EVIDENCE.

11 YOU SHOULD CONSIDER ALL OF
12 THE EVIDENCE BEARING UPON EVERY ISSUE
13 REGARDLESS OF WHO PRODUCED IT HERE IN
14 THIS TRIAL.

15 NOW, LET ME GIVE YOU SOME
16 CONCLUDING INSTRUCTIONS.

17 I HAVE NOT INTENDED BY
18 ANYTHING THAT I HAVE SAID OR DONE
19 DURING THIS TRIAL OR BY ANY QUESTIONS
20 THAT I MAY HAVE ASKED, AND I DON'T
21 REMEMBER ASKING MANY, TO SUGGEST HOW
22 YOU SHOULD DECIDE ANY QUESTIONS OF
23 FACT, OR THAT I BELIEVE OR DISBELIEVE
24 ANY WITNESS. IF ANYTHING I HAVE SAID
25 OR DONE HAS SEEMED TO SO INDICATE, YOU
26 MUST DISREGARD IT AND FORM YOUR OWN
27 OPINIONS, WHICH I KNOW YOU ALL WILL
28 DO.

1 THE PURPOSE OF THE COURT'S
2 INSTRUCTIONS IS TO INSTRUCT YOU AS TO
3 THE APPLICABLE LAW SO THAT YOU MAY
4 ARRIVE AT A JUST AND LAWFUL VERDICT.

5 WHETHER SOME INSTRUCTIONS
6 APPLY WILL DEPEND ON WHAT YOU FIND TO
7 BE THE FACTS.

8 EVEN THOUGH I HAVE
9 INSTRUCTED YOU ON VARIOUS SUBJECTS
10 INCLUDING DAMAGES, YOU MUST NOT TREAT
11 THE INSTRUCTIONS AS INDICATING THE
12 COURT'S OPINION ON HOW YOU SHOULD
13 DECIDE ANY ISSUE IN THIS CASE OR AS TO
14 WHICH PARTY IS ENTITLED TO YOUR
15 VERDICT.

16 NOW, IN THE JURY ROOM, IT IS
17 YOUR DUTY TO DISCUSS THE CASE IN ORDER
18 TO REACH AN AGREEMENT, IF YOU CAN.

19 EACH OF YOU MUST DECIDE THE
20 CASE FOR YOURSELF, BUT SHOULD DO SO
21 ONLY AFTER CONSIDERING THE VIEWS OF
22 EACH OTHER JUROR.

23 YOU SHOULD NOT HESITATE TO
24 CHANGE AN OPINION IF YOU ARE CONVINCED
25 IT IS WRONG. HOWEVER, YOU SHOULD NOT
26 BE INFLUENCED TO DECIDE ANY QUESTION
27 IN A PARTICULAR WAY SIMPLY BECAUSE A
28 MAJORITY OF THE JURORS OR ANY OF THEM

1 FAVOR SUCH A DECISION.

2 NOW, THE ATTITUDE AND
3 CONDUCT OF JURORS AT THE BEGINNING OF
4 THEIR DELIBERATIONS ARE VERY
5 IMPORTANT.

6 IT IS RARELY HELPFUL ON
7 ENTERING THE JURY ROOM TO EXPRESS AN
8 EMPHATIC OPINION ON A CASE OR TO
9 ANNOUNCE A DETERMINATION TO STAND FOR
10 A CERTAIN VERDICT.

11 WHEN ONE DOES THAT AT THE
12 OUTSET, A SENSE OF PRIDE MAYBE AROUSED
13 AND ONE MAY HESITATE TO CHANGE A
14 POSITION, EVEN IF IT IS SHOWN TO BE
15 WRONG.

16 REMEMBER, YOU ARE NOT
17 PARTISANS OR ADVOCATES IN THIS MATTER.

18 YOU MUST BE IMPARTIAL JUDGES
19 OF THE FACTS.

20 YOU MUST NOT DETERMINE ANY
21 ISSUE IN THIS CASE BY CHANCE, SUCH AS
22 BY FLIP OF A COIN -- I HAVE TO SAY
23 THAT, I KNOW YOU WOULD NEVER DO IT --
24 THE DRAWING OF LOTS OR BY ANY OTHER
25 CHANCE DETERMINATION.

