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Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War

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NOTE

UP IN SMOKE: HOW THE PROXIMATE CAUSE
BATTLE EXTINGUISHED THE TOBACCO WAR

*Stasia Mosesso**

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In the United States tobacco use causes more deaths each year than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires combined.¹

The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarette pack as a storage container for a day's supply of nicotine²

1 Food and Drug Administration Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,395, 44,398 (Aug. 28, 1996). For recent data on deaths caused by tobacco use, see Office on Smoking and Health, Centers for Disease Control and Prevention, *Cigarette Smoking-Related Mortality*, at <http://www.cdc.gov/nccdphp/osli/mortali.htm> (July, 1996).

2 Class Action Complaint and Demand for Jury Trial at 51, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 1:97CV0625) (quoting the remarks of William L. Dunn, Jr., a Philip Morris scientist, in an internal memorandum); see also Doug Levy & Tim Friend, *In 1994, FDA Put on the Spot Tobacco Firms' Studies at Issue*, USA TODAY, July 3, 1996, at 5A (reporting the statement of Joseph Califano, Secretary of Health, Education and Welfare, that had it been known that nicotine was addictive in 1979 an official report would have been issued to that effect). For a good discussion of the degree of knowledge obtained in private by the industry, see Juan Carlos Lopez-Campillo, *Tobacco Company Liability Under Mail Fraud*, 10 ST. THOMAS L. REV. 441, 450 (1998).

If proven to be true, the allegations demonstrate that the defendants intentionally bargained away the lives and health of tens of millions of Americans for profit. While the law is forced to address allegations of malfeasance on a continual basis, rarely if ever have American courts been faced with allegations of fraud so nefarious in nature, so wide in scope, or so broad in impact. The moral blame attached to such conduct, and society's policy in preventing harms in the future, could scarcely argue more strongly in favor of a finding of proximate cause.³

INTRODUCTION

The Racketeer Influenced Corrupt Organizations Act⁴ (RICO) was enacted in 1970 to respond to the special challenge of enterprise criminality, that is, a pattern of specified crimes (violence, provision of illegal goods and services, corruption in government, and fraud), by, through, or against enterprises, licit and illicit.⁵ Its legislative history indicates that it was intended to provide "new weapons of unprecedented scope for an assault upon organized crime and its economic roots."⁶ While RICO was designed to control organized crime, the idea that the statute is *limited* in application to organized crime "finds no support in the Act's text, and is at odds with the tenor of its legislative history."⁷ Organized crime, in short, provided the occasion for its

3 *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 584 (E.D.N.Y. 1999).

4 Organized Crime Control Act, 18 U.S.C. § 1968 (1994). RICO is a prosecutorial and plaintiff's tool that can be used for a multiplicity of purposes. The drafters envisioned it as a vehicle to take money out of the hands of racketeers and keep them from investing it in businesses, with the goal of eventually stifling entire corrupt underground operations. See G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 253-55 (1982).

5 RICO was enacted as Title IX of the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (1970). According to the Fifth Circuit, enterprise criminality includes "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors." *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (quoting G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013-14 (1980)).

6 *Russello v. United States*, 464 U.S. 16, 26 (1983).

7 *H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 244 (1989) ("Congress drafted RICO broadly enough to encompass a wide range of criminal activity, [more than organized crime,] taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."); see also *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984) (discussing RICO's application beyond organized crime).

drafting, but the statute applies to "any person."⁸ RICO authorizes a wide range of sanctions aimed at stifling illegal conduct.⁹ Among other remedies, the statute provides for recovery for injury to business or property occurring "by reason of" a violation of the statute.¹⁰

Section 1964(c) reads, "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."¹¹

The focus of this Note is the debate over the § 1964(c) language "by reason of" in the context of the recent tobacco litigation.¹² The Supreme Court has held that "by reason of" means proximate cause in the traditional tort sense of the phrase.¹³ The interpretation of this language is a recurring issue among circuit courts of appeals.¹⁴ This Note will examine, in chronological order, the decisions of the Second, Third, Fifth, Seventh, and Ninth Circuit Courts in the Philip Morris litigation. This recent litigation provides an apt framework for a discussion of § 1964(c). The critical issue in the litigation was determining whether the relationship between the illegal actions of the tobacco industry and the plaintiffs' claimed injuries was "proximate." The fraud perpetuated by the industry has caused, and continues to

8 See *Owl Constr. Co.*, 727 F.2d at 542 ("[A]lthough the legislative history of RICO vividly demonstrates that it was primarily enacted to combat organized crime, nothing in that history, or in the language of the statute itself, expressly limits RICO's use to members of organized crime." (quoting *United States v. Uni Oil, Inc.*, 646 F.2d 946, 953 (5th Cir. 1981))); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) ("Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises The former . . . enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.").

9 Such remedies include fines, imprisonment, forfeiture, injunctions, and treble damages. See 18 U.S.C. §§ 1963–1964 (1994 & Supp. 1998).

10 See *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (providing an excellent account of the pleading burden for a civil RICO case, discussing each element in turn).

11 18 U.S.C. § 1964(c) (Supp. 1998).

12 The States proceeded against the tobacco industry under, among other theories, RICO.

13 See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

14 See *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788, 789 (5th Cir. 2000); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 825–26 (7th Cir. 1999); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234–36 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000); *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 963–64 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 789 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 921 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000).

cause, countless, devastating consequences; however, as will be shown in this Note, the circuit courts of appeals show no willingness to find that the industry's fraud is their "proximate cause."

This Note will explain how the circuit courts are engaging in an improper proximate cause analysis by either substituting a formal direct-indirect analysis for the mandated policy-based inquiry on the "remoteness" prong of "proximate cause" or by misapplying the policy-based methodology to deselect all plaintiffs instead of to select the best enforcer of RICO, leaving a fraud of unprecedented scope and impact unremedied under RICO. This policy-based methodology for RICO was set out by the Supreme Court in 1992.¹⁵ Parts II and III will discuss the tobacco controversy underlying these lawsuits. Parts IV and V will provide an excursus on the history and current Supreme Court treatment of "proximate cause" and "remoteness." Finally, Part VI will examine the misapplication of law by the Second, Third, Fifth, Seventh, and Ninth Circuits in the tobacco litigation. This Note concludes that the failure to properly analyze this issue not only leaves a massive fraud unremedied, but has wide-reaching ramifications for the future of RICO and other areas of jurisprudence.

I. BACKGROUND FACTS

Tobacco is the only consumer product that is not capable of being used safely.¹⁶ It is also the "single most important preventable cause of death in our society."¹⁷ Every year about four million people die of tobacco-related illnesses.¹⁸ Cigarettes are presently known to contain at least forty-three different carcinogenic chemicals.¹⁹ The diseases caused by cigarette smoking are numerous. They include cancers of the mouth, larynx, esophagus, stomach, pancreas, uterus, cervix, kidney, and colon.²⁰ The Treasury Department estimates that

15 See *Holmes*, 503 U.S. 258.

16 See RICHARD KLUGER, *ASHES TO ASHES* 412 (1996).

17 U.S. DEP'T OF HEALTH & HUMAN SERVS., *CDC REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS—A REPORT OF THE SURGEON GENERAL* 11 (1989), at http://www.cdc.gov/tobacco/sgt_1989.htm (on file with the *Notre Dame Law Review*).

18 See WORLD HEALTH ORG., *MAKING A DIFFERENCE* 65 (1999). The Surgeon General characterized smoking as "the most important health issue of our time." SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., *REDUCING THE HEALTH CONSEQUENCES OF SMOKING: CANCER*, at xi (1982).

19 See American Lung Association, *Fact Sheet Smoking*, at http://www.lungusa.org/tobacco/smoking_factsheet99.html (last visited Aug. 20, 2000).

20 See generally [http://www.philipmorris.com/tobacco_bus/tobacco_issues/link22\(2\).html](http://www.philipmorris.com/tobacco_bus/tobacco_issues/link22(2).html) (last modified Oct. 8, 1999) (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., *SMOKING AND HEALTH, A REPORT OF THE SURGEON GENERAL* (1979) (reporting

sixty billion dollars are spent each year on treating smoking related injuries.²¹ Of this sixty billion, twenty-one billion is borne by the federal government.²²

Tobacco use is especially prevalent among young adults.²³ In America, it is illegal in all fifty states and the District of Columbia to sell tobacco to children.²⁴ Nevertheless, despite the existence of such rules, the laws prohibiting the sale of tobacco to minors are not stringently enforced.²⁵ "Approximately three million U.S. adolescents are smokers, and they smoke nearly one billion packs of cigarettes each year."²⁶

II. CONSPIRACY OF TOBACCO INDUSTRY

A. Overview

Although the tobacco industry knew of the link between smoking and disease, particularly cancer, it took measures to obfuscate that re-

mortality statistics among smokers and discussing link between smoking and disease but *not* stating that nicotine is addictive)).

21 See Wendy Koch, *Clinton Pushed to Sue Tobacco Firms*, USA TODAY, July 14, 1998, at 1A. For further information regarding government costs due to tobacco use, see U.S. DEP'T OF HEALTH & HUMAN SERVS., *Medical-Care Expenditures Attributable to Cigarette Smoking—United States, 1993*, in 43 CDC MORBIDITY & MORTALITY WKLY. REP. 469, 470 (July 8, 1994) (estimating that \$50 billion was spent on smoking related medical costs in 1993).

22 See Koch, *supra* note 21, at 1A. The federal government recently filed suit against the tobacco industry, seeking disgorgement, not treble damages, under RICO. For more information about the complaint, see Action on Smoking & Health, *Home Page*, at <http://www.ash.org> (last visited Sept. 5, 2000). See also Bob Van Voris, *Many Legal Questions Endure for U.S. v. Industry*, at <http://www.no-smoking.org/oct99/10-08-99-1.html> (last visited Oct. 6, 2000) (quoting Bob Van Voris, *DOJ Tobacco Suit A Long Shot*, NAT'L L.J., Oct. 11, 1999, at A1).

23 For a good summary of youth tobacco use around the world, see WORLD HEALTH ORG., TOBACCO USE BY YOUTH: A SURVEILLANCE REPORT FROM THE GLOBAL YOUTH TOBACCO SURVEY PROJECT 2000, at 869-71 (2000). See also, U.S. DEP'T OF HEALTH & HUMAN SERVS., *Reasons for Tobacco Use and Symptoms of Nicotine Withdrawal Among Adolescent and Young Adult Tobacco Users—United States, 1993*, in 43 CDC MORBIDITY & MORTALITY WKLY. REP. 745, 745 (Oct. 21, 1994) ("Among adults in the United States who have ever smoked daily, 91.3% tried their first cigarette and 77.0% became daily smokers before age 20 years.").

24 See U.S. DEP'T OF HEALTH & HUMAN SERVS., TOBACCO USE AND USUAL SOURCE OF CIGARETTES AMONG HIGH SCHOOL STUDENTS—UNITED STATES, 1995, at 413 (1996).

25 See WORLD HEALTH ORG., *supra* note 23, at 874; see also U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 24, at 413.

26 U.S. DEP'T OF HEALTH & HUMAN SERVS., *Changes in Cigarette Brand Preferences of Adolescent Smokers—United States, 1989-1993*, in 43 CDC MORBIDITY & MORTALITY WKLY. REP. 577, 577 (Aug. 19, 1994).

ality from the time that it received the information. The information the industry suppressed dealt primarily with the issues of the carcinogenic nature of tobacco and the addictive properties of nicotine. A summary of the massive fraud perpetrated upon the government²⁷ and the general public follows.²⁸

In the late 1800s very few Americans used tobacco products.²⁹ The industry was expanding, however, and by 1950 one-half of the American adult population were smokers.³⁰ Around 1953 a decline in cigarette use was noted, and tobacco stock prices began to slide.³¹ Smokers were becoming increasingly aware of minor throat and mouth irritations, and many were trying to quit the habit.³² The tobacco industry responded by trying to make cigarettes more appealing. This campaign took the form of marketing and advertising.

27 The industry actually addressed the role of the government in its efforts to shift the costs of smoking from themselves to others. An internal memorandum of British American Tobacco in 1974 stated: "We should influence medical and Government opinion and get each group to accept some responsibility for helping to solve what is seen as a major public health program [sic] rather than putting all the onus on the industry." Petition for Writ of Certiorari at 8, *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (No. 98-1426). A similar Philip Morris internal memorandum from 1978 evinces the same logic.

Health care costs are rising at an alarming rate: \$42 billion in 1966, \$163 billion in 1977, \$310 billion in 1983 (anticipated). More industry antagonists are using an economic argument against cigarettes: i.e., cigarettes cause disease; disease requires treatment; major health care costs are borne by the government; the taxpayers pay in the end We must be prepared to counter this line of argument.

