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Remoteness Doctrine: A Rational Limit on Tort Law

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THE REMOTENESS DOCTRINE: A RATIONAL LIMIT ON TORT LAW

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An individual or corporation should be subject to liability when it is negligent or commits a wrong that *directly* harms another. The effects of *any* wrongful act, however, can reach beyond the person who is directly hurt and adversely affect persons far removed from the event. At some point, imposition of liability becomes too tenuous, too remote. In such situations, the "remoteness doctrine" provides a rational limit on tort law.[1]

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[1] *See* Petition of Kinsman Transit Co., 388 F.2d 821, 825 (2d Cir. 1968) (stating that "the connection between defendants' negligence and the claimants' damages is *too tenuous and remote* to permit recovery") (emphasis added). *See generally* Holmes v. Security Investor Protection Corp., 503 U.S. 258, 287 (1992) (Scalia, J., concurring) ("Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith.").

INTRODUCTION

The "remoteness doctrine" has been applied in two different contexts: attenuated harm cases and cases involving derivative claims. A classic example of the doctrine's application to bar a claim involving an attenuated harm is *The Wagon Mound No. 1.*[2] In that case, a freighter named the Wagon Mound carelessly discharged a large quantity of furnace oil into the Port of Sydney, Australia. The oil quickly spread across the bay and came into contact with the slipways of the plaintiff's wharf, interfering with its use, but otherwise causing only nominal damage. The oil suddenly ignited when cotton waste floating on the surface was set fire by molten metal dropped from the wharf by the plaintiff's workmen. The fire seriously damaged the wharf.

Although the defendant's wrongful act and the plaintiff's harm could have been linked, the defendant was not held liable. In reaching its decision, the court stated the remoteness doctrine with cellular clarity

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2 Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., Ltd. (the Wagon Mound), [1961] AC 388 (P.C. 1961) (Eng.) (hereinafter "*Wagon Mound No. 1*").

when it said that "there is no such thing as negligence in the air, so there is no such thing as liability in the air."[3]

Another example of remoteness based on an attenuated harm is an individual driving too fast because he is late for work. Suppose he causes an accident on a major highway. The accident creates a huge, but foreseeable, traffic jam. In the traffic jam is a doctor who fails to reach a patient in time for emergency treatment. The patient dies. No court would allow the decedent's family to recover in tort against the negligent driver. The harm is simply too tenuous, too remote.

Other remoteness cases have involved unusual, but equally serious, circumstances. In *Oehler v. Davis*,[4] a dog collar manufacturer sold a defective dog collar. The collar broke, allowing the dog to escape its owner and bite someone. The court decided that the plaintiff had no cause of action against the dog collar's manufacturer, because the harm was too remote.[5]

In another case, a day care center negligently allowed a child to consume poison. Relatives with whom the child was residing lost custody of the child, because bruises caused by the poisoning were mistaken for the results of child abuse.[6] The relatives sued the day care center, alleging "extreme mental hardship, anguish and humiliation, loneliness and disruption from the loss of the companionship of the child . . . ."[7] The relatives' claim against the day care center for loss of custody was dismissed, because it was too remote.[8]

In these examples, the remote harm was serious and often foreseeable. Nevertheless, the connection between the harms and the wrongs was deemed to be too tenuous for tort law to allow recovery.

The remoteness doctrine comes into play even more strongly when the alleged harm is derivative in nature. For example, consider a machine tool company that sells a defective product to an employer. As a result, an employee is seriously injured and the employer, who provides worker compensation benefits, is forced to pay the employee's medical expenses. A direct claim by the employer against the manufacturer would not be allowed because the harm to the employer, though foreseeable, is too remote.[9]

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[3] *Id.*; *see also* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928) ("Proof of negligence in the air, so to speak, will not do.").

[4] 298 A.2d 895 (Pa. Super. 1972).

[5] *See* Oehler v. Davis, 298 A.2d 895, 898 (Pa. Super. 1972).

[6] *See* Lewis v. Kehoe Academy, 346 So. 2d 289, 291 (La. App. 1977).

[7] *Id.*

[8] *See id.* at 292-93.

[9] Tort law, however, does permit the employer to recover for certain types of economic harm, such as worker's compensation costs or medical expenses paid on behalf of the employees, through the process of subrogation. The employer can join in the employee's tort claim

I. HISTORY OF THE REMOTENESS DOCTRINE - ITS APPLICATION

The roots of the remoteness doctrine in American law have been traced back to *Anthony v. Slaid*,[10] where the plaintiff, by contract and for a fee, agreed to provide reasonable support to all the paupers in town for a specified period of time. The defendant assaulted a pauper, directly causing him significant injuries, and also causing the plaintiff an indirect (or derivative) economic loss. The Supreme Judicial Court of Massachusetts rejected the plaintiff's claim as too remote. Over 150 years later, the Supreme Court of the United States still cites this principle with approval.[11]

Judges have searched for traditional doctrinal concepts to explain remoteness, in both attenuated harm and derivative cases. Sometimes, the concept of "proximate cause" is cited in support of the doctrine because proximate cause embraces a public policy element which, in some instances, limits claims, even though there was a clear cause-in-fact relationship between the defendant's wrongful act and the plaintiff's alleged harm. Other times, the concepts of "standing" or "duty" are used to explain the remoteness doctrine. Both of these doctrines embrace a public policy element.[12]

As Professors Prosser and Keeton state in their treatise: "[I]n negligence cases, *the duty is always the same* - to conform to the legal standard of reasonable conduct in the light of the apparent risk."[13] Types of harm not sufficiently close to the negligent or wrongful act (e.g., an economic loss that is indirectly related to a direct personal injury) may be beyond the scope of a duty owed.

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against the manufacturer of the machine tool, but the employer's claim can be no greater than that of the employee. It is a firmly established rule of tort law that one who pays expenses on behalf of another does not have standing to bring a separate and distinct claim against the original tortfeasor. *See* ARTHUR LARSON & LEX K. LARSON, 2 LARSON'S WORKERS' COMPENSATION § 74 (Desk ed. 1999) (discussing the mechanics of subrogation).

10 52 Mass. 290 (1846).

11 *See* Associated General Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. 519, 532-33 n.25 (1983) (stating the general principle on damages that "'*where the plaintiff sustains injury from the defendant's conduct to a third person,* [the plaintiff's cause of action] *is too remote* . . . .") (emphasis original).