26 FOR EXAMPLE, IF YOU
27 DETERMINE THAT A PARTY IS ENTITLED TO
28 RECOVER, YOU MUST NOT ARRIVE AT THE

1 AMOUNT OF DAMAGES TO BE AWARDED BY
2 AGREEING IN ADVANCE TO DETERMINE AN
3 AVERAGE OR TO MAKE THAT YOUR VERDICT
4 WITHOUT FURTHER EXERCISE OF YOUR
5 INDEPENDENT CONSIDERATION, JUDGMENT
6 AND DECISION.

7 THE INSTRUCTIONS WHICH I AM
8 NOW GIVING TO YOU WILL BE MADE
9 AVAILABLE IN WRITTEN FORM FOR YOUR
10 DELIBERATIONS.

11 YOU WILL FIND THAT THE
12 INSTRUCTIONS MAY BE TYPED, PRINTED OR
13 HANDWRITTEN.

14 PORTIONS MAY HAVE BEEN ADDED
15 OR DELETED.

16 YOU MUST DISREGARD ANY
17 DELETED PART OF AN INSTRUCTION AND NOT
18 SPECULATE AS TO WHAT IT WAS OR THE
19 REASONS FOR ITS DELETION. YOU ARE NOT
20 TO BE CONCERNED WITH THE REASONS FOR
21 ANY MODIFICATION.

22 EVERY PART OF THE TEXT OF AN
23 INSTRUCTION, WHETHER TYPED, PRINTED OR
24 HANDWRITTEN, IS OF EQUAL IMPORTANCE.

25 YOU ARE TO BE GOVERNED ONLY
26 BY THE INSTRUCTION IN ITS FINAL
27 WORDING.

28 YOU WILL BE PERMITTED TO

1 SEPARATE AT THE NOON AND EVENING
2 RECESSES.

3 DURING YOUR ABSENCE, THE
4 COURTROOM WILL BE LOCKED AND NO ONE
5 WILL GO INTO THE JURY ROOM OTHER THAN
6 YOU OR MY ATTENDANT WHO TAKES YOU IN
7 THERE.

8 YOU ARE TO RETURN FOLLOWING
9 THE RECESSES AT 1:30 P.M. AND AT 8:45
10 ON THE NEXT SUCCEEDING COURT DATE.

11 DURING SUCH PERIODS OF
12 RECESS, YOU MUST NOT DISCUSS WITH
13 ANYONE ANY SUBJECT CONNECTED WITH THIS
14 TRIAL.

15 AND, MORE IMPORTANTLY, NOW,
16 YOU MUST NOT DELIBERATE FURTHER UPON
17 THE CASE UNTIL ALL 12 OF YOU ARE
18 TOGETHER AND REASSEMBLED IN THE JURY
19 ROOM

20 SO FOR EXAMPLE, WHEN YOU GO
21 OUT TO LUNCH, YOU CAN GO OUT TO LUNCH
22 WITH EACH OTHER, BUT DON'T DISCUSS
23 DELIBERATIONS TOGETHER WHEN YOU ARE
24 NOT IN THE JURY ROOM. DON'T THE TWO
25 OF YOU GET TOGETHER OUT THERE AND JUST
26 TALK AMONG YOURSELVES. IT IS VERY
27 IMPORTANT THAT WHENEVER YOU TALK ABOUT
28 THIS CASE, ALL 12 OF YOU BE PRESENT

1 AND ALL OF YOU CAN HEAR ANYTHING THAT
2 ANYBODY ELSE HAS TO SAY ABOUT THE
3 CASE.

4 AT SUCH TIME AS YOU ARE RE-
5 ASSEMBLED, YOU WILL NOTIFY MY CLERK OR
6 COURT ATTENDANT THAT THE JURY IS
7 RE-ASSEMBLED AND THEN YOU WILL
8 CONTINUE YOUR DELIBERATIONS.