Id.

28 The information contained in this Section represents that which was available to the courts that decided the Funds' cases against the tobacco industry in 1997. The facts have been set out in this fashion because none of the circuit courts of appeals who took up the Funds cases recited the facts that were before them. Supreme Court precedent mandates that lower courts accept a well-pleaded fact scenario. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see also H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (stating that a court may dismiss a complaint only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" (citing *Conley*, 355 U.S. at 45-46)). For a good summary of the tobacco industry's misconduct, see Daniel Givelber, Note, *Cigarette Law*, 73 *IND. L.J.* 867, 888-93 (1998). For in-depth analyses of the industry's actions throughout the controversy, see STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* 339-90 (1996); PHILIP J. HILTS, *SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* 102-71 (1996).

29 *See* HILTS, *supra* note 28, at 1.

30 *See id.*

31 *See id.* at 2.

32 *See id.*

Brands competed to provide the "smoothest" tasting cigarette.³³ Companies invoked the help of the medical community to lend credence to their claims. For example, one advertisement read: "Doctors recommend Camel."³⁴ At this time, the extent of the medical dangers of cigarettes was not fully appreciated.

The 1950s brought compelling evidence that smoking was linked with health problems, including, in particular, cancer.³⁵ Epidemiologists studied smoking because they believed it might explain the rocketing incidences of lung cancer, once a very rare disease in America.³⁶ These scientists determined that the incidences of lung cancer increased proportionally with the number of packs of cigarettes the population smoked per day.³⁷ As medical information became more advanced, the tobacco companies became increasingly fearful of smoker product liability suits and government regulation.³⁸ Given the steadily increasing amount of information about tobacco use,

[t]he companies had three courses of action open to them, theoretically. They could have accepted the evidence against them as conclusive and gone out of business rather than further risking the public's health. They could have emphatically denied that their product was lethal and gone sullenly about their trade. Or they could have solemnly proclaimed their concern, decried any rush to judgment, and joined in the study of the problem, hoping that it would either exonerate their product or isolate the harmful agent.

33 See *id.*; see also GLANTZ ET AL., *supra* note 28, at 28.

34 See HILTS, *supra* note 28, at 2.

35 One of the earliest studies was completed by Dr. Ernst L. Wynder and Dr. Everts A. Graham in 1950. See GLANTZ ET AL., *supra* note 28, at 25. Actually, as early as 1946, chemists employed by tobacco companies started to display concern about tobacco use. A letter sent from a Lorillard chemist to the manufacturing committee of the company reveals this concern. "Certain scientists and medical authorities have claimed for many years that the use of tobacco contributes to cancer development in susceptible people. Just enough evidence has been presented to justify the possibility of such a presumption." Class Action Complaint and Demand for Jury Trial at 25, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 1:97CV0625).

36 See HILTS, *supra* note 28, at 3. Lung cancer rose from less than five cases in 100,000 men in 1900 to more than 18,000 cases in 100,000 in 1950. See *id.* In fact, in 1919 a medical school professor summoned the entire school to view an autopsy of a man who died of lung cancer, because he believed that they may never get the opportunity to see one again. See *id.*

37 See *id.*

38 While some tobacco executives argued that the best course of action would be to develop a safer cigarette, ultimately they were persuaded that the existence of a safer product would open the floodgates of product liability. They decided that professed ignorance of a safer alternative would guard against negligence or strict products liability litigation. See Givelber, *supra* note 28, at 891.

As prudent men purveying a legal, popular, and highly profitable product, they elected this third course, promising that if science could definitively identify a nasty ingredient that indisputably harmed smokers, their laboratories would remove it forthwith But the cigarette industry did not leave it at that. Instead, it proceeded during the last half of the 'Fifties to dispute, distort, minimize, or ignore the unfolding evidence against it.³⁹

The industry responded to the increasing flood of adverse information in a threefold manner. First, low tar and filtered cigarettes were introduced, giving smokers the false impression that safer alternatives existed.⁴⁰ Second, an inside committee consisting of chief executives of the major tobacco companies, their general counsel, publicists, and others was created in order to create the appearance of a unified effort to address the health issues surrounding smoking. The committee established an industry-wide approach to deception regarding its product.⁴¹ Finally, a massive marketing campaign began to counteract the increasing amounts of information available to the public regarding the truth about tobacco.⁴² This campaign included the targeting of youth in marketing efforts.⁴³

B. *Low Tar and Filtered Cigarettes*

An early tactic of the industry was to market low tar and filtered brand cigarettes. These cigarettes were not safer than other brands, although they were packaged and marketed in such a fashion as to indicate that they were preferable to other kinds of cigarettes.⁴⁴ Although reduced tar levels do not make cancer less likely to develop, tobacco companies began to compete with one another to provide the lowest tar cigarette.⁴⁵ Tobacco executives were aware that filtered and low-tar cigarettes were not safer products, but supported the production and marketing of them in order to ensure the profitability of their product.⁴⁶

39 KLUGER, *supra* note 16, at 205.

40 See *infra* Part II.B. Ironically, the development and sale of truly safer cigarettes was suppressed by the industry. See *infra* Part III.C.

41 See *infra* Part II.C.; GLANTZ ET AL., *supra* note 28, at 32-39.

42 See *infra* Part II.D.; see also GLANTZ ET AL., *supra* note 28, at 32-39.

43 See *infra* Part III.E.

44 See GLANTZ ET AL., *supra* note 28, at 26.

45 This competition is known as the "tar derby." See *id.* at 27.

46 Ernest Pepples, Vice President of Brown & Williamson, acknowledged the reality of low tar and filtered cigarette safety in a memorandum. "In most cases . . . the smoker of a filter cigarette was getting as much or more nicotine and tar as he would have gotten from a regular cigarette. He [the smoker] had abandoned the regular cigarette, however, on the ground of reduced risk to health." Memorandum from Ernest Pepples,

C. Tobacco Information Research Council

In response to an article published in the December 1953 *Cancer Research Journal*,⁴⁷ the Chief Executive Officers of the five largest tobacco companies met on December 15, 1953 at the Plaza Hotel in New York City to formulate a strategic course of action.⁴⁸ In response to the increasing publicity surrounding the link between cancer and tobacco use, industry leaders hired a public relations firm, Hill & Knowlton, to orchestrate a unified response to the troubling situation.⁴⁹ An internal document of Hill & Knowlton reveals the mood at the meeting. "[O]fficials stated that salesmen in the industry are frantically alarmed and that the decline in tobacco stocks on the stock exchange market has caused grave concern"⁵⁰ Because the group agreed that the appearance of a firm stance was crucial, the Tobacco Industry Research Committee (TIRC) was formed in 1954.⁵¹ Publicly, the group claimed to be committed to determining whether the reports linking tobacco use to cancer were valid.⁵² The professed goals were to research questions of tobacco use and health. The Council awarded research grants to independent scientists who were promised complete scientific freedom to conduct their studies. Grantees alone "are responsible for reporting or publishing their findings in the accepted scientific manner—through medical and scientific journals and societies."⁵³

Vice President of Brown & Williamson Tobacco Corporation (1976), in *GLANTZ ET AL.*, *supra* note 28, at 27 (quoting ERNEST PEPPLES, *INDUSTRY RESPONSE TO THE CIGARETTE HEALTH CONTROVERSY 2* (1976)).

47 See *HILTS*, *supra* note 28, at 4.

48 The top executives from American Tobacco, U.S. Tobacco, Benson & Hedges and Philip Morris were all at the meeting. See *id.* at 5. R.J. Reynolds, Philip Morris, Brown & Williamson, American Tobacco, and Benson & Hedges all agreed to the emergency plan. See *id.* at 4. The only major tobacco company to refuse to join in the meeting was Lorillard. See *id.*

49 See *id.* at 5–8.

50 Class Action Complaint and Demand for Jury Trial at 28, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 1:97CV0625).

51 See *KLUGER*, *supra* note 16, at 164–69. In 1964 the TIRC changed its name to the Council for Tobacco Research (CTR). See *GLANTZ ET AL.*, *supra* note 28, at 48. In 1958, cigarette manufacturers created another group known as the Tobacco Institute (TI). See *KLUGER*, *supra* note 16, at 210.

52 See *GLANTZ ET AL.*, *supra* note 28, at 33.

53 *Id.* at 36 (quoting *COUNCIL FOR TOBACCO RESEARCH, ORGANIZATION AND POLICY STATEMENT* (1985)).

In fact, this group was no more than a public relations facade⁵⁴ that would fool people into thinking that independent research was being conducted in good faith.⁵⁵ This lawyer-driven group only sought to create an air of controversy surrounding the carcinogenic nature of tobacco.⁵⁶ The group knew that it had to maintain ignorance about the risks associated with smoking.⁵⁷ It sought to convey the belief that cigarettes were as safe as they could possibly be and to focus attention upon the fact that the public was aware of the dangers of smoking. To this end, the group engaged in a conspiracy to conceal a great deal of crucial information.⁵⁸ The actions taken in furtherance of the conspiracy, including express fraudulent claims, are

54 In fact, the TIRC was set up one floor below the Hill & Knowlton offices in New York City and was effectively controlled by the public relations firm. Class Action Complaint and Demand for Jury Trial at 30, *Tex. Carpenters* (No. 1:97CV0625).

55 Actually, lawyers, rather than scientists, often made final decisions on funding. See GLANTZ ET AL., *supra* note 28, at 36. Stanton Glantz undertakes a thorough analysis of the innerworkings of the TIRC. See *id.* at 35–46.

56 The Hill & Knowlton memorandum that summarized the meeting at the Plaza Hotel belies the truth of the statements released to the public. The true goal of the group was clear.

They [the industry] are also emphatic in saying that the entire activity is a long-term, continuing program, since they feel that *the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future . . .* The current plans are for Hill & Knowlton to serve as the operating agency of the companies, hiring all staff and disbursing all funds.

Class Action Complaint and Demand for Jury Trial at 29, *Tex. Carpenters*, (No. 1:97CV0625) (emphasis added).

57 The “tobacco executives grew dependent on lawyers in framing their every public move and in the sort of research they undertook privately.” KLUGER, *supra* note 16, at 227–28.

58 See *Kurzweil v. Philip Morris Co.*, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,446, at 96,942 (S.D.N.Y. Apr. 8, 1997) (“The documentary evidence of internal and industry studies and Philip Morris’ manipulation of nicotine was not capable of discovery before August 1995.”); *Am. Tobacco Co. v. Florida*, 697 So. 2d 1249, 1257 (Fla. Dist. Ct. App. 1997).

The special master found that there was evidence that the defendants hid from and misrepresented to the public the health risks of smoking and that their conduct constituted fraud on the public. There was also evidence that the defendants utilized their attorneys in carrying out their misrepresentations and concealment to keep secret research and other conduct related to the true health dangers of smoking.

Id.; see also *Washington v. Am. Tobacco Co.*, No. 96–2–15056–8 SEA, 1997 WL 728262, at *6 (Wash. Super. Ct. Nov. 21, 1997) (“[The] court finds that the state has made a prima facie showing that R.J. Reynolds was engaged in or was planning a fraud at the time the communications were made . . .”).

legion.⁵⁹ A stunning statistic best expresses the truth about the TIRC and its aims: "For every dollar spent on its joint research effort in those early years, the industry spent nearly \$200 on advertising and promoting its product."⁶⁰

A purported function of the TIRC was to provide funding to scientists who would research the health effects of tobacco.⁶¹ In reality, most of these scientists were focused on issues tangential to the health impacts of cigarettes. In a survey taken of grantees of TIRC funds, eighty percent of the scientists admitted that their research was not focused upon the health effects of smoking.⁶² Rather, the majority of the scientists appears to have been seeking alternative explanations for the information presented by scientists who claimed that smoking caused cancer.⁶³ Fraudulent studies were sponsored, which supposedly "tested" the effects of tobacco and not surprisingly "determined" that a particular brand of cigarettes "would have no *adverse* effects on the throat, sinuses or affected organs."⁶⁴ Additionally, TIRC expressly instructed many of its grantees to work "off the books" so that the research would never be made public.⁶⁵ Grantees whose work revealed unfavorable information were stripped of their grants and coerced into removing adverse information from their reports.⁶⁶

Throughout the years in which the industry banded together to present a united public relations front, each company was, in fact, conducting private research into the true nature of cigarettes. Internal memoranda now available show that the companies' own scientists came to identical conclusions as those of outside scientists.⁶⁷ These discoveries, kept private, contained reams of information about "numerous compounds that caused cancer and arrays of others which encouraged cancer growth."⁶⁸ "At the very time that the companies were

59 See Clifford E. Douglas, *Tobacco Deal Lets the Industry Off the Hook*, N.Y. TIMES, Feb. 5, 1998, at A22; Clifford E. Douglas, Letter, *Tobacco Execs Dance Around Definition of Addiction*, USA TODAY, Feb. 2, 1998, at 12A [hereinafter Douglas, Letter].