12 *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES 85 (Council Draft No. 1, Sept. 25, 1998); *see also* International Brotherhood of Teamsters Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc., 34 F. Supp.2d. 656, 661 (N.D. Ill. 1998) (noting that "the remoteness doctrine involves public policy concerns which are determined as a matter of law, and not fact, completely unrelated to factual or proximate causation"); Iowa v. Philip Morris, Inc., 577 N.W.2d 401, 406 (Iowa 1998) ("The remoteness doctrine 'is not based upon a factual inquiry to determine whether the damages claimed were foreseeable or whether they were a proximate cause; rather it is a legal doctrine incorporating public policy considerations.").

13 *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984) (emphasis added).

Whatever conceptual vehicle is utilized — proximate cause or duty — the remoteness limitation on liability has endured as a basic doctrine of tort law. Occasionally, however, courts have demonstrated an unfortunate willingness to discard basic doctrines of tort law to go after "unpopular" defendants. For example, in the 1980s, some courts imposed unprecedented, absolute liability against unpopular defendants who had manufactured products containing asbestos and failed to warn the public about health dangers that were later associated with these products.[14] As wisdom prevailed, these cases were overruled or modified by the courts themselves or by legislatures.[15]

But history can repeat itself. Basic fairness suggests that the doctrine should be applied in the same way to all defendants; however, courts may feel pressure to undermine the remoteness doctrine with respect to unpopular defendants.[16] Any distortion of well-established principles of law to target unpopular defendants can, and will, migrate to others. If the doctrine is destroyed, remote liability may attach to persons who do not have the "remotest" idea that they could one day be held liable for their actions.[17]

By definition, the remoteness doctrine is not applied in a precise, mechanical way, but a long history of case law supports its application. This article will describe and analyze several common factors that support the remoteness doctrine in cases involving either attenuated or derivative claims. The article will also analyze the remoteness doctrine's rationale and consider it conceptually, from the point of view of both

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[14] *See, e.g.*, Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 546 (N.J. 1982) (holding that medical community's presumed unawareness of the dangers of asbestos was irrelevant in failure to warn case); Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 114 (La. 1986) ("A manufacturer or supplier who sells a product with a construction or composition flaw is subject to liability without proof that there was any negligence on its part in creating or failing to discover the flaw.").

[15] For example, *Beshada* and *Halphen* were modified by legislation stating that courts are to take into account the manufacturer's warning that accompanied the product. *See* N.J. REV. STAT. § 2A:58C-3(3) (1987) (stating that the manufacturer of a product that was allegedly designed in a defective manner shall not be liable if "[t]he harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning"); LA. REV. STAT. ANN. § 9:2800.56(2) (1988) (stating that "[a]n adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.").

[16] *See, e.g.*, Paul M. Barrett, *Pivotal Trial Pits Gun Victims Against Industry*, WALL ST. J., Jan. 4, 1999, at A13, A15 (reporting on case presenting novel theory that gun manufacturers could be liable for negligent failure to supervise distribution of their products).

[17] *See* William H. Pryor, Jr. et al., *Report of the Task Force on Tobacco Litigation Submitted to Governor James and Attorney General Sessions*, 27 CUMB. L. REV. 577, 637 (1996) ("[W]e strongly suspect that a lawsuit against tobacco companies would provide aid and comfort to those who want to sue other firms that sell products that have been linked to health risks [, such as the manufacturers of alcohol].").

proximate cause and duty. Finally, this article will examine the application of the doctrine with respect to today's unpopular defendants.

II. FACTORS THAT SUPPORT THE REMOTENESS DOCTRINE

A. INTERVENING ACTS BETWEEN DEFENDANT'S CONDUCT AND PLAINTIFF'S INJURY

While the remoteness doctrine is not based simply on distances in time or space, it is more likely to apply when there have been independent intervening acts between the defendant's conduct and the plaintiff's alleged injury. This occurs most frequently in cases involving *attenuated harms.*

For example, in *The Wagon Mound No. 1*,[18] an intervening act occurred when molten metal was dropped into furnace oil on the water. It was highly unlikely that the furnace oil would ignite, because that type of oil has an extremely high "flash point." Plaintiff's act of dropping the molten metal was an independent act that occurred after defendant's negligent conduct took place. It contributed to the "remoteness" of the harm.

In another famous case, *Petition of Kinsman Transit Co.*,[19] employees of Kinsman Transit Company negligently and improperly moored a ship, the Shivas, at a dock owned by the Continental Grain Company in the Buffalo River at a point about three miles above a lift bridge operated by the City of Buffalo. It was late January, and the river, winding and about 200 feet wide, was full of floating ice, which was moving with a rapid current. Ice and debris accumulated, building a wedge between the ship and the dock. Pressure from the wedge snapped the mooring lines and pulled out an improperly anchored mooring block. The Shivas broke loose and floated downstream, where it collided with another ship, the Tewksbury. The collision snapped the Tewksbury from its moorings, and the two ships went down the river together. Frantic telephone calls were placed to city workers to have them raise the bridge. The phone calls went unanswered because one bridge crew had gone off duty and another was late in arriving. By the time the second crew began to raise the drawbridge, it was too late. The ships crashed into the center of the bridge and caused it to collapse.

The bridge collapse affected owners of wheat stored aboard a ship berthed in the Buffalo harbor below the bridge. Because of the accident, their ship could not be moved and unloaded at the shipper's grain elevators located upstream of the collapsed bridge. The shipper was put to

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18 [1961] A.C. 388 (P.C. 1961) (Eng.).

19 388 F.2d 821 (2d Cir. 1968).

considerable additional expense for extra transportation and storage costs and for the purchase of replacement wheat.

The Second Circuit Court of Appeals, affirming a lower court ruling, held that "the injuries to [the shippers] were too 'remote' or 'indirect' a consequence of defendant's negligence" to create liability.[20] This was true even though the court found that it was "foreseeable" that the defendant's negligence could lead to indirect economic loss.[21]

B. THE POSSIBILITY OF DUPLICATE RECOVERY FOR THE SAME HARM

The remoteness doctrine is also supported by the need to avoid duplicative recoveries for what is in essence a single harm.[22] This is especially important in cases involving *derivative claims*. For example, if a defective product in the workplace injures an employee, health care costs and pain and suffering can be essential parts of the employee's product liability claim. If the employer were *also* allowed a direct and separate cause of action against the manufacturer of the product to recoup wages and health benefits paid to the employee as worker compensation, the manufacturer could be forced to pay twice for the same harms.

Duplication could arise in the employee's product liability suit because *the jury would not know* that the employer had also reimbursed the plaintiff. The collateral source rule, which is still the law in most states, would keep the jury from being apprised of that fact.[23] Further, if the employer had a separate claim, that jury would not necessarily know that a previous award had been made to the worker for his or her medical costs.

It is fundamentally unfair for defendants to pay twice for the same harm — indeed, in the above example, for the same medical expenses. This potential for duplicate recovery has led courts to vest control of a cause of action in the hands of the person who has been directly injured. Indirect claims alleging economic loss are left to subrogation.