9 YOU WILL NOW RETIRE AND YOU
10 WILL SELECT ONE OF YOUR NUMBER TO ACT
11 AS FOREPERSON.

12 YOUR FOREPERSON WILL PRESIDE
13 OVER YOUR DELIBERATIONS.

14 ALL JURORS SHOULD
15 PARTICIPATE IN ALL DELIBERATIONS AND
16 VOTE ON EACH ISSUE. ANSWER THE
17 QUESTIONS ACCORDING TO THE DIRECTIONS
18 ON THE FORM AND THE FORM IS WHAT I
19 HAVE RIGHT HERE, AND ALL OF THE
20 INSTRUCTIONS OF THE COURT.

21 IF NINE OR MORE CAN AGREE ON
22 THE ANSWERS, YOU SHALL RETURN A
23 SPECIAL VERDICT IN THE FORM OF WRITTEN
24 ANSWERS TO QUESTIONS ON THE FORM THAT
25 YOU WILL BE GIVEN.

26 AS SOON AS ANY NINE OR MORE
27 JURORS HAVE AGREED UPON EACH ANSWER,
28 HAVE THE ANSWER SIGNED AND DATED BY

1 YOUR FOREPERSON AND RETURN WITH IT TO
2 THIS ROOM

3 IT NEED NOT BE THE SAME NINE
4 OR MORE JURORS THAT AGREE UPON EACH
5 ANSWER TO THE QUESTIONS.

6 YOU MAY BE POLLED IN OPEN
7 COURT.

8 IF SO, EACH JUROR MUST BE
9 ABLE TO STATE TRUTHFULLY THAT THE
10 ANSWER DOES OR DOES NOT EXPRESS HIS OR
11 HER VOTE.

12 SO LET ME TALK ABOUT THAT
13 LAST THING, THE POLLING.

14 AFTER YOU VOTE AND YOU HAVE
15 COME BACK IN WITH YOUR VERDICT,
16 WHATEVER IT MAY BE, ONE SIDE OR THE
17 OTHER MAY ASK TO HAVE THE JURY POLLED.
18 IF WE DO THAT, WHAT I HAVE TO DO IS BE
19 ABLE TO GO TO EACH ONE OF YOU AND SAY,
20 OKAY, AS TO VERDICT NUMBER 1, DID YOU
21 VOTE YES OR NO ON QUESTION NUMBER 1.

22 AND YOU HAVE TO BE ABLE TO
23 TELL ME YOUR ANSWER.

24 WELL, THERE'S QUITE A FEW
25 QUESTIONS HERE AND YOU CAN PROBABLY
26 GUESS, ALL RIGHT.

27 AND IN FACT, THERE ARE EIGHT
28 SPECIAL VERDICT FORMS.

1 THE LAST ONE HAS TO DO WITH
2 DAMAGES AND THE OTHER, THE OTHERS ARE
3 THE LIABILITY QUESTIONS LEADING TO
4 THAT LAST QUESTION.

5 SO YOU ARE GOING TO WANT TO
6 HAVE A PART OF YOUR NOTEBOOK IN WHICH
7 YOU RECORD HOW YOU ANSWERED EACH
8 QUESTION. YOU CAN CHANGE YOUR MIND,
9 YOU CAN HAVE MULTIPLE VOTES BUT ALWAYS
10 REMEMBER WHAT YOUR LAST VOTE IS, SO
11 THAT AS TO EACH QUESTION, WE CAN ASK
12 YOU AT THE END.

13 IF I POLL YOU AND YOU CAN'T
14 REMEMBER HOW YOU VOTED, THEN I HAVE TO
15 SEND THE JURY BACK IN AND YOU HAVE TO
16 KEEP DELIBERATING.