60 KLUGER, *supra* note 16, at 206.

61 See GLANTZ ET AL., *supra* note 28, at 36 (quoting COUNCIL FOR TOBACCO RESEARCH, ORGANIZATION AND POLICY STATEMENT 1 (1985)).

62 See HILTS, *supra* note 28, at 15.

63 See *id.* at 10. Among those alternative explanations to the lung cancer epidemic were genetics and air pollution. See *id.* at 15.

64 Class Action Complaint and Demand for Jury Trial at 26, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 1:97CV0625).

65 See HILTS, *supra* note 28, at 11.

66 See *id.*

67 See *id.* at 15.

68 *Id.* at 11.

insisting publicly and in lawsuits that cigarettes are neither addictive nor carcinogenic, their own research, shielded from the public view, was establishing the opposite.⁶⁹ By the 1960s, at least one tobacco company, Brown & Williamson, had determined through its own laboratory tests that cigarette tar caused cancer in animals.⁷⁰

During the time the industry was stifling its own independent research, it was also using its leverage to keep others from publishing truthful information about the health risks. The TIRC considered libel suits against some researchers, but mainly focused on discrediting anyone who published information adverse to their product.⁷¹ Under-the-table payments were made to magazine writers who would publish articles presenting the industry's side of the story.⁷² This campaign was made possible through the use of the lawyers hired to represent the industry in their legal battles.⁷³

D. *Keeping the Debate Alive: Public Relations Campaign*

The tobacco industry adopted a calculated strategy to create doubt in the minds of smokers about the safety of cigarettes. The industry's primary goal was to counter-attack the reports of independent scientists by claiming that their research was dishonest and motivated by a desire for increased funding.⁷⁴ First, the industry claimed no conclusive proof that smoking caused cancer existed.⁷⁵ This claim was bolstered by express warranties regarding the healthfulness of tobacco.⁷⁶ Second, it maintained that smoking was not addictive.⁷⁷ Finally, the industry vowed to continue independent research regarding

69 Givelber, *supra* note 28, at 893.

70 See GLANTZ ET AL., *supra* note 28, at 4.

71 See HILTS, *supra* note 28, at 14.

72 See *id.*

73 See *Am. Tobacco Co. v. State*, 697 So. 2d 1249, 1257 (Fla. Dist. Ct. App. 1997). "There was also evidence that the defendants utilized their attorneys in carrying out their misrepresentations and concealment to keep secret research and other conduct related to the true health dangers of smoking." *Id.* The alleged participation of the lawyers has been duly noted by judges. See *Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6, 18-19 (E.D.N.Y. 1996); *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 689 (D.N.J. 1992), *vacated*, 975 F.2d 81 (3d Cir. 1992) (vacating because the court considered material outside the record).

74 See HILTS, *supra* note 28, at 6. An attempt to discredit science generally was also instituted. The industry claimed that the correlation between smoking and disease was only statistical, as though that meant that scientists were somehow manipulating numbers to achieve desired results. See *id.* at 18.

75 See GLANTZ ET AL., *supra* note 28, at 2.

76 See *infra* note 80; see also GLANTZ ET AL., *supra* note 28, at 3.

77 See *infra* text accompanying notes 95-100, 160-63.

the health issues surrounding smoking.⁷⁸ Hill & Knowlton characterized this approach as not purely defensive, but positive and "pro cigarette."⁷⁹

The tobacco industry used popular advertising media to propagate misinformation regarding tobacco use. Magazines, radio, and television were filled with advertisements aimed at combating increasing amounts of negative medical information.⁸⁰ In 1954, perhaps the most famous of the public statements was released in 448 newspapers across the United States.⁸¹ This strategic announcement was entitled "A Frank Statement to Cigarette Smokers."⁸² This statement assured the public that the industry was committed to a thorough and unbiased inquiry into the health concerns raised by researchers.⁸³

Not only did the industry fail to follow its stated agenda, but it actually worked directly against the health interests of its customers and the public. Time and again the industry vowed to continue research and present the facts to the public.

We recognize that we have a special responsibility to the public—to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use. We accepted this responsibility in 1954 by establishing the TIRC, which provides research grants to independent scientists. We

78 See *infra* note 82; see also HILTS, *supra* note 28, at 6.

79 *Id.* at 6.

80 For example, "Not a cough in a Carload," "Not a single case of throat irritation due to smoking Camels," "The Throat-tested cigarette." Class Action Complaint and Demand for Jury Trial at 26, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 1:97CV0625).

81 Interestingly, internal memoranda state that the ad should appear in "no Negro newspapers." HILTS, *supra* note 28, at 12.

82 The advertisement read, in pertinent part:

Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings. . . . Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer: 1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health 2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE. 3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition, there will be an Advisory Board of scientists disinterested in the cigarette industry This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

GLANTZ ET AL., *supra* note 28, at 34.

83 See *id.*

pledge continued support of this program of research until the facts are known.⁸⁴

Advertisements and carefully strategized marketing were not the only measures taken to dupe the public. Any time a tobacco representative spoke on the record, he denied that tobacco and smoking were health risks. Tobacco executives made the following fraudulent statements:

- “If it is proven that cigarettes are harmful, we want to do something about it regardless of what somebody else tells us to do. And we would do our level best. It’s only human.”⁸⁵
- “[T]he cigarette industry is as vitally concerned or more so than any other group in determining whether cigarette smoking causes human diseases. . . . That is why the entire tobacco industry . . . since 1954 has committed a total of \$40 million for smoking and health research through grants to independent scientists and institutions.”⁸⁶
- “Cigarette smoking has not been scientifically established to be a cause of chronic diseases, such as cancer, cardiovascular disease, or emphysema. Nor has it been shown to affect pregnancy outcome adversely.”⁸⁷

The report of the Scientific Advisory Board of the TIRC also illustrated the depths of the deception on the part of the industry. It read, in pertinent part:

The continued failure of evidence which is qualitatively different or of increased significance to appear leaves the causation theory of smoking in lung cancer, heart disease and other ailments without clinical and experimental proof. . . . The result is that the tobacco theory is rapidly losing much of the unique importance claimed by its adherents at its original announcement.⁸⁸

This report amounted to an outright rejection of a decade’s worth of internal and external research.⁸⁹

84 Class Action Complaint and Demand for Jury Trial at 36, *Tex. Carpenters* (No. 1:97CV0625) (quoting a TIRC/TI advertisement entitled “A Statement about Tobacco and Health”).

85 *Id.* (quoting a 1964 statement by Bowman Gray, R.J. Reynolds’ Chairman).

86 *Id.* at 37 (quoting a 1972 statement by Horace Korengay, TI President).

87 *Id.* (quoting a March 1983 statement by Sheldon Summers, MD, Scientific Director of CTR).

88 KLUGER, *supra* note 16, at 211 (quoting SCIENTIFIC ADVISORY BOARD OF THE TOBACCO INDUSTRY RESEARCH COMMITTEE, CAUSATION THEORY OF SMOKING UNPROVED (1960)).

89 *See id.*

III. THE NICOTINE PROBLEM

A main area of concern to the tobacco industry was the issue of nicotine. Although the industry then maintained that nicotine was not addictive, medical research, including research done by the companies themselves, belied those claims.⁹⁰ The properties of nicotine were isolated and understood in the nineteenth century, long before any debate arose as to its use in cigarettes.⁹¹ Thus, the deception regarding nicotine is particularly offensive.

In the tale of cigarettes and lung cancer, we can imagine that the executives had some hope of escape, and dreamed of making things all right after cheating for some time. But the tale of nicotine is different; there is no doubt in their minds. In this story, they aren't lying in hopes things will get better, they are just lying.⁹²

The industry's strategy with respect to nicotine was two-fold. First, in keeping with their previous patterns, public statements were made denying that nicotine was addictive, and inside research was suppressed.⁹³ Second, the industry used the research it had gathered regarding nicotine to manipulate levels in cigarettes in order to continue to sell them.⁹⁴

A. *Public Statements and Suppression of Research Regarding Nicotine Addiction*

The industry, in particular Philip Morris, employed scientists to privately study the effects of nicotine on laboratory animals.⁹⁵ While publicly claiming that nicotine was not an addictive ingredient in tobacco, internal documents written during the same period reveal that the industry knew the reverse to be true. A recent civil complaint against Philip Morris cited the following quotations from internal memoranda of various cigarette companies:

90 See GLANTZ ET AL., *supra* note 28, at 15.

91 See HILTS, *supra* note 28, at 42.

92 *Id.* at 42-43.

93 The addictive properties of nicotine have been known to the tobacco industry since at least the 1960s. See GLANTZ ET AL., *supra* note 28, at 58. Tobacco executives, astonishingly enough, continue to maintain that cigarettes are not addictive. See Bill Meier, *Among Cigarette Makers, Old Habits Die Hard*, N.Y. TIMES, Sept. 7, 1997, at E3.

94 See Lopez-Campillo, *supra* note 2, at 451.

95 Dr. DeNoble and Dr. Mele were hired by Philip Morris and were instructed to keep their work secret. In fact, the laboratory animals were delivered early in the morning so that even other Philip Morris researchers would not know about their work. See Class Action Complaint and Demand for Jury Trial at 49, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 1:97CV0625).

- “Nicotine is not only a very fine drug, but the technique of administration by smoking has considerable psychological advantages”⁹⁶
- “A body left in this unbalanced state craves for renewed drug intake in order to restore the physiological equilibrium. This unconscious desire explains the addiction of the individual to nicotine.”⁹⁷
- “Moreover, nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms.”⁹⁸
- “We think that most smokers can be considered nicotine seekers, for the pharmacological effect of nicotine is one of the rewards that come from smoking. When the smoker quits, he foregoes his accustomed nicotine. The change is very noticeable, he misses the reward, and so he returns to smoking.”⁹⁹

By suppressing research about nicotine, the industry affected outside research as well—even the Surgeon General’s knowledge of nicotine lagged behind the industry’s.¹⁰⁰

B. Sales and Nicotine Level Manipulation

Despite protests to the contrary, the tobacco industry was well-aware that nicotine was the key to cigarette sales. An internal memorandum from Philip Morris reveals this understanding: “The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarette pack as a storage container for a day’s supply of nicotine”¹⁰¹ The industry reconstituted tobacco in order to provide the smoker with an ever-increasing amount of nic-

96 *Id.* at 48 (quoting a 1962 statement by Sir Charles Ellis, Scientific Advisor to British American Tobacco Co., Brown & Williamson’s parent company).

97 *Id.* (quoting a 1963 research report commissioned by Brown & Williamson).

98 *Id.* (quoting a 1963 statement by Addison Yeaman, General Counsel at Brown & Williamson).

99 *Id.* (quoting a 1978 report commissioned by Philip Morris).

100 See GLANTZ ET AL., *supra* note 28, at 15 (showing that the Surgeon General did not conclude that nicotine was addictive until 1988); see also *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 600–07 (7th Cir. 2000) (collecting decisions on when danger of addiction became generally known). “The Surgeon General’s seminal 1964 report on smoking, for instance, said smoking was habituating, but not addictive. The report compared tobacco to coffee. It was not until 1988 that the Surgeon General declared smoking addictive, comparing tobacco to cocaine.” *Id.* at 602.

101 Class Action Complaint and Demand for Jury Trial at 51, *Tex. Carpenters* (No. 1:97CV0625) (quoting the remarks of William L. Dunn, Jr., a Philip Morris scientist, in an internal memorandum); see Lopez-Campillo, *supra* note 2, at 450 (quoting Alix M. Freedman, *Past is Ominous for Substitute Smokes*, WALL ST. J., June 15, 1989, at B1 (quoting William L. Dunn, Jr., Philip Morris research scientist)).

otine in each cigarette.¹⁰² Clearly, the industry paid careful attention to nicotine and did not treat it as just an incidental component of the cigarette.