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20 *Id.* at 824.

21 *See id.*

22 *See generally* Southeast Fla. Laborers Dist. Health Welfare Trust Fund v. Philip Morris, 1998 WL 186878, at *5 (S.D. Fla. Apr. 13, 1998) ("[T]he risks of multiple recoveries is real."); Seafarers Welfare Plan v. Philip Morris, Inc., 27 F. Supp.2d 623, 632 (D. Md. 1998) (noting that "there is a definite risk of multiple recoveries in this case if plaintiffs are allowed to proceed."); International Brotherhood of Teamsters Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc., 34 F. Supp.2d. 656, 662 (N.D. Ill. 1998) (indicating that "an equally compelling basis for dismissal is the substantial risk of double recovery posed by class action suits which could be brought by the individual members based on their personal injuries").

23 *See generally* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1478 (1966) ("[T]he 'collateral source rule' . . . ordains that, in computing damages against a tortfeasor, no reduction be allowed on account of benefits received by the plaintiff from other sources, even though they have partially or wholly mitigated his loss.").

C. THE REMOTENESS DOCTRINE PREVENTS AN AVALANCHE OF CLAIMS

Consider the hypothetical highway accident caused by a negligent driver.[24] Should people who are delayed by that accident be allowed to bring suit for the harms they suffered? In a traffic jam, hundreds of people, sometimes thousands, may be delayed, and virtually all will suffer some type of harm — people are delayed for appointments, they miss business opportunities, and they suffer anxiety. In some situations, physical harm may result, but the claims are still deemed too remote. There is no liability in such cases.

In actions involving derivative harms, concern about an avalanche of claims is also present. As discussed *infra*,[25] the initial suits brought by state attorneys general to recoup payments relating to medical assistance for alleged tobacco-related injuries produced a tidal wave of litigation. When states realized that settlements may be obtained, *more* claims were filed. Soon, cities, taxpayers, union health and welfare funds, Blue Cross/Blue Shield entities, self-insured employers, Native American Indian tribes, and even several foreign governments filed claims.

D. INDIRECT ECONOMIC HARM SUGGESTS REMOTENESS

When the plaintiff alleges a derivative claim (i.e., an indirect economic harm), remoteness concerns are present. For example, in cases like the hypothetical about the defective workplace product,[26] courts have generally been unwilling to allow the employer to bring a direct action against the product's manufacturer to recover lost profits and the cost of medical care for the employee.[27] This is true even though the defendant's conduct may have resulted in serious injury. In this context, the risk of an avalanche of claims is obvious. Anything that would potentially injure an employee or cause the employee to take time off from work could be said to "harm" the employer.

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24 *See supra* notes 4-5 and accompanying text.

25 *See infra* note 42 and accompanying text.

26 *See supra* notes 23-24 and accompanying text.

27 The concept of "transferred intent" has been supplied to permit recovery in remote instances when a defendant's conduct has been purposeful or malicious and the plaintiff suffered physical harm, but *not* when the plaintiff has endured merely indirect *economic* loss. *See* JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 29 (8th ed. 1988) (if someone throws a rock at A and hits B who was hidden in the woods, B has a claim).

III. LEGAL RATIONALE FOR THE REMOTENESS DOCTRINE

A. PROXIMATE CAUSE

Many courts have utilized the concept of "proximate cause" or "legal cause" as a conceptual explanation for the remoteness doctrine. These courts appreciate that there is an important and vital distinction between cause-in-fact ("but for" causation) and proximate cause. If one were merely to ask: "Would the plaintiff have been injured if the defendant had not engaged in negligent or wrongful activity?," thousands of claims could be produced. Tort law has clearly rejected "cause-in-fact" as the sole limitation on whether a defendant will be deemed liable for another's harm.

Courts answering the question of whether a defendant's conduct will be deemed actionable under a "proximate" or "legal" cause analysis have considered factors such as the existence of intervening acts between the defendant's conduct and the plaintiff's harm, the indirectness of the harm, and the lack of foreseeability of the harm to justify holding that a defendant's conduct, however negligent or wrongful, was too "remote" and, therefore, not the "proximate cause" of the plaintiff's harm. These courts have also made public policy choices about whether the defendant's conduct was important enough in its causal relationship with the plaintiff's harm to warrant the imposition of liability.

B. LIMITED DUTY

Duty limitations also help to explain the remoteness doctrine. Judges who have embraced the remoteness doctrine, either because of concerns about duplicate recovery, concerns about creating an avalanche of new claims, or because the plaintiff suffered an indirect economic harm, have at times explained their result by stating that a defendant did not breach a "duty" to the plaintiff.

"Duty" is a question of law, not of fact; and in the context of derivative suits, it is *not* tied to the concept of foreseeability. In using a duty rationale, a court can explain why the line on liability should be drawn at a certain point. As the draft *Restatement (Third) Of Torts: General Principles* makes clear:

> There are . . . situations in which the requirements of negligence, legal causation, and physical harm can be satisfied, but in which for reasons of principle or policy, the imposition of liability seems plainly troublesome. In

such cases, judicial screening of the plaintiffs claim, under the heading of duty, is appropriate.[28]

IV. THE REMOTENESS DOCTRINE AND "UNPOPULAR" DEFENDANTS

A. ALCOHOL, TOBACCO, AND FIREARMS

When the defendant is a manufacturer of alcoholic beverages, firearms, or tobacco products, some courts may be tempted to forego 200 years of legal history and abandon the remoteness doctrine.

For example, a judge may firmly believe that alcoholic beverages cause tremendous harm and provide little or no benefit to society. The judge may have experienced the devastation of alcoholism in his or her own family. Maybe a drunk driver killed a close friend or relative. The judge may be shocked by advertisements that appear to glamorize alcohol use and entice young people to use products containing alcohol.

Now, imagine that a state attorney general in that judge's courtroom is seeking to recover medical costs to the state allegedly "caused" by alcohol abuse. The state's claim is derived from harms to individual consumers of products containing alcohol, and from individuals injured by such persons.

The attorney general details the costs to the state to treat just one person - a young mother who was the victim of an accident caused by a drunk driver who had a history of drunk driving arrests. The attorney general "estimates" that long-term medical and related costs to the state, in this one incident, may exceed $2 million. Further, the attorney general presents "data" to show the alleged total cost of alcohol abuse to the state. This data includes not only costs created by drunk drivers, but also Medicaid expenditures "caused" by alcohol-related diseases. It also includes costs to the welfare system that the attorney general concludes would never have occurred if persons on welfare were not "addicted" to alcohol. The "estimated" costs are now in the hundreds of millions of dollars.