17 SO TRY TO REMEMBER AS BEST
18 YOU CAN.

19 ALL RIGHT, MR. CLERK, WOULD
20 YOU PLEASE SWEAR OUR COURT ATTENDANT
21 SO THAT SHE MAY TAKE CONTROL OF THE
22 JURY

23 THE CLERK: YOU DO SOLEMNLY SWEAR THAT
24 YOU WILL TAKE CHARGE OF THE JURY AND KEEP THEM
25 TOGETHER WHILE THEY ARE DELIBERATING ON THE CAUSE,
26 THAT YOU WILL NOT SPEAK TO THEM YOURSELF NOR ALLOW
27 ANYONE ELSE TO SPEAK WITH THEM UNLESS OTHERWISE
28 INSTRUCTED BY THE COURT. AND WHEN THEY HAVE AGREED

1 UPON A VERDICT, YOU WILL RETURN THEM INTO THE
2 COURT, SO HELP YOU GOD.

3 THE COURT ATTENDANT: I DO.

4 THE CLERK: THE ALTERNATE JUROR.

5 YOU DO SOLEMNLY SWEAR THAT YOU WILL
6 TAKE CHARGE OF THE ALTERNATE JURORS AND KEEP THEM
7 APART FROM THE JURY WHILE THE JURY DELIBERATES ON
8 THE CAUSE UNLESS OTHERWISE INSTRUCTED BY THE COURT,
9 SO HELP YOU GOD.

10 THE COURT ATTENDANT: I DO.

11

12 (AT 10:16 A.M THE JURY
13 RETIRED TO COMMENCE
14 DELIBERATIONS.)

15

16 (THE FOLLOWING PROCEEDINGS
17 WERE HELD IN OPEN COURT OUT
18 OF THE PRESENCE OF THE JURY:)

19

20 THE COURT: I AM HANDWRITING IN ONE
21 CHANGE, WHICH I NEEDED TO MAKE WHILE I WAS GIVING
22 THE INSTRUCTION TO THE JURY.

23 IT'S 2.60, SECOND FULL PARAGRAPH,
24 "PLAINTIFF HAS THE BURDEN OF PROVING BY A
25 PREPONDERANCE OF THE EVIDENCE ALL OF THE FACTS
26 NECESSARY TO ESTABLISH," THERE'S A COLON THERE. I
27 STRUCK THE COLON AND "NECESSARY TO ESTABLISH THE
28 ESSENTIAL ELEMENTS OF EACH SEPARATE CLAIM," PERIOD.

1 THE NEXT PARAGRAPH STARTS "THE
2 ESSENTIAL ELEMENTS OF EACH SEPARATE CLAIM ARE SET
3 FORTH THROUGHOUT THESE INSTRUCTIONS." IT JUST
4 DIDN'T MAKE SENSE THERE TO END IT THERE WITH THAT
5 COLON.

6 AS TO THE ALTERNATES, LET ME
7 SUGGEST THE FOLLOWING, COUNSEL. AND THAT IS WE
8 HAVE FIVE ALTERNATES. I WOULD LET ALL THE
9 ALTERNATES GO HOME RIGHT NOW, TELL ALL BUT
10 ALTERNATE NUMBER 1 THAT THEY HAVE TO CALL IN EVERY
11 MORNING AT 9 O'CLOCK TO CHECK IN WITH US TO MAKE
12 SURE THAT WE CAN GET TO THEM IF WE NEED THEM
13 AND HAVE ALTERNATE NUMBER 1
14 ACTUALLY PHYSICALLY COME INTO THE COURTHOUSE EACH
15 DAY AND REPORT IN.

16 MR. PIUZE: WHATEVER THE COURT FEELS IS
17 APPROPRIATE IS FINE WITH ME.

18 MR. LEITER: THAT'S FINE WITH US.

19 THE COURT: ALTERNATE NUMBER 1 MUST COME
20 TO THE COURTHOUSE EVERY MORNING, REPORT IN AT 9
21 O'CLOCK A.M., DOESN'T HAVE TO BE HERE AT 8:45, 9
22 O'CLOCK.