Given the wealth of information now held by both the public and the companies, claims that nicotine was not addictive, or that the industry was unaware of that fact, were dishonest and evasive. In 1994, Donald Johnston, C.E.O. of American Tobacco, testified to Congress:

At no point in the manufacturing process is nicotine content controlled, adjusted or restored to compensate for nicotine lost during the manufacturing process. . . . At no time in the new product development cycle is nicotine delivery considered as a criteria [sic] for product design, basically because nicotine delivery follows 'tar' delivery and the inventory of tobaccos available for use.¹⁰³

This testimony was completely disingenuous, if not an outright lie: nicotine levels were, in fact, being manipulated very carefully so that an increased amount of nicotine could be delivered to the smoker without compromising the taste of the cigarette.¹⁰⁴

Although "choice," "assumption of the risk," and other argumentative slogans have been employed to divert blame to smokers themselves, scientific realities about nicotine addiction explain why such arguments fail. Given that the industry manipulated nicotine levels to get more smokers hooked on the habit, it is fruitless to argue that smokers were able to exercise complete free choice with respect to cigarettes.¹⁰⁵ Certainly, at least some individuals knew and understood the risks involved in the habit. Nevertheless, the relationship

102 See HILTS, *supra* note 28, at 44. For an account of how tobacco is reconstituted, see *id.* at 44-45. The use of ammonia compounds in manufacturing increases the levels of nicotine that are delivered to the smoker. *Id.* at 169 (quoting 1995 pretrial deposition testimony of Dr. Jeffrey S. Wigand, Chief of Research for Brown & Williamson).

103 HILTS, *supra* note 28, at 43 (quoting Letter from Donald Johnston, Chief Executive of American Tobacco, to Henry Waxman, Chairman of the Congressional Commerce Committee's Subcommittee on Health and the Environment (Oct. 14, 1994)).

104 See *id.* at 45. The work of Dr. Irby reveals how important nicotine manipulation was to the industry. He suggested two different ways to boost nicotine levels. The first idea was to add nicotine to the cigarette directly, and the second was to modify the formula used to make the cigarette. See *id.* at 44-46. His research was meticulously executed to enable him to brief the executives on exactly how much of each type (high or low nicotine quantity) of tobacco would be necessary. See *id.* at 44.

105 This reality is especially stark with respect to children smokers. See Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 485-89 (1998). Even most utilitarians and libertarians draw the line of "liberty" at children. See, e.g., H.L.A. HART, *LAW, LIBERTY AND MORALITY* 4-6 (1963); *infra* note 527.

between understanding that something is unhealthy and becoming addicted to the use of that product must be distinguished. While many smokers are able to quit the habit, "the strength of cigarettes' grip on consumers who have not succeeded in quitting is undeniable. Although millions of people quit smoking, many millions more have tried to quit and have failed. Seventeen million smokers attempt to quit each year; only about 1.3 million per year succeed."¹⁰⁶ They represent the core of the industry's consumers. Their "choice" or "assumption of the risk" is illusory.

C. *Suppression of Safer Cigarettes*

The industry executives with more laudable moral scruples felt that perhaps the safest alternative given the information they held was to manufacture a safer cigarette.¹⁰⁷ Unfortunately, these executives were eventually convinced that to start production and sale of a safer cigarette would mean the destruction of their business. Once the industry admitted that the product was unreasonably dangerous, the proverbial house of cards would collapse, and the industry would be subject to countless lawsuits.

Any incentive to creating a safer cigarette ran directly contrary to the best interest of the tobacco industry. As Daniel Givelber points out:

Rather than the negligence regime creating incentives towards safety, it produced the opposite result. The tobacco companies never explicitly competed in terms of safety. Indeed, they assiduously avoided mentioning safety in their marketing and failed to conduct meaningful research into safer ways of making cigarettes. Astonishingly, they put lawyers rather than scientists or manufacturing executives in charge of the research that was conducted, and they withheld dissemination of the results of that research as privileged legal work product. Collusion, not competition, ensured that the companies neither discussed the relative safety of the various brands nor worked strenuously to bring to market a demonstrably safer product.¹⁰⁸

Several tobacco companies researched the development of safer cigarettes during the same time they were maintaining that cigarettes were not health risks.¹⁰⁹ Five companies both designed and tested

106 Cupp, *supra* note 105, at 484–85.

107 See GLANTZ ET AL., *supra* note 28, at 108; HILTS, *supra* note 28, at 57.

108 Givelber, *supra* note 28, at 888.

109 See GLANTZ ET AL., *supra* note 28, at 109.

safer cigarettes, one of which had a filter to absorb the carcinogens.¹¹⁰ These research efforts were not made public.¹¹¹

Safer cigarette production was recognized as a "real problem" for the tobacco industry.¹¹² If a safer cigarette were produced, it would call into doubt not only the safety of existing cigarettes, but also the previous warranties that cigarettes were produced in the safest manner possible. A Philip Morris internal memorandum reveals the concern of that company to the introduction of safer cigarettes: "We have reason to believe that in spite of the gentlemen [sic] agreement for the tobacco industry in previous years that at least some of the major companies have been increasing biological studies with their own facilities."¹¹³ This deviation from the agreed course of action was, of course, problematic for the industry.

D. *Marketing and Sales to Minors*

The most reprehensible aspect of the tobacco industry's conduct was the deliberate marketing of its deadly product to children.¹¹⁴ The industry recognized the need to lure smokers at an early age, given the addictive nature of its product. Efforts to attract a young market succeeded.¹¹⁵ Eighty-two percent of smokers in America started smoking before the age of eighteen, sixty-two percent began smoking before they were sixteen, and thirty-eight percent began smoking before they were fourteen.¹¹⁶ A study conducted by the National Institute of Drug Abuse found that in the years between 1991 and 1994 the

110 See HILTS, *supra* note 28, at 39.

111 See *id.*

112 See GLANTZ ET AL., *supra* note 28, at 440.

113 See Class Action Complaint and Demand for Jury Trial at 38, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 1:97CV0625) (quoting a 1968 statement of the Vice President of Research and Development at Philip Morris).

114 See generally Robert Adler, *Here's Smoking at You, Kid: Has Tobacco Product Placement in the Movies Really Stopped?*, 60 MONT. L. REV. 243 (1999) (discussing cigarette advertising and product placement targeting young adults).

115 For an analysis of how advertisement affects teen smoking, see Kathleen M. Paralusz, *Ashes to Ashes: Why FDA Regulation of Tobacco Advertising May Mark the End of the Road for the Marlboro Man*, 24 AM. J.L. & MED. 89, 91-98 (1998). See also Patricia A. Davidson, *Tales from the Tobacco Wars: Industry Advertising Targets Teenage Girls*, 13 WIS. WOMEN'S L.J. 1, 1-16 (1998) (detailing efforts to target not only the youth market smokers generally, but young women in particular).

116 See Class Action Complaint and Demand for Jury Trial at 61, *Tex. Carpenters* (No. 1:97CV0625).

increase in smoking rates was highest among eighth graders, up thirty percent.¹¹⁷

The marketing efforts directed at youth, most notably the Marlboro Man and Joe Camel, were strategic ploys at capturing new smokers,¹¹⁸ since nicotine addiction typically does not develop in adults.¹¹⁹ Among persons who start smoking after the age of 21, ninety percent quit the habit completely within a relatively short time.¹²⁰ However, it usually takes at least one year to become addicted to nicotine.¹²¹ If the industry did not target young smokers, "the entire industry would collapse within a single generation."¹²²

Tobacco companies were acutely aware that most of their customers began smoking by age nineteen.¹²³ Three quarters of those young smokers began smoking by age seventeen.¹²⁴ Marketing and advertising efforts to this age group were crucial to the livelihood of the industry. It needed to attract smokers by making smoking appealing, and it needed to maintain those smokers by delivering enough nicotine to get, and keep, them addicted.¹²⁵ The claim that the industry did not know its product was addictive is contradicted by every strategic maneuver made from the industry's inception.

After the Surgeon General's report¹²⁶ was released, the industry announced that it was instituting a code of marketing.¹²⁷ A public enforcer was selected and given the power to levy fines, if a company targeted children in its advertising.¹²⁸ Unfortunately, no fines were ever actually imposed, and the administrators eventually resigned from their positions.¹²⁹ The codes were promptly

117 See *id.* at 62.

118 See generally Mary B. Meaden, Comment, *Joe Camel and the Targeting of Minors in Tobacco Advertising: Before and After 44 Liquormart v. Rhode Island*, 31 NEW ENG. L. REV. 1011 (1997) (giving an in-depth discussion of the marketing of tobacco to children).

119 See HILTS, *supra* note 28, at 65.

120 See *id.*

121 See *id.*

122 *Id.*

123 See *id.*

124 See *id.*

125 See generally Clay Calver, *Excising Media Images to Solve Societal Ills: Communication, Media Effects, Social Science, and the Regulation of Tobacco Advertising*, 27 SW. U. L. REV. 401 (1998) (discussing cultural and societal effects of cigarette advertising with respect to behavior and attitudes).

126 U.S. DEP'T OF HEALTH & HUMAN SERVS., SMOKING AND HEALTH, A REPORT OF THE SURGEON GENERAL (1979).

127 See HILTS, *supra* note 28, at 68.

128 See *id.*

129 See *id.*

“scuttled.”¹³⁰ The industry continued to place its greatest marketing emphasis on youth. Claude Teague, R.J. Reynolds’ assistant chief in Research and Development, for example, worked shamefully on developing a cigarette to appeal to beginning smokers. His reports include the following statements:

- “Happily for the tobacco industry, . . . nicotine is both habituating and unique in its variety of physiological actions”¹³¹
- “[The smoker] appears to start to smoke for purely psychological reasons—to emulate a valued image, to conform, to experiment, to defy, to be daring, to have something to [do] with his hands, and the like This leaves us, then, in the position of attempting to design and promote the same product to two different types of market with two different sets of motivations, needs and expectations.”¹³²
- “Realistically, . . . if our company is to survive and prosper, over the long term we must get our share of the youth market Thus we need new brands designed to be particularly attractive to the young smoker, while ideally at the same time being appealing to all smokers.”¹³³
- “Thus, a new brand aimed at the young smoker must somehow become the ‘in’ brand and its promotion should emphasize togetherness, belonging and group acceptance, while at the same time emphasizing individuality and ‘doing one’s own thing.’”¹³⁴

The result of Dr. Teague’s suggestions was the infamous Joe Camel, the “smooth character,” an appealing cartoon character who smoked cigarettes.¹³⁵ R.J. Reynolds was not the first or only company to develop a recognizable character to peddle cigarettes. Philip Morris launched Marlboro Man after years of research into the male youth market and found him outstandingly successful.¹³⁶ Creator, Jack Landry, proclaimed the commercials “would turn rookie smokers on to Marlboro . . . the right image to capture the youth market’s fancy . . . a perfect symbol of independence and individualistic rebellion.”¹³⁷ Indeed, the Marlboro Man did his job. Explained one executive: “When you see teenage boys—people the cigarette companies aren’t sup-

130 *Id.*

131 *Id.* at 72 (quoting Memorandum of Claude Teague (Apr. 14, 1972)).

132 *Id.* at 73 (quoting Memorandum of Claude Teague (Apr. 14, 1972)).

133 *Id.* at 74 (quoting Memorandum of Claude Teague (Apr. 14, 1972)).

134 *Id.* at 75 (quoting Memorandum of Claude Teague (Apr. 14, 1972)).

135 *See id.* at 70.

136 *See id.* at 66–67.

137 *Id.* (quoting the statement of Jack Landry, Philip Morris Ad Executive, to an undisclosed writer).

posed to be targeting in the first place—going crazy for this guy, you know they're hitting their target."¹³⁸ Before long, Marlboro had captured a larger share of starters than any other cigarette and was the leading cigarette sold in the country.¹³⁹

Marketing was not the only method used to attract young smokers. Product placement was also an important aspect of the industry's approach. Cigarette promotions appeared far more often in stores located near schools.¹⁴⁰ They often appeared at a height of three feet or lower.¹⁴¹ In spite of these calculated efforts to appeal to young smokers, the industry continued to claim that it was not encouraging young people to smoke.¹⁴² As late as 1990, R.J. Reynolds' Division Manager for Florida Sales asked R.J. Reynolds sales representatives to identify the stores in their area that were closest in proximity to high schools and colleges.¹⁴³ These accounts were then given particular attention.¹⁴⁴ One of the company's affiliates undertook a "Youth Target" study with the purpose of "provid[ing] marketers and policy makers with an enriched understanding of the mores and motives of this important emerging adult segment which can be applied to better decision making in regard to products and programs directed at youth."¹⁴⁵ The industry maintained, however, that advertising and marketing efforts were merely aimed at achieving customer brand loyalty and not to encourage young people to pick up smoking.¹⁴⁶ Nev-

138 *Id.* at 67 (quoting an unnamed executive who worked on Marlboro).

139 *See id.*

140 *See id.* at 93.

141 *See id.* at 97. This effort was directed at capturing the Young Adult Segment or YAS. According to an RJR salesman, "If you got a high school on a block, and at the end of the block you got a Seven-11, that's one YAS outlet. The criteria you would use was simple. The stores were the ones where the kids hang out." *Id.* at 97 (quoting Mike Shaw, a former RJR Salesman, during an interview with Philip Hiltz regarding the Young Adult Segment). Another salesman, Terence Sullivan, related a chilling exchange: "Someone asked exactly who the young people were that were being targeted, junior high school kids, or even younger? The reply came back 'They got lips? We want 'em.'" *Id.* at 98 (quoting Terence Sullivan, an RJR Sales Representative, describing a regional sales meeting during an interview with Philip Hiltz).