Under any traditional analysis, all of the attorney general's claims would be deemed "too 'remote' or 'indirect' a consequence of defendant's negligence" to create liability, because they are derivative.[29] Nevertheless, one can see how the judge in the example would be tempted to "adjust" the law and allow the attorney general's claim.

Likewise, some may hold the opinion that certain firearms, especially assault weapons and "Saturday Night Special" handguns, serve no

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[28] *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES 45 (Council Draft No. 1, Sept. 25, 1998).

[29] *See* Petition of Kinsman Transit Co., 388 F.2d 821, 824 (2d Cir. 1968).

useful purpose to society. Recently, the City of New Orleans filed suit against gun makers to recoup costs the city allegedly incurred because of the illegal use of firearms.[30] Other major cities, including Chicago and Philadelphia, have filed similar lawsuits.[31] These claims have stirred great emotional feelings.[32]

Under a traditional tort law analysis, such gun litigation would not stand. Both the derivative nature of many of the asserted injuries and the presence of significant intervening causes weigh heavily in favor of finding such claims remote. If emotion were to overcome law, however, the fact that manufacturers of certain firearms are "unpopular" might cause judges to cast aside the remoteness doctrine, seize upon a new liability theory, and allow a claim.

We have seen a preview of potential future claims against manufacturers of alcoholic beverages and guns in litigation involving tobacco products — perhaps the most vilified of any legal product currently sold in the United States. As one federal district judge sagely observed: "The tobacco industry has, as of late, become the whipping-boy of American political discourse."[33] It has happened to the tobacco industry, and it can happen to others.

B. THE TOBACCO INDUSTRY – A PREVIEW

For almost fifty years, smokers and their relatives have brought claims against tobacco companies. Yet, they have had a very poor record of success for several reasons.[34] One reason is the application of the assumption of risk defense and principles of contributory negligence or comparative fault. Despite very strong arguments by plaintiffs' attorneys that people who smoke are "addicted" and incapable of "voluntarily" encountering the risks of smoking, many jurors believe that smokers understood the risks related to smoking and voluntarily encountered them.

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30 *See* Paul M. Barrett, *Other Cities May Follow New Orleans In Antigun Suit, but Fight Will Be Hard*, WALL ST. J., Nov. 2, 1998, at A16.

31 *See id.*; *see also Miami-Dade County Votes To Sue Gun Manufacturers*, WALL ST. J., Jan. 25, 1999, at B2.

32 Some state legislatures have taken action to prevent such lawsuits. *See Louisiana Passes a Bill to Prevent Gun Lawsuits*, WALL ST. J., June 4, 1999, at B2 ("A bill preventing Louisiana cities from suing the gun industry was passed by the state Senate without a dissenting vote Wednesday.").

33 Southeast Florida Laborers Dist. Health and Welfare Trust Fund v. Philip Morris, 1998 WL 186878, at 6 (S.D. Fla. April 13, 1998). The court goes on to state that "[t]he fact that that the tobacco industry has recently become very unpopular, however, is insufficient ground for this Court to overturn well-established common law rules . . . ." *Id.*

34 *See generally* GARY T. SCHWARTZ, *Tobacco Liability in the Courts*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 131 (Robert L. Rabin & Stephen D. Sugarman eds. 1993); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STANFORD L. REV. 853 (1992).

Another reason for the limited success smokers have had is the issue of specific causation. Smoking cigarettes causes lung cancer, but individual plaintiffs have not been found by juries to have proven that *their* use of a particular cigarette caused *their* specific cancer.

Additionally, plaintiffs have lost many cases, because of the doctrine of federal preemption. In *Cipollone v. Liggett Group, Inc.*,[35] the United States Supreme Court held that post-1968 claims for failure to warn were preempted by the requirements in the congressionally mandated "surgeon general's warning."

With tobacco becoming the scapegoat of "right thinking" people, some creative lawyers tried to develop a way around the problems that smokers met when they brought their individual cases. Plaintiff's attorneys determined that if there were a way to vest in the State or another third party an "independent" cause of action that would not be subject to the barriers faced by individual plaintiffs, especially with respect to assumption of risk and specific causation, claims against the industry might be successful. These attorneys also knew that "independent" actions could aggregate the damage claims of thousands of individual smokers, creating the specter of crushing liability.

The first wave of third party "independent" suits were brought by State attorneys general to recoup payments relating to medical assistance given to Medicaid recipients predicated on the allegation that those recipients suffered harm because of their use of tobacco products. Cities, union health and welfare funds, Blue Cross/Blue Shield entities, self-insured employers, Native American Indian tribes, taxpayers, and foreign governments then filed their own claims. Ultimately, the state attorneys general claims were settled for a substantial amount of money.[36]

Despite the unpopularity of the defendants, most courts have followed basic principles of law and applied the remoteness doctrine to dismiss these derivative claims.[37] Some courts, however, bent the rules of

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35 505 U.S. 504 (1992).

36 *See* Milo Geyelin, *Top Tobacco Firms Agree to Pay States Up to $206 Billion in 25-Year Settlement*, WALL ST. J., Nov. 16, 1998, at A3 ("The four biggest tobacco companies agreed to pay as much as $20 billion to 46 states to settle suits seeking to recover health costs connected to smoking.").

37 *See* Iowa v. Philip Morris Inc., 577 N.W.2d 401, 407 (Iowa 1998) (holding that "failure to apply the remoteness doctrine would permit unlimited suits to be filed"); Laborers Local 17 Health and Benefit Fund v. Phillip Morris, Inc., 172 F.3d 223 (2d Cir. 1999) (holding statutory and common law claims "doomed" under traditional principles of proximate cause); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 934 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (holding that claims may not be brought except by those who suffered *direct* economic loss attributable to the defendants); Oregon Laborers-Employers Health & Welfare Trust Fund v. Phillip Morris, Inc., 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 789 (2000) (holding that derivative claims for injuries suffered by smokers barred because of remoteness); City of Birmingham, Ala. v. American Tobacco Co., 10 F. Supp.2d 1257 (N.D. Ala. 1998); Regence Blueshield v. Philip Morris, Inc., 40 F.

remoteness, because of their belief in the "justness" of the result.[38] Plaintiffs' lawyers provided legal talismans to help them. Nevertheless, the following sections demonstrate that, under the traditional legal point of view, remoteness principles apply to derivative claims against tobacco product manufacturers.

V. APPLICATION OF THE REMOTENESS DOCTRINE TO THE TOBACCO INDUSTRY

A. BACKGROUND

Even though the state attorneys general cases against the tobacco industry have settled, the application of the remoteness doctrine to unpopular defendants remains highly relevant. Health care plans, foreign governments, and others still have actions pending against the tobacco industry. Furthermore, the theories raised in the now-settled attorneys general cases are very likely to be alleged in litigation involving other products and services. Indeed, as already noted, they are already being used in actions against the gun industry.