23 THE COURT ATTENDANT: THE REST CAN GO TO
24 THEIR PLACE OF EMPLOYMENT AND CALL?

25 THE COURT: YES.

26 WOULD YOU BRING THEM BACK IN AND
27 LET ME CHAT WITH THEM FOR A SECOND.

28 I WILL TELL THEM THAT. I WILL ALSO

1 ADMNISH THEM NOT TO DISCUSS THIS CASES WITH
2 ANYONE.

3

4 (THE FOLLOWING PROCEEDINGS WERE
5 HELD IN OPEN COURT IN THE
6 PRESENCE OF THE ALTERNATE
7 JURORS:)

8

9 THE COURT: COME ON IN AND HAVE A SEAT
10 FOR A SECOND. I WANT TO CHAT WITH YOU. WE ARE ON
11 THE RECORD. COUNSEL ARE PRESENT. WE HAVE ONLY OUR
12 ALTERNATES.

13 SIR, YOU ARE SO USED TO GOING TO
14 YOUR CHAIRS. YOU CAN SIT ANYWHERE YOU WANT TO.

15 WELL, GOOD ALTERNATES, YOU MAY OR
16 MAY NOT PARTICIPATE, ITS PROBABLY UNLIKELY THAT YOU
17 WILL BE CALLED, AT LEAST ALL BUT MAYBE ALTERNATE
18 NUMBER 1. SOMETIMES THINGS HAPPEN DURING JURY
19 DELIBERATIONS AND MAYBE A THIRD OF THE TIME I HAVE
20 HAD TO PUT ALTERNATE NUMBER 1 IN.

21 BUT THERE' S ALSO BEEN OCCASIONS
22 WHEN WE HAVE HAD TO GO TO ALTERNATE NUMBER 2 AND
23 EVEN ALTERNATE NUMBER 3.

24 SO HERE' S THE PROCEDURE WE ARE
25 GOING TO FOLLOW

26 ALTERNATE NUMBER 1, YOU HAVE TO
27 COME TO THE COURTHOUSE EVERY MORNING AT 9 O' CLOCK
28 AND REPORT IN SO WE CAN PHYSICALLY SEE YOU, SAY HI

1 TO YOU, MAKE SURE THAT YOU ARE HAPPY AND WELL AND
2 SO FORTH.

3 THE REST OF YOU DON'T NEED TO COME
4 TO THE COURTHOUSE.

5 AGAIN, YOU CAN CALL BUT YOU NEED
6 TO -- YOU MUST CALL IN EVERY MORNING AT ABOUT,
7 LET'S SAY, MAKE IT 9:15, AROUND THAT TIME. JUST
8 CALL IN, MAKE SURE WE KNOW WHERE YOU ARE, MAKE SURE
9 THAT YOU ARE HEALTHY, THAT YOU ARE DOING FINE AND
10 GIVE US A TELEPHONE NUMBER WHERE WE CAN REACH YOU,
11 SO THAT YOU ARE ALWAYS WITHIN ABOUT AN HOUR, WE CAN
12 GET A HOLD OF YOU. BECAUSE IF WE NEED TO GET YOU,
13 WE ARE GOING TO NEED TO GET YOU AND GET YOU
14 QUICKLY.

15 AND BY CHECKING IN EACH DAY, WHEN
16 WE DO GET A VERDICT IN THE CASE, WHAT I WILL DO IS,
17 MAKE SURE THAT -- DO MY BEST TO MAKE SURE THAT YOU
18 HAVE AN OPPORTUNITY TO PARTICIPATE IN THE TAKING OF
19 THE VERDICT, WHICH WOULD MEAN THAT IF YOU WANT TO,
20 YOU WOULDN'T HAVE TO COME DOWN, BUT IF YOU WANT TO
21 COME DOWN AND ACTUALLY BE HERE WHEN THE VERDICT IS
22 TAKEN, AND IF I CAN GET YOU QUICKLY ENOUGH HERE, I
23 WILL MAKE ACCOMMODATIONS SO THAT YOU CAN
24 PARTICIPATE IN THAT, WHICH I THINK PROBABLY MOST OF
25 YOU WOULD WANT TO DO. BUT IF YOU DON'T WANT TO,
26 YOU DON'T HAVE TO.