142 *See* Class Action Complaint and Demand for Jury Trial at 63, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 1:97CV0625).

143 *See* HILTZ, *supra* note 28, at 96.

144 *See id.* at 97; *see also* Class Action Complaint and Demand for Jury Trial at 63, *Tex. Carpenters* (No. 1:97CV0625).

145 Class Action Complaint and Demand for Jury Trial at 64, *Tex. Carpenters* (No. 1:97CV0625).

146 *See id.* at 63.

ertheless, industry documents and testimonies before Congress¹⁴⁷ contradict these claims.

E. Continuing Conspiracy

The pattern evident in the above commentary continued. The medical and scientific communities persisted in researching the health risks of smoking,¹⁴⁸ and the industry continued to launch counter-active marketing ploys to divert attention away from the truth, all the while sitting on the research that was conclusive—that cigarettes are indeed carcinogenic and addictive.¹⁴⁹ By 1964, strong evidence about the nature of cigarettes had accumulated, but the industry stayed on its originally plotted course.¹⁵⁰ This led to countless cover-ups, the closing of research laboratories, as well as increased security at factories, including keeping some areas of the operations secret.¹⁵¹

For decades, smokers unsuccessfully sued the tobacco industry for health problems caused by cigarette smoking.¹⁵² Documents from these cases were not made public. In 1988 Judge H. Lee Sarokin in the New Jersey District Court¹⁵³ read the “tobacco papers.” Although they remained sealed, the judge’s words revealed much about their content. He noted:

A jury might reasonably conclude that the industry’s announcement of proposed independent research into the dangers of smoking and its promise to disclose its findings was nothing but a public relations ploy—a fraud—to deflect the growing evidence against the industry, to encourage smokers to continue and non-smokers to begin,

147 In testifying before Congress, the model who played the “Winston [sic] [Marlboro] Man” explained,

I was clearly told that young people were the market that we were going after [I]t was made clear to us that this image was important because kids like to role play, and we were to provide the attractive role models for them to follow I was told I was a live version of the GI Joe

Id. at 64.

148 See GLANTZ ET AL., *supra* note 28, at 56.

149 See HILTS, *supra* note 28, at 25–39.

150 See *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 427–28 (Tex. 1997) (“[The] industry continues to dispute the health risks of smoking and the addictive nature of cigarettes, before Congress, in the national press, and even at the oral argument before the Court in this case.” (footnotes omitted)).

151 See HILTS, *supra* note 28, at 20.

152 See *id.*

153 See *id.* at 21; *Haines v. Liggett Group*, 140 F.R.D. 681, 684 (D.N.J. 1992), *vacated*, 975 F.2d 81 (3d Cir. 1992).

and to reassure the public that adverse information would be disclosed.¹⁵⁴

In 1994, the levee broke when thousands of pages of internal documents from Brown & Williamson were made public.¹⁵⁵ They were first published, in part, in the *New York Times*.¹⁵⁶ These documents revealed many of the missing pieces about the conduct of the tobacco industry during the time in which the controversy about tobacco use was alive.¹⁵⁷ The availability of this information opened up the possibility of the litigation that followed, most notably the suits by the attorneys general of forty states against the industry.¹⁵⁸ One confidential internal memorandum documenting the tobacco industry's strategy speaks volumes:

For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts—litigation, politics, and public opinion.

While the strategy was brilliantly conceived and executed over the years, helping us win important battles, it is only fair to say that it is not—nor was it ever intended to be—a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of

- creating doubt about the health charge without actually denying it

- advocating the public's right to smoke, without actually urging them to take up the practice

154 *Haines*, 140 F.R.D. at 684.

155 See GLANTZ ET AL., *supra* note 28, at 2. The documents were obtained by a paralegal, Merrell Williams, who copied them before being fired from the company. Brown & Williamson subsequently sued Williams unsuccessfully to enjoin the release of the papers. See *The Brown & Williamson Documents: Where Do We Go From Here?*, 274 JAMA 256, 256 (1995). Many of the documents were marked "confidential" or "attorney work product," which suggested that the authors never expected them to be released outside the corporation, even for legal proceedings. See *id.* These documents demonstrate that the tobacco industry in general, and Brown & Williamson in particular, engaged in public deception for at least thirty years. See *id.* To view these documents in their entirety, see *Tobacco Control Archives*, at <http://www.library.ucsf.edu/tobacco> (last modified Aug. 29, 2000).

156 See Philip J. Hiltz, *Tobacco Company was Silent on Hazards*, N.Y. TIMES, May 7, 1994, at A1.

157 Efforts to have these documents sealed were quashed. Judge Harold H. Greene of the U.S. District Court for the District of Columbia remarked that the attempt to shield the documents from the public was "patently crafted to harass those who would reveal facts concerning [Brown & Williamson's] knowledge of the health hazards inherent in tobacco." *Maddox v. Williams*, 855 F. Supp. 406, 416 (D.D.C. 1994), *aff'd*, 62 F.3d 408 (D.C. Cir. 1995).

158 See generally Givelber, *supra* note 28 (discussing the history of products liability suits against the tobacco industry).

—encouraging objective scientific research as the only way to resolve the question of the health hazard.¹⁵⁹

The tobacco industry continued to take measures to conceal the information it had possessed for decades. As recently as 1998, tobacco representatives appeared before Congress and would only admit that “nicotine is addictive ‘under certain definitions’” and would not concur with the Surgeon General’s or the World Health Organization’s definitions.¹⁶⁰

Testifying under oath before Congress, the C.E.O. of R.J. Reynolds stated, “Smoking is no more addictive than coffee, tea or Twinkies.”¹⁶¹ The C.E.O. of Brown & Williamson testified, “I do not believe that nicotine is addictive”¹⁶² and “nicotine is a very important constituent in the cigarette smoke for taste.”¹⁶³

F. The Result

The tobacco industry’s public relations campaign was one of the most successful in history. In the face of mounds of scientific data, the industry succeeded in keeping a kernel of doubt regarding cigarettes’ effects on health in the minds of the public.¹⁶⁴ Although it took several decades to uncover, as a result of the publication of the industry’s internal documents, the truth is out.¹⁶⁵ Countless individuals sued the industry unsuccessfully;¹⁶⁶ however, recently several states have

159 Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1488 (1999) (quoting Memorandum from Fred Panzer, Vice President of Public Relations, Tobacco Institute, to Horace R. Kornegay, President, Tobacco Institute (May 1, 1972)).

160 Douglas, Letter, *supra* note 59, at 12A.

161 *Regulation of Tobacco Products (Part I): Hearings Concerning Whether the Food and Drug Admin. Has Jurisdiction to Regulate and Therefore Ban Cigarettes Before the House Health & Env’t Subcomm., Energy & Commerce Comm.*, 103d Cong. 579 (1994) (statement of James W. Jobuson, C.E.O., R.J. Reynolds Co.); see also John Freeman, *Standing Up to the Client*, S.C. LAW., Mar./Apr. 1999, at 10.

162 *Regulation of Tobacco Products (Part III): Hearings Before the House Health & Env’t Subcomm., Energy & Commerce Comm.*, 103d Cong. 139 (1994) (statement of Thomas Sandefur, C.E.O., Brown & Williamson).

163 *Id.* at 144.

164 For a discussion of the behavior of consumers with respect to the realities of the dangers of smoking, see Pauline M. Ippolito & Richard A. Ippolito, *Measuring the Value of Life Saving from Consumer Reactions to New Information*, 25 J. PUB. ECON. 53, 62 (1984).

165 For an excellent account of the content of the tobacco industry’s internal documents, see Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 519–66 (1999).

166 For a history of the tobacco litigation starting in the 1950s, see Ingrid L. Dietsch Field, Comment, *No Ifs, Ands, or Butts: Big Tobacco is Fighting for its Life Against*

challenged the balance of the litigation with the force of government and armed with more information about both tobacco and the tobacco industry. These states sued the industry and obtained a settlement of \$246 billion, to be paid over twenty-five years, to reimburse the states for the costs of treating their citizens for tobacco-related illnesses.¹⁶⁷ President Clinton approved FDA regulations, stating "Joe Camel and the Marlboro Man will be out of our children's reach forever."¹⁶⁸ Congress debated, but failed to enact comprehensive legislation. During the Senate debate,¹⁶⁹ the Gregg Amendment was adopted; it denied immunity to the industry in suits by health care payers.¹⁷⁰ Ultimately, the legislation failed to pass.¹⁷¹

Despite the wealth of information now available concerning the tobacco industry's efforts to deceive the public, plaintiffs suing tobacco companies still have to prove that the fraud perpetrated by the industry caused their illnesses. Federal courts of appeals have consistently held that the tobacco industry's fraud did not constitute the

a New Breed of Plaintiffs Armed with Mounting Evidence, 27 U. BALT. L. REV. 99, 100-06 (1997). See also Anna Burdeshaw Fretwell, Note, *Clearing the Air: An Argument for a Federal Cause of Action to Provide an Adequate Remedy for Smokers Injured by Tobacco Companies*, 31 GA. L. REV. 929, 933-64 (1997) (discussing the various causes of action and describing litigation against the tobacco industry).

167 See Marc Lacey, *Tobacco Industry Accused of Fraud in Lawsuit by U.S.*, N.Y. TIMES, Sept. 23, 1999, at A1 (reporting federal racketeering suit by government to recover moneys not included in states' \$246 billion settlement); Henry Weinstein, *Big Tobacco Settles Minnesota Lawsuit for 6.6 Billion*, L.A. TIMES, May 9, 1998, at A1 (reporting last minute settlement in the State of Minnesota's case against Philip Morris); see also John Swartz, *Cigarette Makers Settle Florida Suit for \$11.3 Billion*, WASH. POST, Aug. 26, 1997, at A1 (reporting the terms of the Florida settlement); Sandra Torry and Ceci Connolly, *Tobacco Firms Set to Pay Texas \$14.5 Billion; Deal Would Be Fourth by Industry Since Summer*, WASH. POST, Jan. 16, 1998, at A1 (reporting then-pending Texas settlement as the largest in history).

168 Stephen Barr & Martha M. Hamilton, *Clinton Curtails Tobacco Ads in Bid to Cut Sales*, WASH. POST, Aug. 24, 1996, at A1. But see *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000) (holding that tobacco regulation was beyond the authority of the FDA).

169 See 144 CONG. REC. 2809-11 (daily ed. Mar. 31, 1998) (statements of Senators Domenici, Enzi, Hatch, Dodd, and Lautenberg).

170 See Gregg Amendment, S. CON. RES. 86, 105th Cong., 144 CONG. REC. 2811 (1998) (enacted) (rejecting a cap on damage recovery from the industry).

171 The industry objected to the McCain sponsored bill, because it would have raised the price of cigarettes by \$1.10 per pack. See David E. Rosenbaum, *Senate Drops Tobacco Bill with '98 Revival Unlikely: Clinton Lashes Out at G.O.P.*, N.Y. TIMES, June 18, 1998, at A1. The industry quickly perceived that this would compromise their profits and launched a campaign against it. See *id.* After the bill failed to pass, the industry raised the price of cigarettes by \$0.45 per pack. See Barry Meier, *Cigarette Makers Announce Large Price Rise*, N.Y. TIMES, Nov. 24, 1998, at A20.

proximate cause of plaintiffs' injuries. The circuit courts, however, have engaged in an improper analysis of proximate cause, as Part VI of this Note will show. To appreciate how the circuit courts have misapplied the law of proximate cause, an understanding of the history and current Supreme Court treatment of proximate cause and remoteness is necessary.

IV. HISTORY AND DEVELOPMENT OF PROXIMATE CAUSE

The historical development of liability and causation is useful to cast light on proximate cause. "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond."¹⁷² Holding an actor responsible for the entire logical extension of his conduct is impossible. Jurists must determine, therefore, how to decide when an action is too far removed from its result to find liability. This question has puzzled legal scholars for almost a century.¹⁷³

The term "proximate cause" originated in the nineteenth century.¹⁷⁴ It was the first legal metaphor used to explain objective causation.¹⁷⁵ Nevertheless, the roots of the issue—and its policy justification—run deeper.¹⁷⁶ Lord Bacon is credited with the famous formulation: "*In jure non remota causa, sed proxima spectatur*" ("In law, look to the proximate, not remote cause").¹⁷⁷ This distinction and its

¹⁷² WILLIAM L. PROSSER & ROBERT E. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 41, at 264 (5th ed. 1984).