The healthcare reimbursement cases against the tobacco industry have been predicated on the allegation that the plaintiffs suffered economic loss as a result of money spent to provide medical treatment to smokers. Many of the claims have alleged a variety of common law theories.[39] Others have been based on statutes, such as the Federal Rack-

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Supp.2d 1179, 1185 (W.D. Wash. 1999) (holding that the plaintiff failed to show defendant's product was the proximate cause of their injury); International Brotherhood of Teamsters Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc., 34 F. Supp.2d. 656, 661 (N.D. Ill. 1998) (applying the remoteness doctrine to preclude recovery); Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 21 F. Supp.2d 664, 669 (E.D. Tex. 1998) ("Fundamental principles of proximate cause dictate that plaintiffs may only recover for injuries directly suffered."); Seafarers Welfare Plan v. Philip Morris, Inc., 27 F. Supp.2d 623, 635 (D. Md. 1998) (holding that "the causal connection between the Defendants' alleged unlawful trade practices and the Plaintiffs' alleged injury is too tenuous" to permit recovery); Hawaii Health & Welfare Trust Fund for Operating Engineers v. Phillip Morris, Inc., 52 F. Supp.2d 1196, 1199-2000 (D. Haw. 1999) (holding that claims for indirect economic injury were barred under the remoteness doctrine); Southeast Fla. Laborers Dist. Health Welfare Trust Fund v. Philip Morris, 1998 WL 186878, *6 (S.D. Fla. Apr. 13, 1998) ("If courts were to ignore the law and permit recovery as a matter of course against an unpopular defendant [such as the tobacco industry] for the sole reason that the defendant is unpopular, courts would have abandoned their constitutionally-mandated role of interpreting the law and would have assumed the role of political institutions."); New Jersey Carpenters Health Fund v. Phillip Morris, Inc., 17 F. Supp.2d 324, 332 (D.N.J. 1998) ("As payors of medical expenses, the funds' injuries are too remote, absent a right of subrogation, to directly sue the defendants — the alleged tortfeasors — for the health care costs incurred due to misconduct aimed at their participants.").

38 *See* Texas v. American Tobacco Co., 14 F. Supp.2d 965 (E.D. Tex. 1997); Iron Workers Local Union No. 17 Insurance Fund and its Trustees v. Philip Morris Inc., 1998 WL 602033 (N.D. Ohio Sept. 10, 1998).

39 *See supra*, note 37.

eteer Influenced and Corrupt Organizations Act (RICO), federal and state antitrust laws, or state consumer protection statutes.[40]

Common law principles can and sometimes should be intertwined with statutory actions. Within the maze of common law and statutory theories lies a basic question: "Do the predicates for the remoteness doctrine apply in tobacco cases?" The following discussion considers each of the factors that supports the doctrine and examines their application to the tobacco industry.

B. ARE THERE INTERVENING ACTS BETWEEN THE DEFENDANT'S CONDUCT AND THE PLAINTIFF'S LOSS?

In cases where the remoteness doctrine has been applied under the common law a number of intervening acts have occurred. For example, consider the unusual pattern of events in *Petition of Kinsman Transit Co.*[41] — one ship hitting another, both going down a river, combining with people who negligently failed to lift a drawbridge. There were a great many distinct intervening acts that arose between the time of the defendant's alleged negligence and the plaintiff's loss.

Tobacco cases and similar derivative actions do not involve a multiplicity of intervening acts; however, they do involve one major intervening act: someone made the decision to smoke cigarettes. The indirect economic losses allegedly borne by governments and health care plans would not have occurred if an individual had not made a decision to smoke cigarettes. The smoker is the person who has *directly* suffered the harm. His or her choice to begin and continue to smoke is an "intervening" cause.[42]

An analogy might be made to an individual who engages in high-risk behavior in a workplace and is injured after choosing to remove a safety guard on a machine in order to expedite production. If an employer were to try to bring a claim against the machine's manufacturer, the employee's conduct would be regarded as an intervening act and the employer's harm would be deemed remote.

An argument can be made that the person who chose to smoke was or is "addicted," and, therefore, his conduct is not an intervening act. This addiction argument, however, is more relevant to the smoker's claim about whether he or she voluntarily assumed the risk, than it is with respect to a party who suffered an indirect economic loss because an

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40 *See id.*

41 388 F.2d 821 (2d Cir. 1968).

42 *See* Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 21 F. Supp.2d 664, 674 (E.D. Tex. 1998) ("The Court is of the opinion that the individual smokers' decisions to smoke or to continue smoking amount to intervening factors that break the causal chain between Tobacco's conduct and the cost burdens borne by the Funds.").

individual smoked. Although the smoker's intervening act itself may not result in the automatic application of the remoteness doctrine, it is relevant to the general issue as to whether a plaintiff's harm is too many steps removed.

C. DUPLICATE RECOVERY FOR THE SAME HARM SHOULD BE AVOIDED

As discussed above, application of the remoteness doctrine avoids duplicate recoveries for what is, in essence, a single harm. To the extent that courts allow governments or union funds to recover for costs that could be related in some way to smoking, there is a substantial risk of duplicate recoveries and multiple imposition of liability. Currently, there are hundreds of cases pending on behalf of individual smokers, as well as some class actions brought on behalf of smokers. These claims seek recovery for the same type of medical expenses — and in some cases the very same medical expense dollars — that are sought by the union funds.

In the individual cases, the collateral source rule precludes a jury from knowing that the smoker had already been paid by another source, whether the payment came from the State, a fund, or an insurer. Because the fund cases have in many instances "led the pack" and moved ahead of individual smoker cases, the fact that these damages would in the future be asserted in the smoker's case cannot be raised in the fund cases themselves.