27 THE OTHER THING I NEED TO TELL YOU
28 IS THIS, IT IS CRUCIAL FOR YOU, DO NOT DISCUSS THIS

1 CASE WITH ANYONE, ABSOLUTELY ANYONE.
2 WHO KNOWS WHO COULD APPROACH YOU,
3 SOME MEMBER OF THE PRESS COULD APPROACH YOU,
4 SOMEBODY COULD COME OUT OF THE BLUE, THEY MIGHT USE
5 SOME NAME OTHER THAN SOME REAL NAME AND JUST TRY TO
6 FIND OUT WHAT YOU THINK OR WHAT YOU -- AND YOU
7 DON'T WANT TO SAY A WORD TO A SOLE BECAUSE WHAT YOU
8 WANT TO DO, AND WHAT WE ARE ALL GOING TO DO RIGHT
9 NOW IS WE ARE GOING TO PROTECT THE INTEGRITY OF THE
10 12 WHO ARE GOING TO BE DECIDING THIS CASE.

11 AND THE WAY WE ARE GOING TO DO THAT
12 IS NONE OF US ARE GOING TO SAY A PEEP TO ANYONE
13 UNTIL THEY REACH A VERDICT. OKAY.

14 VERY WELL.

15 ALL RIGHT. YES, MA'AM

16 ALTERNATE JUROR: SO THAT MEANS THAT WE
17 GO TO WORK?

18 THE COURT: YES, BECAUSE YOU ARE NOT --
19 YOU ARE STILL ON JURY DUTY, BUT YOU ARE NOT COMING
20 DOWN HERE EVERY DAY. AND USUALLY THE EMPLOYERS,
21 IT'S BETWEEN YOU AND YOUR EMPLOYER, BUT IT IS MY
22 UNDERSTANDING THAT MOST EMPLOYERS, IF YOU DON'T
23 HAVE TO COME DOWN HERE, THEY DO WANT YOU AT WORK.

24 ALTERNATE JUROR: BECAUSE I WORK FOR THE
25 POST OFFICE AND I WORK ON A HIGHLY RESTRICTED AREA,
26 THE REGISTRY, AND SOMETIMES WE ROTATE POSITIONS.
27 AND IF THEY PUT ME IN CHARGE OF THE VALUABLE CAGE,
28 I MAY HAVE A HARD TIME LEAVING THE AREA.

1 THE COURT: YOU ARE GOING TO HAVE TO TELL
2 THEM THAT ACCOMMODATIONS ARE GOING TO HAVE TO BE
3 MADE.

4 ALTERNATE JUROR: IF I COULD HAVE A
5 LETTER.

6 THE COURT: TO SAY WHAT?

7 ALTERNATE JUROR: SAYING THAT IF I AM
8 NEEDED, YOU WOULD APPRECIATE IT IF I AM LET GO.

9 THE COURT: IMMEDIATELY. I WILL DO THAT
10 AND I WILL DO THAT RIGHT NOW

11 ALTERNATE JUROR: IT IS THE SAME WITH ME,
12 BECAUSE I WORK THE WINDOWS, THE SAME THING,
13 FINANCE.

14 THE COURT: OKAY, IF YOU WOULD, JUST GIVE
15 MY CLERK YOUR NAME AND ALSO BE SURE THAT YOU GIVE
16 ME THE NAME OF THE PERSON THAT I NEED TO WRITE THIS
17 LETTER TO. STAY RIGHT HERE AND I WILL WRITE YOUR
18 LETTERS RIGHT NOW OKAY.

19 THE CLERK: MR. CLERK, YOU ALL CAN GO OUT
20 IN THE HALLWAY.

21

22

23 (AT THIS TIME, THE PROCEEDINGS
24 IN THE ABOVE-ENTITLED WERE
25 CONCLUDED.)

26

27

28