¹⁷³ "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion." *Id.* at 263; see also LEON GREEN, *RATIONALE OF PROXIMATE CAUSE* 135–36 (1927).

"Cause," although irreducible in its concept, could not escape the ruffles and decorations so generously bestowed: remote, proximate, direct, immediate, adequate, efficient, operative, inducing, moving, active, real, effective, decisive, supervening, primary, original, contributory, ultimate, concurrent, *causa causans*, legal, responsible, dominating, natural, probable, and others. The difficulty now is in getting any one to believe that so simple a creature could have been so extravagantly garbed.

Id.

¹⁷⁴ See Morton J. Horwitz, *The Rise and Early Progressive Critique of Objective Causation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 471, 479 (David Kairys ed., 3d ed. 1998).

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ 7 FRANCIS BACON, *Maxims of the Law*, in *THE WORKS OF FRANCIS BACON* 327, 327 (J. Spedding et al. eds., London, Longman & Co. 1879).

relationship to the law were memorialized in Bacon's *Maxims of the Law*.¹⁷⁸

[T]aken literally, [Bacon's phrase] would mean that only the antecedent which is nearest in time or space is to be regarded as the legal cause, and no other will be held responsible. Whether Bacon really meant anything of the sort is at least doubtful. If he did, the courts have long since ceased to pay attention to him.¹⁷⁹

Bacon's formulation is decidedly at the root of many of the misconceptions about "proximate cause" in tort litigation.¹⁸⁰ The phrase is problematic since it apparently refers only to nearness in time, whereas decisions of whether or not to hold a defendant accountable almost always involve more considerations than physical proximity to the damage.¹⁸¹ The phrase also fails to take into account the reality of the extra elements involved in these determinations. In fact, "[p]roximate cause' . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct."¹⁸² How to classify these other considerations is continually the focal point of the "proximate cause" debate.

In the nineteenth century, the law turned away from subjective, policy-based theories of determining proximate cause.¹⁸³ Legal writers strove to identify a manner in which judges and juries could produce uniform results.¹⁸⁴ "At the conceptual center of all late-nineteenth-century efforts to construct a system of private law free from the dangers of redistribution was the idea of objective causation."¹⁸⁵ The writers sought to legitimize the legal system as a whole by ensuring that a fact-finder could look "objectively" to the cause of an injury and restore the status quo.¹⁸⁶ Nevertheless, the chief policy concern was the proper identification of the defendant.¹⁸⁷ If an "ob-

178 *See id.*

179 PROSSER & KEETON, *supra* note 172, § 42, at 276.

180 According to H.L.A. Hart and Tony Honoré, "Causation in law is less a concept to be analysed than a ghost to be exorcised." H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 3 (2d ed. 1985).

181 Prosser and Keeton view the term "proximate cause" as extremely troublesome. "It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness. For this reason 'legal cause' or perhaps even 'responsible cause' would be a more appropriate term." PROSSER & KEETON, *supra* note 172, § 42, at 273.

182 *Id.* § 41, at 264.

183 *See* Horwitz, *supra* note 174, at 479.

184 *See id.* at 478-79.

185 *Id.* at 478.

186 *Id.* at 479.

187 *See id.*

jective" formula could not be achieved and "[i]f the question of which of several acts caused the plaintiff's injury was open to judicial discretion, . . . private law [could not] stay clear of the dangers of the political uses of law for purposes of redistribution"188 That effort, of course, failed; its story is worth reviewing.

A. *Chains of Causation*

Proponents of the chain of causation theory believed it "necessary to find a single scientific cause and thus a single responsible defendant, for any acknowledgment of multiple causation would open the floodgates of judicial discretion."¹⁸⁹ This theory held that "judges could determine scientifically which acts in a complicated series of events really caused the plaintiff's injury."¹⁹⁰ The scientific chain-of-causation framework proved complicated and unworkable. Writers attacked this system and proposed different solutions.¹⁹¹ Doctrines of intervening and supervening causes, which will be discussed later in this Note,¹⁹² were natural outgrowths of the chain-of-causation theory.¹⁹³ They remain part of the law today.

B. *Moral Culpability*

Notions of moral culpability provide another method to distinguish those defendants who should and those defendants who should not be held accountable. This theory is premised on the belief that moral culpability, when combined with "but for" causation, points to an appropriate sanction.¹⁹⁴ It provides that "in assessing responsibility, the degree of moral blameworthiness may properly be a controlling factor in deciding whether an actor is legally responsible for harm of which his act was a necessary condition."¹⁹⁵ The theory is "inspired by the belief that the obscurities of proximate cause may be avoided if determinations of the extent of liability for wrongdoing which are at present discussed in causal terms are treated as judgments about the social utility or justice of exacting compensation"196 This line of reasoning becomes troubling once it is extended to situations where

188 *Id.*

189 *Id.*

190 *Id.*

191 *See id.* at 490-93.

192 *See infra* text accompanying notes 251-55.

193 *See* Horwitz, *supra* note 174, at 479.

194 *See* HART & HONORÉ, *supra* note 180, at 301.

195 *Id.*

196 *Id.* at 299.

an act is illegal, but not thought to be *per se* morally wrong. Discerning whose notions of moral opprobrium should be taken into consideration presents problems in a pluralistic society.

H.L.A. Hart and Tony Honoré argue that moral culpability theory is “intended not merely to give an account of the actual behavior of courts . . . but to offer rational bases of responsibility.”¹⁹⁷ They therefore criticize moral theory, because

this theory has no plausibility as an account of what lawyers or ordinary men understand by causing harm, nor would it be tolerable as a method for assessing responsibility. In the former role it fails because it allows no place for the use of causal language in determining whether contingencies other than human acts are the cause of harm, and because it distorts the relation of causation to moral blame Because our judgments of moral responsibility are powerfully influenced by causation in a sense . . . the latter also fails as a satisfactory basis for legal responsibility and a substitute for ordinary causal principles.¹⁹⁸

While it is true that notions of morality guide courts' decisions on causation, a principle that articulates these realities is yet to be developed.

C. *Foreseeability*

Some philosophers spoke of “proximate cause” in terms of foreseeability.¹⁹⁹ They believed the “proximate cause” decision should turn on whether the result was, or should have been, foreseeable by the actor.²⁰⁰ This test seems, at first glance, to be a sound guiding principle because holding the actor accountable for consequences that are foreseeable seems fair. Thus, the system would not be subject to the whim or caprice of an individual judge, and defendants would be able to anticipate consistent results. Ironically, the foreseeability theory proved to be more complex than originally foreseen.

The debate began in 1850, by Baron Pollock, who first articulated the idea that foreseeability and degree of the risk of harm should govern the extent of liability in negligence cases. “[N]o defendant should ever be held liable for consequences which no reasonable person would expect to follow from the conduct.”²⁰¹

197 *Id.* at 301.

198 *Id.* at 301–02.

199 *See* Horwitz, *supra* note 174, at 484–87.

200 *See id.*

201 PROSSER & KEETON, *supra* note 172, § 43, at 281.

Nevertheless, others would hold a defendant liable "for consequences brought about by [his] acts, even though they were not reasonably to be anticipated."²⁰² This theory was first seen in an 1870 English case, *Smith v. London & Southwestern Railway Co.*²⁰³ This view on liability is much more expansive than limiting liability to that which a reasonable person might foresee. It provides that defendants owe a duty to others beyond which a reasonable person might think was "foreseeable."²⁰⁴ Judge Andrews expanded upon this formulation in his dissent in *Palsgraf v. Long Island Railroad Co.*²⁰⁵ and argued that a far-reaching duty was owed by all people to one another.²⁰⁶ This view has been largely dismissed.

Hart and Honoré rejected the foreseeability test as a substitution for causation. "[T]he principal form of the claim that policy dominates this branch of the law consists in an appeal to foreseeability or risk as the exclusive or at least the main test."²⁰⁷ They explained, however, that "[a] reading of many cases on 'proximate cause' or 'remoteness of damage' leaves on the mind a strong impression of the number and variety of references to foreseeability to be found in [policy] judgments, even when they professedly treat of causal problems."²⁰⁸

Francis Wharton also rejected a foreseeability standard and instead placed emphasis on divorcing legal and scientific causation. He offered a formulation that held: "If the consequence flows from any particular negligence according to ordinary natural sequence, without the intervention of any independent human agency, then such consequence, whether foreseen as probable or unforeseen, is imputable to the negligence."²⁰⁹ This formulation is commonly thought to be the "orthodox view of objective causation that would continue to dominate late-nineteenth-century legal thought."²¹⁰

D. *The Backlash*

The attempt to fashion a set of rules that would govern proximate cause determinations was, Hart and Honoré argued, misguided.

202 *Id.* § 43, at 290.

203 5 L.R.-C.P. 98 (1870).

204 *See id.* at 679–80.

205 162 N.E. 99 (N.Y. 1928).

206 *See id.* at 103.

207 HART & HONORÉ, *supra* note 180, at 254.

208 *Id.*

209 HORWITZ, *supra* note 174, at 484 (quoting F. WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE § 138 (2d ed. 1878)).

210 *Id.* at 484–85.

Efforts to lay down, even for separate branches of the law, or even for a specific jurisdiction, general rules defining causal connection, or "proximate cause," or determining when harm is too "remote" to be attributed to antecedent wrongdoing as its consequence, are, on some variants of this view, all misguided. They are useless because they are inevitably couched in language so vague as to permit courts to attach any meaning they wish to them. Worse they disguise as a finding of fact, albeit a peculiarly recondite kind of fact, the often creative function which the courts discharge when they determine in concrete cases the proper limits of scope of general rules. All such rules are a deception and a cheat, encouraging a superstition and blinding us to the nature of an important judicial duty.²¹¹

The chief architect of the preferred policy-based formulation was Nicholas St. John Green. Green explained, "Where a court says the damage is remote, it does not follow naturally, it is not proximate, all they mean and can mean is that they think that in all circumstances the plaintiff *should* not recover."²¹² Green's position was based on the idea that, because "judges and jurists inevitably imported moral ideas into their determinations of legal causation, they were making discretionary policy determinations under the guise of doing science."²¹³ He believed that identifying a single "proximate cause" was practically impossible.²¹⁴ Instead, he took a more philosophical stance saying,

211 HART & HONORÉ, *supra* note 180, at 4.

212 *Id.* at 5 (quoting Nicholas St. John Green from 1874).

213 Horvitz, *supra* note 174, at 481.

214 Green believed that objective causation was possible in the physical sciences, but was not a viable paradigm for a legal system. *See id.* at 480. Famously, Green wrote:

There is but one view of causation which can be of practical service. To every event there are certain antecedents, never a single antecedent, but always a set of antecedents, which being given the effect is sure to follow, unless some new thing intervenes to frustrate such result. It is not any one of this set of antecedents taken by itself which is the cause. No one by itself would produce the effect. The true cause is the whole set of antecedents, taken together But when a cause is to be investigated for any practical purpose, the antecedent which is within the scope of that purpose is singled out and called the cause, to the neglect of the antecedents which are of no importance to the matter in hand. These last antecedents, if mentioned at all in the inquiry, are called conditions. Suppose a man to have been drowned. What was the cause of his death? There must have been a man, and there must have been water, and there must have been a coming together of the man and the water under certain circumstances. The fact of there being a man, and the fact of there being water, and each and every attending circumstance, without the presence of which circumstance the death would not have taken place, together with the fact that there was nothing intervening to prevent, constitute the true cause.

"To every event there are certain antecedents It is not any one of this set of antecedents taken by itself which is the cause. No one by itself would produce the effect. The true cause is the whole set of antecedents taken together."²¹⁵ Green also pointed out the reality that the Supreme Court's current analysis admits of today—that proximate cause is truly a policy-based notion. He believed courts manipulated their usage of the terms "proximate" and "remote" to accomplish purposes other than determining causation in a strict sense.²¹⁶ He explained that having one rule for determining causation was inadvisable because, when courts decide causation issues, the "answer" "often var[ies] in proportion to the misconduct, recklessness, or wantonness of the defendant."²¹⁷ Hart and Honoré echoed this idea.