Despite the fact that tobacco companies have become an "outlaw" industry in the minds of many, the overwhelming number of courts that have faced this issue have recognized the risk of duplicate recovery for the same harm and supported the application of the remoteness doctrine.[43]

D. AVOIDING AN AVALANCHE OF CLAIMS

Within the framework of the tobacco health care reimbursement cases, one can see the potential for an avalanche of claims. A few short years ago, there were only a handful of State cases. The States attempted to assert that their right of action was independent and superior to that of

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[43] *See id.* at 672 ("There can be no doubt that allowing this suit to go forward creates the risk of duplicative liability for the same conduct."); Southeast Fla. Laborers Dist. Health Welfare Trust Fund v. Philip Morris, Inc., 1998 WL 186878, at *5 (S.D. Fla. Apr. 13, 1998) ("[T]he risks of multiple recoveries is real."); Seafarers Welfare Plan v. Philip Morris, Inc., 27 F. Supp.2d 623, 632 (D. Md. 1998) (noting that "there is a definite risk of multiple recoveries in this case if plaintiffs are allowed to proceed."); International Brotherhood of Teamsters Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc., 34 F. Supp.2d. 656, 662 (N.D. Ill. 1998) (indicating that "an equally compelling basis for dismissal is the substantial risk of double recovery posed by class action suits which could be brought by the individual members based on their personal injuries").

the individual smoker. As will be amplified later, the only State supreme courts that directly addressed this issue recognized that, under the common law, subrogation principles apply (i.e., that a person or entity who had a remote claim had to proceed through subrogation and face the same defenses and litigation hurdles that would be met by the individual who was directly harmed).[44]

Once some lower courts broke this barrier, more States filed claims. Other plaintiffs, such as union health and welfare funds, Blue Cross/Blue Shield, Native American Indian tribes, taxpayers, and foreign governments, filed claims too.

The avalanche will not end with tobacco. The principles that are set forth in the opinions that might permit such claims would be equally applicable to States or union funds that were "economically" damaged, because their citizens or members were injured or harmed by other products. Courts could expand those principles to apply to manufacturers of alcoholic beverages, who may be deemed "responsible" under such concepts. It could also be true with respect to gun manufacturers, as already reflected in the filings of lawsuits against that industry. If tort law is extended to allow claims without consideration of the injured party's fault — a fundamental point in the tobacco healthcare reimbursement cases — the avalanche opens horizons whose only limit is the imagination and creative thought processes of plaintiffs' lawyers.

Consider one example: virtually all automobiles can be driven over 100 miles per hour. Some cars can be driven 130 or even 140 miles per hour. These are illegal speeds in all States. Who does not know of a teenager who tried to test the family car to see "just how fast it would go"? That experience may be even more common than the number of teenagers who "experiment" with cigarettes.

Sometimes "excessive" speed kills or maims the driver, passengers in the vehicle, or others on the highway, resulting in health care costs that could be quite substantial. The indirect economic cost is very real, either to a State or insurance fund. Should automobile companies be subject to "direct" lawsuits by such entities? Traditional remoteness principles would say no, but the theories espoused by plaintiffs in the tobacco healthcare reimbursement cases would suggest the contrary.

High fat foods can be a substantial health hazard. If one were permitted to group defendants without having to define their individual contribution to harm — an approach that has been undertaken by plaintiffs in some tobacco healthcare reimbursement cases — fast food enterprises that cater to children could be deemed liable to such plaintiffs.

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44 *See* Bales v. Warren County, 478 N.W.2d 398, 400 (Iowa 1991) (holding that the plaintiff's "right to reimbursement depends on subrogation principles").

Plaintiffs' lawyers contend that there will be no avalanche of claims, because tobacco is the only product that causes harm when it is used "as intended." Intended by whom and about what? Clearly those who sell fast food intend that persons consume their products. Medical evidence suggests that those products can harm a substantial portion of the population when used "as intended." Although motor vehicle manufacturers do not intend for a person to drive over 100 miles per hour, they produce a product that easily can reach and surpass that goal. Adult beverage manufacturers do not intend that their products be used to excess or consumed by alcoholics, but it happens. Gun manufacturers claim, with justification, that their products are intended for sport and self-protection, not to harm innocent people.

The reality is that the manufacturers cannot control the use of the product once it is sold, regardless of their intentions. More importantly, the "used as intended" theory touted in the media has no recognition in law. Abandonment of the remoteness doctrine and fundamental subrogation principles in tobacco cases could create an avalanche of claims against other defendants. That concern has been a major factor leading a number of courts to retain the remoteness doctrine's limitation on liability.

E. INDIRECT ECONOMIC HARM SUGGESTS REMOTENESS

The now-settled state attorneys general claims against tobacco products manufacturers were derivative, "indirect" economic loss claims. The plaintiffs did not suffer personal injury or damage to property. The same is true with respect to the pending fund and foreign government claims. For nearly 200 years, tort law principles have held that indirect economic claims are "remote" when they are derived from a direct injury to a person.

By way of contrast, tort law recognizes the injured person's claim. The steadfast application by courts of the remoteness principle in this context focuses, in part, on the fact that allowing indirect economic loss claims could dwarf and bury the rights of the individual who was directly harmed. Courts also have recognized that allowing indirect economic loss claims has virtually no stopping point.

Tort law has engaged in prioritization. Personal injury claims have the highest weight and priority. Damage to property is secondary. Economic loss runs a far third, and when the economic losses are only indirect, the remoteness doctrine bars recovery. Traditional subrogation principles protect that balance by recognizing the primacy of the claim by the injured individual, while at the same time allowing those derivatively injured a rational way to recover without the risk of creating double recoveries or an avalanche of claims.

F. A SUMMATION

The remoteness doctrine can be placed under the conceptual envelope of "proximate cause," "standing," or "duty." No matter where the doctrine is placed conceptually, however, the factors of intervening acts, potential for duplicate recovery, potential for an avalanche of claims, and the fact that the harm alleged is an indirect economic claim, suggest that a neutral application of common law principles would bar State and foreign government and fund claims in tobacco cases.

A legislature could overrule the common law and create a direct cause of action. This happened in Florida, Maryland, and Vermont.[45] There also could be individual, unique State statutes construed to allow States direct claims. Such claims raise constitutional questions that are beyond the scope of this article. But, in the overwhelming number of common law and statutory situations the principles that support the remoteness doctrine indicate that it applies to tobacco cases.[46]

Plaintiffs in the tobacco cases have argued that there is one aspect to "proximate cause" which might suggest that indirect economic loss claims in tobacco cases are not remote — foreseeability. It is foreseeable that if persons smoke and thereby suffer a serious illness, the smoker's conduct and use of tobacco products could, in turn, impose a cost on union health or welfare funds, Blue Cross/Blue Shield plans, Native American Indian tribes, taxpayers, and foreign governments. But, the remoteness doctrine is not predicated on foreseeability.

Numerous courts have correctly recognized that, regardless of whether analyzed under the rubric of proximate cause or duty, remoteness is an independent and dispositive requirement separate and apart

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[45] *See* FLA. STAT. ANN. § 409.910 (1999) ("Principles of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third party sources."); MD. CODE ANN., HEALTH-GEN § 15-120(e)(2) (1998) ("In any action . . . brought by the state against a manufacturer of a tobacco priduct, the causation and the amount of medical assistance expenditures attributable to the use of a tobacco product may be proved or disproved by evidence of statistical analysis, without proof of the causation or the amount of expenditures for any particular program recipient or any other individual."); VT. STAT. ANN. tit. 33, §§ 1904, 1911 (1998) (The cause of action by a state against a tobacco company for tobacco related expenses "shall be a direct cause of action and not a subrogated cause of action."). *See generally* Robert A. Levy, *Tobacco Medical Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. (arguing that recent developments in tobacco litigation threaten our democratic system by eliminating common law principles of evidence and causation).

[46] *See* Southeast Florida Laborers Dist. Health and Welfare Trust Fund v. Philip Morris, 1998 WL 186878, at 6 (S.D. Fla. April 13, 1998) ("If courts were to ignore the law and permit recovery as a matter of course against an unpopular defendant for the sole reason that the defendant is unpopular, courts would have abandoned their constitutionally-mandated role of interpreting the law and would have assumed the role of political institutions.").

from foreseeability.[47] Indeed, those derivatively injured by the conduct of others can almost always assert that their derivative injuries were "foreseeable." For that reason, allowing "foreseeability" to circumvent the remoteness doctrine would be the death knell of the doctrine. Indeed, it was quite "foreseeable" that a third party would pay the medical expenses of the unfortunate pauper victimized in *Anthony v. Slaid*.[48] By definition, paupers are destitute and their medical expenses will necessarily be borne by others. More broadly, in society today, it is always "foreseeable" that products which injure individuals will result in "harm" (i.e., payments for the injured individual's medical expenses) to insurers, governments, employers, or others.

The principal policy public factor that argues for common law principles and precedent to be ignored in tobacco cases, including the remoteness doctrine, is the heinous conduct alleged to have been committed by the defendants. That alleged conduct creates a question which has apparently vexed some courts: are the rules of law to be ignored because of the wrongfulness of a defendant's conduct? Most higher appellate courts have said "no."[49] The greatest "tension" in this regard has occurred in the State healthcare reimbursement cases. They will be briefly discussed next.

VI. THE REMOTENESS DOCTRINE'S LIABILITY LIMITATIONS AND STATE ATTORNEY GENERAL SUITS

THE GREATEST TENSION BETWEEN THE REMOTENESS DOCTRINE AND THE NEED BY SOME TO IMPOSE LIABILITY AGAINST UNPOPULAR DEFEND-

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47 *See, e.g.*, Iowa v. Philip Morris, 577 N.W.2d 401 (Iowa 1998) (holding that the remoteness doctrine is not based upon a factual inquiry as to foreseeability or proximate cause, but on "public policy considerations"); Oregon Laborers-Employees Health and Welfare Trust Fund v. Philip Morris, Inc., 17 F. Supp.2d 1170 (D. Ore. 1998) (holding that proximate cause includes "a policy element that encompasses concepts of equity and standing (where a plaintiff stands in relation to a defendant's harmful conduct)"); International Brotherhood of Teamsters Local 734 Health and Welfare Trust Fund v. Philip Morris, Inc., 34 F. Supp.2d. 656, 661 (N.D. Ill. 1998) (holding that "the remoteness doctrine involves public policy concerns . . . completely unrelated to factual or proximate causation").

48 52 Mass. 290 (1846).

49 *See* Laborers Local 17 Health and Benefit Fund v. Phillip Morris, Inc., 172 F.3d 223 (2d Cir. 1999) (holding statutory and common law claims "doomed" under traditional principles of proximate cause); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 934 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (holding that claims may not be brought except by those who suffered *direct* economic loss attributable to the defendants); Oregon Laborers-Employees Health and Welfare Trust Fund v. Phillip Morris, Inc. 1999 WL 493306, *9 (9th Cir. 1999) (holding that derivative claims for injuries suffered by smokers barred because of remoteness). *See generally* THE COMPLETE WRITINGS OF THOMAS PAINE (Philip S. Foner ed., 1945) ("He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.").

ANTS OCCURRED IN THE HEALTHCARE REIMBURSEMENT SUITS BROUGHT BY STATE ATTORNEYS GENERAL AGAINST MANUFACTURERS OF TOBACCO PRODUCTS. EVEN THOUGH THOSE CASES HAVE SETTLED, REMOTENESS PRINCIPLES CONTINUE TO BE RELEVANT GIVEN THAT ATTEMPTS WILL BE MADE TO APPLY THE NOVEL TORT THEORIES RAISED IN THE STATE TOBACCO CASES TO OTHER CONTEXTS.

A. STATE SUPREME COURTS UPHOLD REMOTENESS DOCTRINE

In the State attorney general tobacco cases, the remoteness doctrine was usually upheld when it was considered by State courts of last resort.

1. *The Florida Decision*

In light of the fact that the tobacco companies made a substantial settlement with the State of Florida before the global settlement occurred, it is surprising to learn that the Supreme Court of Florida upheld the remoteness doctrine liability limitation. Some background may help explain this apparent contradiction.

In 1994, the Florida legislature enacted a series of "midnight amendments" to the Florida Medicaid Third-Party Liability Act, which granted the State an "independent right" against tobacco and other companies whose products may have caused injury to the citizens of the State which, in turn, created costs for the State. Among other things, the legislation nullified traditional common law defenses that would have applied to the State if it had pursued its claim under the traditional common law.[50] These new amendments were challenged by both the tobacco industry and a broad coalition called the Associated Industries of Florida as depriving defendants of basic constitutional rights.[51]

In the context of litigation over the Third-Party Liability Act, Florida's Attorney General argued that the legislature had not made any fundamental change in the law; rather, he contended, the common law of Florida always had given the State the right to bring the sort of claims asserted in the lawsuit. In a split decision, the Florida Supreme Court upheld some portions of the legislation, but declared other parts unconstitutional.[52]

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50 *See* FLA. STAT. ANN. § 409.910(1) (1998) ("Principles of common law and equity . . . are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources.").

51 *See* Agency for Health Care Admin. v. Associated Indus. of Fla., 678 So. 2d 1239 (Fla. 1996).

52 The court noted that the amendment's abrogation of traditional defenses to effectuate State policy goals had the potential to violate Florida citizen's due process rights, but found that any such problems would arise in the application of the Act. *See id.* at 1243. The amendments also allowed the State to proceed without identifying individual recipients of Medicaid payments. The court found that that portion of the statute violated procedural due process.

The entire court, however, rejected the Attorney General's argument that an independent right to bring claims had always been part of Florida law. Specifically, the Florida Supreme Court stated that prior to the enactment of the new statute, "[t]he State was given a traditional subrogation action. Such an action allowed the State to occupy the same position as a Medicaid recipient in its pursuit of third-party resources."[53] Thus, under the law prior to the enactment of the special statute, the State's claim would have been deemed too remote.