The causal language used by the courts in determining such issues, unsatisfactory as it often is, has seldom been a mere disguise for judgments of policy or expediency or judicial intuitions of what is just; though since the causal notions latent in ordinary thought, like all other fundamental concepts, have aspects which are vague and indeterminate, decisions involving them outside the central area of simple cases have been powerfully and properly influenced by judicial conceptions of policy or justice.²¹⁸

What one of the various circumstances necessary to the death we shall single out as the cause, to the neglect of the other circumstances, depends upon the question for what purpose we are investigating the death. For each different purpose with which we investigate we shall find a different circumstance, which we shall then intelligibly and properly call the cause. The man may have committed suicide; we say he himself was the cause of his death. He may have been pushed into the water by another; we say that other person was the cause. The drowned man may have been blind, and have fallen in while his attendant was wrongfully absent; we say the negligence of his attendant was the cause. Suppose him to have been drowned at a ford which was unexpectedly swollen by rain; we may properly say that the height of the water was the cause of his death. A medical man may say that the cause of his death was suffocation by water entering the lungs. A comparative anatomist may say that the cause of his death was the fact that he had lungs instead of gills like a fish. The illustration might be carried to an indefinite extent. From every point of view from which we look at the facts, a new cause appears. In as many different ways as we view an effect, so many different causes, as the word is generally used, can we find for it.

Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201, 211–12 (1870).

215 Green, *supra* note 214, at 211.

216 See Horwitz, *supra* note 174, at 481.

217 Green, *supra* note 214, at 215

218 HART & HONORÉ, *supra* note 180, at 5.

Hart's and Honoré's famous treatise on causation explains how troublesome it is for courts to refer to "proximate cause" as a decision based upon objective causation principles rather than a policy-driven inquiry.

[W]e must take care not to be deceived, by the language used, as to the character of these issues. The terminology of legal rules often tempts courts to consider these issues in the form of questions whether the harm was the "consequence" or "effect" or "caused by" the wrongful act, or whether it was "too remote" or "insufficiently proximate," or whether some third party's action, or some extraordinary natural event was a "superseding cause." These questions *look* like questions of fact to be answered by reference to general principles or definitions telling us in what the relationship of cause and effect consists, or what a superseding cause is. All this, according to the newer doctrine, is illusion: these questions are never questions of fact. They are to be answered, not by inquiring whether the facts of a particular case fall under some general definition of causal connection, but only by inquiring what limit of liability of responsibility is required by "the scope," "the purpose," or "the policy" of specific legal rules involved in the particular case. Is it consonant with the character of the relevant rules to extend the wrongdoer's liability to harm occurring in the way it did?²¹⁹

The debate in the legal community begun in 1850 reached a pinnacle in 1928 in the landmark decision of *Palsgraf*.²²⁰ The majority in *Palsgraf* framed the issue in terms of duty, rather than by reference to causation.²²¹ Justice Cardozo's opinion stated: "The conduct of the [railroad] guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively [sic] to her it was not negligence at all."²²²

Though Judge Andrews's dissenting view in *Palsgraf*—that a far-reaching duty was owed by all people to one another—has been largely dismissed,²²³ since the 1920s and *Palsgraf*, questions of proximate cause are often answered, not through a duty analysis, but by using Judge Andrews's famous formulation from the *Palsgraf* dissent.

219 *Id.* at 4.

220 *Palsgraf* involved a woman who was injured by a falling scale when an unexpected explosion caused a disruption on the railroad platform. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928). The events were somehow set in motion when a railroad conductor helped a passenger onto a train, dislodging a package the passenger held, which contained fireworks. *See id.*

221 *See id.* at 100–01.

222 *Id.* at 99.

223 *See supra* note 206 and accompanying text.

What we do mean by the word "proximate" is that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics It is all a question of expediency. There are no fixed rules to govern our judgment There is in truth little to guide us other than common sense.²²⁴

An overarching summary of proximate cause was possibly best described by William Prosser, who said that proximate cause is simply "ideas of what justice demands, or of what is administratively possible and convenient."²²⁵

Palsgraf is not the only decision for which the New York Court of Appeals is famous. In 1866 it broke with tradition and handed down a decision that was widely seen as a "radical rejection of the idea of objective causation."²²⁶ *Ryan v. New York Central Railroad* involved assigning liability for a fire which destroyed several houses.²²⁷ The court limited liability to one homeowner, because only that house was destroyed as a "proximate" result of the railroad's negligence.²²⁸ All the other homes were considered to be merely "remotely" affected.²²⁹ The court defended its opinion, not formally or analytically, but on policy grounds by arguing that another result would "create a liability which would be the destruction of all civilized society."²³⁰ The decision was not a popular one; it received a great deal of criticism both in America and in England.²³¹ "The conception of objective causation was too central to the legitimation of the entire system of private law for it to be abandoned even in the interest of erecting a barrier to entrepreneurial liability."²³²

E. Proximate Cause—Injuries Due to Defendant's Acts to a Third Party

Generally, judges are reluctant to allow tort recovery when the injury flowed from an injury to a third party. An early effort to limit

²²⁴ *Palsgraf*, 162 N.E. at 103–04 (Andrews, J., dissenting).

²²⁵ PROSSER & KEETON, *supra* note 172, § 41, at 264; *see also* *Khurana v. Innovative Health Care Sys. Inc.*, 130 F.3d 143, 148 n.5, 149 (5th Cir. 1997) (stating that there is no universal formulation for determining proximate cause), *vacated as moot*, *Teel v. Khurana*, 525 U.S. 979 (1998).

²²⁶ *Horwitz*, *supra* note 174, at 485.

²²⁷ 35 N.Y. 210, 210 (1866).

²²⁸ *Id.* at 211–13.

²²⁹ *Id.* at 213.

²³⁰ *Id.* at 217.

²³¹ *See* *Horwitz*, *supra* note 174, at 485.

²³² *Id.* at 485–86. Likewise, the concerns about limiting enterprise liability are particularly evident today, especially in the case of the tobacco industry law suits.

liability by a formal or analytical rule of "remoteness" is evident in the seminal case of *Anthony v. Slaid*,²³³ in which the Massachusetts Supreme Judicial Court, by Chief Justice Shaw, held that a person injured only by virtue of an injury to a third party could not collect in tort.²³⁴ Nevertheless, an important exception to *Slaid* developed in subsequent Massachusetts law, holding that *Slaid* did not apply to injuries where "allegation[s] of malice on the part of the defendant toward the plaintiff or anybody" or "allegation[s] of *deliberate* design by the defendant to accomplish a definite end regardless of consequences to others" were made.²³⁵ The traditional rule was aptly articulated in J. Sutherland's 1893 treatise. "Where the plaintiff sustains injury from the defendant's conduct to a third person it is too remote, . . . unless the wrongful act is wilful for that purpose."²³⁶ Prosser echoes that sentiment, explaining that "the scope of liability should ordinarily extend to but not beyond all 'direct' (or 'directly traceable') consequences *and those indirect consequences that are foreseeable*."²³⁷ Sutherland's 1916 treatise elaborated on "wilful for that purpose."²³⁸ In that edition, Sutherland used an illustration in which the defendant induced a ship captain to move his ship. The captain, believing the defendant to be the harbor master, followed the instruction. The plaintiff, the wharf owner who suffered a loss of rent, was allowed to recover "if the defendant acted with a malicious and fraudulent design to injure the plaintiff."²³⁹

Issues of limiting responsibility continue to perplex modern scholars, but the basic framework developed by the nineteenth-cen-

233 52 Mass. (11 Met.) 290 (1846). *Slaid* dealt with an assault of a pauper by the defendant's wife, after which plaintiff paid the expenses. See *id.* at 291. The Court held that these expenses were not recoverable. See *id.*

234 See *id.*

235 *Chelsea Moving & Trucking Co. v. Ross Towboat Co.*, 182 N.E. 477, 479 (Mass. 1932) (emphasis added); see also *Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 822 n.5 (1st Cir. 1948). *Keene Lumber Co. v. Leventhal* held that *Slaid* is inapplicable where the defendant is alleged to have intended the pecuniary loss of a third party and he is aware of the contractual relationship between that third party and the directly injured party. See *id.* *Chelsea Moving & Trucking Co. v. Ross Towboat Co.* made clear that whether "the damage is too remote and indirect" depends on if it is "the natural and probable consequences of the . . . tort." *Chelsea Moving & Trucking Co.*, 182 N.E. at 479.

236 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 68 (2d ed. 1893).

237 PROSSER & KEETON, *supra* note 172, § 42, at 273 (emphasis added).

238 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 128 (John R. Berryman ed., 4th ed. 1916).

239 *Id.* (citing *Gregory v. Brooks*, 35 Conn. 437, 446 (1868)).

tury philosophers continues to operate as the foundation for "proximate cause" jurisprudence.

Legal scholars generally recognize the ability of fact finders to determine whether causation in fact is present,²⁴⁰ aside from decisions of liability. Causation in fact is often termed "but for" causation or "substantial factor" causation.²⁴¹ It focuses on whether the plaintiff's injury flowed from the actions of the defendant.²⁴² It does not answer the question whether the defendant should be held accountable. Nevertheless, determining causation in fact is quite complex.

Some comparison between factual and contrary-to-fact conditions is implicit in the classic formulation that a cause is a necessary antecedent, and in the explication that in a very real and practical sense, the term "cause in fact" embraces all things which have so far contributed to the result that without them it would not have occurred.²⁴³

Usually, causation in fact is discussed in terms of "but for" or "substantial part." Prosser and Robert Keeton explain that an act or omission is "not regarded as a cause of an event if the particular event would have occurred without it."²⁴⁴ The "but for" rule, however, is not necessarily a limiting agent, because

once events are set in motion, there is, in terms of causation alone, no place to stop. The event without millions of causes is simply inconceivable; and the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those which are to be held legally responsible.²⁴⁵

As a limiting factor, the "proximate cause" determination picks up where causation in fact leaves off.

"Substantial factor" tests are employed in situations where several causes combine to create a particular result.²⁴⁶ Historically, the law

240 This concept refers to whether what did occur in the world would have occurred if other counter-factual elements had been present. See PROSSER & KEETON, *supra* note 172, § 41, at 265.

241 *Id.* at 263-66.

242 *See id.*

243 *Id.* at 265.

244 *Id.* at 266.

245 *Id.*

246 See RESTATEMENT (SECOND) OF TORTS § 432 (1965).

Negligent Conduct as Necessary Antecedent of Harm: (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent. (2) If two forces are actively operating,

has been unwilling to absolve one actor from liability simply because of the presence of another actor.²⁴⁷ These questions are typically left to juries.²⁴⁸ The causation in fact inquiry is preliminary to a "proximate cause" determination, but notions of fairness and justice come into play even at this primary stage. Courts look to discover beyond "but for," whether the cause in question was a "significant" or "important" part of the consequence.²⁴⁹ Causation in fact, as a preliminary inquiry, is often confused with a final proximate cause determination when in reality the two should, according to Prosser and Keeton, be kept separate and distinct. "Unlike the fact of causation, with which it is often hopelessly confused, [the proximate cause decision] is primarily a problem of law."²⁵⁰

Understanding the doctrine of foreseeability is particularly important with respect to intervening causes. An intervening cause is "one which comes into active operation in producing the result *after* the negligence of the defendant."²⁵¹ When a "secondary" cause contributes to a result, courts must ask whether that second cause can be said to have superseded the first in terms of substantiality or directness.²⁵² Prosser and Keeton succinctly identify the crux of the issue.

one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about the harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

Id.

247 See PROSSER & KEETON, *supra* note 172, § 41, at 266-68.

248 See RESTATEMENT (SECOND) OF TORTS § 434 (1965).

Functions of Court and Jury: (1) It is the function of the court to determine (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff; (b) whether the harm to plaintiff is capable of apportionment among two or more causes; and (c) the questions of causation and apportionment, in any case in which the jury may not reasonably differ. (2) It is the function of the jury to determine, in any case in which it may reasonably differ on the issue, (a) whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff, and (b) the apportionment of the harm to two or more causes.

Id.

249 PROSSER & KEETON, *supra* note 172, § 42, at 273.

250 *Id.*

251 *Id.* § 44, at 301.

252 See RESTATEMENT (SECOND) OF TORTS § 442B (1965).

Intervening Force Causing Same Harm as That Risked by Actor's Conduct: Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally

On its face, the problem is one of whether the defendant is to be held liable for an injury to which the defendant has in fact made a substantial contribution, when it is brought about by a later cause of independent origin, for which the defendant is not responsible. In its essence, however, it becomes again a question of the extent of the defendant's original obligation; and once more the problem is not primarily one of causation at all, since it does not arise until cause in fact is established. It is rather one of the policy as to imposing legal responsibility.²⁵³

Traditionally, notions of limiting liability to risk are employed in cases where intervening causes are identified in addition to a defendant's conduct. Usually, the law will require a defendant to anticipate a normal flow of events following his actions, but will not expect a defendant to anticipate a consequence that is not reasonably connected.²⁵⁴ Further, a defendant will not usually be held liable unless his conduct "created or increased an unreasonable risk of harm through its intervention."²⁵⁵

V. RICO AND ANTITRUST APPROACHES TO PROXIMATE CAUSE

The challenges presented to common law judges in implementing a system of causation that would limit liability in a reasonable manner are echoed in the difficulties judges today have in applying RICO²⁵⁶ and the Clayton Act.²⁵⁷ An overview of the development of antitrust proximate cause principles is, therefore, crucial to an understanding of proximate cause theory under RICO.

caused by a third person and is not within the scope of the risk created by the actor's conduct.