2. *The Iowa Decision*

The Supreme Court of Iowa faced the same issue, but there was no "remedial statute" to help the State's case. Iowa's Attorney General argued that the State had independent rights which were superior to the rights of individual smokers. Cutting through the Attorney General's arguments, the court held that the State's claim was derivative in nature and for reasons of public policy barred by the remoteness doctrine.[54] The court stated that "failure to apply the remoteness doctrine would permit unlimited suits to be filed . . . [and that they were] not inclined to open the proverbial floodgates of litigation to such an extent."[55]

3. *The Decision of the Eastern District of Texas*

One federal court that partially sustained a State healthcare reimbursement suit did so based on a unique expansion of the "quasi-sovereign" doctrine. The United States District Court for the Eastern District of Texas applied its understanding of "quasi-sovereign" principles in allowing Texas to pursue an independent claim.[56] Before the Texas federal court's decision, the quasi-sovereign doctrine had been limited to suits for injunctive relief. The Texas federal court extended the doctrine to damage claims based on the State's claim that it had "expend[ed] millions of dollars each year in order to provide medical care to its citizens under Medicaid", despite the fact that the court was sitting in diversity

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The court also held unconstitutional the portion of the amendments that abolished Florida's statute of repose. The court stated that such modifications only could be applied to claims that were not yet barred by the statute of repose. The court sustained a provision that provided for the joinder of multiple claims. The court also sustained the constitutionality of permitting market share liability, but indicated that the legislature could not utilize market share liability in connection with the concept of joint and several liability. Importantly, the court indicated that the State could proceed with its new cause of action to recover payments made after the effective date of the Act, specifically, July 1, 1994. *See id.* at 1256. With respect to claims that accrued prior to the time, the State was left to the traditional subrogation action.

53 *Id.* at 1244.

54 *See* Iowa v. Philip Morris, 577 N.W.2d 401 (Iowa 1998).

55 *Id.* at 406.

56 Texas v. American Tobacco Co., 14 F. Supp.2d 956, 962 (E.D.Tex. 1997).

and *guessing* what the common law of Texas *might be*.[57] Previously, of course, the amount of a plaintiff's alleged economic harm or loss had never been a basis for overcoming either the remoteness doctrine or the requirement that a derivative claim should be predicated on subrogation. The Supreme Court of Minnesota clearly recognized this fact in a tobacco case.[58]

In support of its decision, the federal district court in Texas also stated that "participating in the Medicaid program and having it operate in an efficient and cost-effective manner improves the health and welfare of the people of Texas."[59] The court, however, failed to address a basic premise of tort law: allowing claims by people who are directly injured provides sufficient deterrence to protect the health and welfare of everyone. Mere incantation of words like "efficient" and "cost effective" is not generally deemed sufficient to overcome longstanding legal rules.

Further, the court did not provide any careful evaluation of the public policy reasons for finding that the "remoteness" doctrine did not apply. As indicated in this article, the reasons that the remoteness doctrine should apply include: (1) the existence of intervening acts between the defendant's conduct and the plaintiff's injury; (2) the possibility of duplicate recovery for the same harm; (3) the potential for an avalanche of claims; and (4) the fact that tort law disfavors indirect economic harm claims. None of these factors are ameliorated by the State's "quasi-sovereign" status.

Predictably, the decision of the federal court in Texas started an avalanche of claims. Other attorneys general relied upon the theory. Plaintiffs' lawyers likewise embraced the court's "quasi-sovereign" theory on behalf of foreign countries such as the Republics of Guatemala, Panama and Nicaragua, and can be expected to do so in other lawsuits by foreign countries. What public entities will be next?

In rendering its decision, the federal court in Texas distinguished the United States Supreme Court's decision in *United States v. Standard Oil of California*,[60] which held that the Federal Government could not recover funds it expended to treat a soldier by way of a direct, independent cause of action against the defendant who caused that harm.[61] The

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57 *Id.* at 962.

58 *See* Minnesota v. Philip Morris, Inc., 551 N.W.2d 490, 495 (Minn. 1996) (concluding in a case involving Blue Cross that the "injury, albeit substantial, . . . is simply too remote").

59 Texas v. American Tobacco, 14 F. Supp.2d at 964.

60 332 U.S. 301 (1947).

61 *See id.; see also* District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1080 (D.C. Cir. 1984) (stating that absent authorizing legislation, the costs of public protection from safety hazards should be borne by society as a whole, not by the tortfeasor whose act allegedly created the need for the service); City of Flagstaff v. Atchison, Topeka & Sante Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983) (stating the same principle).

federal district court in Texas observed, correctly, that the "quasi-sovereign doctrine" had never been deemed to be a basis for a suit brought by the Federal Government.

In a rather stunning example of reverse logic, however, the court contended that the United States Supreme Court's holding was inapplicable because the Texas case involved a State. Yet, the law clearly establishes that no such right is conferred upon the federal government in this circumstance. That reasoning would apply *a fortiori* to foreign governments and logically should apply to State governments as well.

The federal court in Texas also argued that the *Standard Oil* case was inapposite, because the United States was not seeking an independent claim on behalf of the populace. Nothing in the Supreme Court's opinion in *Standard Oil*, however, suggested that its principles were related to the number of people harmed.

Contrary to the Texas district court's decision, if the quasi-sovereign doctrine is to have any underpinning in precedent or logic, it is not to give the State an independent right to bring tort claims for damages. The doctrine should be limited to allowing States to obtain injunctive relief to prevent harm. There may be unique State statutes which a court may interpret to give a State greater rights against tobacco or other unpopular defendants than is or was possessed by people who have suffered direct physical injury, but common law principles underlying the remoteness doctrine do not allow for such a distinction.

VII. CONCLUSION

The basic fiber of American tort law is tested by the unpopular defendant. It is understandable that some judges may feel tempted to modify or change principles of law where allegations suggest that the defendant has engaged in a course of action that has been harmful to society. The judge is then confronted with a basic dilemma. Does he or she bend the law to reach a result? Does the end justify the means?

A judge's answer to this dilemma in the context of tobacco and derivative cases is not an easy one. On the one hand, the remoteness doctrine has both a long history and a clear, concise rationale. This article, in describing that rationale, is meant to be of assistance to judges in their attempt to measure whether the law should be changed because of a particular defendant's wrongful conduct. If one can stand back from the controversial cases and make objective judgments — judgments about the shape of the law and its rationale — the remoteness doctrine has clear, strong public policy bases that would continue to apply in a myriad of contexts. The toughest issue is whether it should simply be put aside for some defendants. The basic principle of equal justice under law strongly suggests that it should not.