Id.

253 PROSSER & KEETON, *supra* note 172, § 44, at 301.

254 *See id.* at 303-06.

255 *Id.* at 305.

256 18 U.S.C. §§ 1961-68 (1994); *see* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983) ("It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case."); *see also* Blue Shield of Va. v. McCready, 457 U.S. 465, 477 n.13 (1982) (stating that "the traditional principle of proximate cause suggests the use of words such as 'remote,' 'tenuous,' 'fortuitous,' 'incidental,' or 'consequential' to describe those injuries that will find no remedy at law").

257 Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 & 29 U.S.C.).

A. *Antitrust*

Section four of the Clayton Act reads, in part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.²⁵⁸

This section of the Clayton Act was itself taken from the language of section seven of the Sherman Act,²⁵⁹ which was designed to create an "effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets."²⁶⁰ The legislative history of the Sherman Act indicates that common law principles were to be applied in construing the Act.²⁶¹ Senator Sherman explained that the bill "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."²⁶² Courts, therefore, used proximate cause principles to limit claims for relief under the Sherman Act.²⁶³ They used similar principles when the Clayton Act was enacted.²⁶⁴ Instead of reading the statute literally, judges looked to questions of foreseeability and directness of injury to inform their decisions.²⁶⁵ The lower federal courts were "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."²⁶⁶ The Supreme Court in *Blue Shield of Virginia v. McCready*,²⁶⁷ commented:

An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation

258 *Id.* § 15(a).

259 *See Associated Gen. Contractors*, 459 U.S. at 530 (citing Sherman Act, ch. 649, § 7, 26 Stat. 210 (1890) (repealed 1955)).

260 *Id.*

261 *Id.* at 531.

262 21 CONG. REC. 2456 (1890) (Statement of Sen. Sherman).

263 *See Associated Gen. Contractors*, 459 U.S. at 533-34.

264 *See id.* at 534-35.

265 *See id.* at 532.

266 *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 263 n.14 (1972).

267 457 U.S. 465 (1982).

to maintain an action to recover threefold for the injury to his business or property.²⁶⁸

B. Associated General Contractors

Prior to 1983, antitrust jurisprudence reflected a tendency on the part of lower courts to apply labels to resolve issues of proximate cause and their bearing on plaintiffs' standing.²⁶⁹ While some decisions might be termed "correct," a lack of consistency resulted. The Supreme Court granted *certiorari* in *Associated General Contractors, Inc. v. California State Council of Carpenters (AGC)* to "synthesiz[e] its prior decisions, and outline a multi-factor inquiry to determine standing questions."²⁷⁰ The Supreme Court has expressly eschewed a black letter rule for determining standing in antitrust cases. The Court referred to "previously decided cases [that] identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances."²⁷¹ It explained, "Some courts have focused on the directness of the injury As a number of commentators have observed, these labels may lead to contradictory and inconsistent results In our view, courts should analyze each situation in light of the factors set forth in the text *infra*."²⁷² The Court then discussed several factors that would inform its decision whether damages should be awarded as a result of antitrust violations.

The factors outlined in *AGC* were (1) specific intent, (2) a causal connection between the alleged antitrust violation and the alleged injury, (3) antitrust injury itself, (4) the relative directness or indirectness of the asserted injury, (5) issues surrounding damage apportionment, (6) speculativeness of damages, as well as (7) the

²⁶⁸ *Id.* at 476-77 (citation omitted).

²⁶⁹ These labels included "directness," "target," or "zone of interest." See, e.g., *Associated Gen. Contractors*, 459 U.S. at 537 n.33. But see *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937) ("[L]abels . . . are subject to the dangers that lurk in metaphors . . . and must be watched . . . lest they put us off our guard."); Randolph S. Sherman, *Sherman Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. REV. 374, 407 (1976) ("[I]t is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case.").

²⁷⁰ *Associated Gen. Contractors*, 459 U.S. at 521. *AGC* arose out of a collective bargaining dispute in which the plaintiff union alleged violation of the antitrust laws by the defendant association with respect to relationships with non-union organizations. See *id.* at 522-23. The violation allegedly resulted in a restraint of trade for the unions. See *id.* at 527. The Supreme Court reversed the decision of the Ninth Circuit on the grounds of an insufficient complaint. See *id.* at 545-46.

²⁷¹ *Id.* at 537.

²⁷² *Id.* at 536 n.33.

presence of less remote claimants to present the claim.²⁷³ The approach of *AGC* specifically rejected the formal or analytical approach of the nineteenth century; it substituted a case-by-case factor approach for any “black letter” rule.

It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing [T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.²⁷⁴

Specific intent of the defendant is relevant to determining whether a violation has occurred, but will not automatically operate to place the claim within the ambit of the Clayton Act.²⁷⁵ The Court made it express that an injury technically falling within the framework of the statute might still not be actionable. “[I]n *McCready*, we specifically held: ‘The availability of the [section four] remedy to some person who claims its benefit is not a question of the specific intent of the conspirators.’”²⁷⁶ The Court remarked that “an allegation of improper motive, although it may support a plaintiff’s damages claim under [section four], is not a panacea that will enable any complaint to withstand a motion to dismiss.”²⁷⁷ To that end, the Court departed from the rule that had been developing since *Slaid*²⁷⁸ which created and recognized a “willful” exception to the remoteness rule.

The second factor was a causal connection that required a factual link between the “wrong” and the injury. Without “but for” or “substantial factor” relation, the claim would fail.

The third factor the Court identified was the nature of the alleged injury. It looked at the nature of the alleged injury and compared it to the types of injury the antitrust provision had been enacted to redress.²⁷⁹ Under the Clayton Act, pleading the correct type of injury is central to recovery—if an injury is not within the scope of Congress’s intent in drafting the law, then the policies reflected by the

273 *See id.* at 537–45.

274 *Id.* at 536–37 (footnote omitted).

275 *See id.* at 537 n.35.

276 *Id.* at 537 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1982)). “It is well settled that a defendant’s specific intent may sometimes be relevant to the question whether a violation of law has been alleged.” *Id.* at 537 n.35.

277 *Id.* at 537.

278 52 Mass. (11 Met.) 290 (1846).

279 *See Associated Gen. Contractors*, 459 U.S. at 538.

statute will not be effectuated. The Sherman Act was "enacted to assure customers the benefits of price competition."²⁸⁰

The fourth factor addressed by the Court was the relative directness or indirectness of the alleged injury. The Court analyzed the chain of causation between the injury and the alleged restraint of trade.²⁸¹ Practical considerations fueled the concern about indirectly injured plaintiffs. Remote injuries present problems concerning allocation of judicial resources. The Court explained that limiting standing would keep "the scope of complex antitrust trials within judicially manageable limits."²⁸² The Court's primary focus in *AGC*, however, was to determine "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" and to concentrate the recovery in them rather than to dissipate it among competing claims at the same time, to prevent leaving "a significant antitrust violation undetected or unremedied."²⁸³

Related to the general consideration of competing claims between direct and indirectly injured claimants were the dangers of double recovery and the problems of apportioning multi-layered damages.²⁸⁴ In the antitrust context, in particular, injuries to several entities along a distribution chain can muddy the waters, in terms of damage awards, because courts have difficulty identifying the extent to which each entity was in fact injured and the extent to which they passed on their losses.²⁸⁵

Remoteness, too, raised the specter of independent factors that may have affected the injury to the degree that the damage claim would be "highly speculative."²⁸⁶ Speculativeness is a concern implicated by the indirectness of an injury, because "any attempt to ascertain damages . . . 'would often require additional long and complicated proceedings involving massive evidence and complicated theories.'"²⁸⁷

280 *Id.*

281 *See id.* at 540.

282 *Id.* at 543.

283 *Id.* at 542; *see, e.g., Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 889 (10th Cir. 1997) (holding that the *Illinois Brick* rule meant that the court "selects the better plaintiff between two possible types of plaintiffs").

284 *See Associated Gen. Contractors*, 459 U.S. at 543-44.

285 *See id.* at 544.

286 *Id.* at 542.

287 *Id.* at 544 (quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968)).

The Court stopped short of holding that an indirect party could *never* sue under the Clayton Act. It limited its analysis to the case at hand and explained that “[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.”²⁸⁸ The Court surmised that “if there is substance to the [indirect] claim, it is difficult to understand why . . . direct victims of the conspiracy have not asserted any claim in their own right.”²⁸⁹ A crucial element of the decision, therefore, was that the Court’s denial of standing to the indirect party did not leave the injury unredressed. Instead, it identified another, better-suited party to bring the claim, who could be a private enforcer of the antitrust provision.

C. RICO—*Holmes v. Securities Investor Protection Corp.*

In *Holmes v. Securities Investor Protection Corp.*,²⁹⁰ the Supreme Court took up the proximate cause determination in the context of a RICO complaint.²⁹¹ The Supreme Court’s careful analysis of injury and causation in *AGC* provided the background to RICO’s treble-damage provisions. The similarity of approach in determining proximate cause between the Supreme Court’s framework for antitrust in *AGC* and for RICO in *Holmes* is hardly accidental. The factors itemized in *AGC* are similar, but not identical, to the factors set out in *Holmes*. Nevertheless, the analytical framework is the same. One distinction is particularly notable. “In *AGC*, ‘directness’ was an independent factor, at best, until the summary paragraph of *AGC*, where it was subsumed in ‘speculation.’”²⁹² The Court in *Holmes*, however, did not treat di-

288 *Id.* at 542.

289 *Id.* at 541 n.47.

290 503 U.S. 258 (1992). *Holmes* involved a securities fraud action in which a non-profit securities protection company sought to protect the customers of one of its members, alleging, among other claims, RICO violations. *See id.* at 263. The Court held that the security protection company did not have standing to sue under RICO. *See id.* at 276.

291 RICO, unlike its antitrust parent, does not require a “racketeering-type” injury to be alleged. “This rejection clearly relaxes the RICO proximate cause test from that applied in antitrust, by focusing on more direct cause and effect relationships than the necessarily more attenuated ones implied by the amorphous concepts of ‘anti-competitive’ injury and violation.” *Brandenburg v. Siedel*, 859 F.2d 1179, 1189 n.11 (4th Cir. 1988).

292 G. Robert Blakey, *The 3rd Circuit: Thoughtful, but Muddled*, *Civ. RICO REP.*, July 10, 2000, at 3, 4.

rectness independently, rather, it referred to directness as a conclusion.²⁹³

The *Holmes* Court synthesized the seven policy factors of *AGC* into three policy factors in *RICO*: (1) whether the remoteness of the injury would make it relatively “more difficult . . . to ascertain the amount of a plaintiff’s damages attributable to the violation, as distinct from other, independent factors,”²⁹⁴ (2) whether “recognizing the claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries,”²⁹⁵ and (3) whether “directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.”²⁹⁶ Because *RICO* does not have an analogue to the antitrust requirement of “antitrust injury,” the *Holmes* Court did not, of course, impose an antitrust injury requirement on *RICO*. As in *AGC*, the *Holmes* Court specifically eschewed any analytical formula:

As we said in *Associated General Contractors*, “the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.” Thus, our use of the term “direct” should merely be understood as a reference to the proximate cause enquiry that is informed by the concerns set out in the text. We do not necessarily use . . . [direct injury] in the same sense as courts before us have and intimate no opinion on results they reached.²⁹⁷

The concern with difficulty of proof is motivated by an underlying desire to have the best plaintiff bring suit. This judgment is relative. Wholly speculative damages are, of course, never recoverable.²⁹⁸ The *Holmes* remoteness approach is not concerned with speculative damages. Instead, it asks whether the indirectness of injury will make the determination of damages *more* difficult than it would be with another plaintiff. The plaintiff with the most direct injury will most

293 See G. Robert Blakey, *Federal Circuit Courts Wrong as a Matter of Law in Taft-Hartley Fund Litigation with Big Tobacco*, CIV. RICO REP., July 10, 2000, at 4.

294 *Holmes*, 503 U.S. at 269.

295 *Id.*

296 *Id.* at 269–70.

297 *Id.* at 272 n.20 (citations omitted).

298 See, e.g., *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 123–25 (1969); *Anderson v. Kutak, Rock & Campbell (In re Taxable Mun. Bond Sec. Litig.)*, 51 F.3d 518, 523 (5th Cir. 1995) (stating that “speculative damages are not compensable under *RICO*”); accord *Gen. Envtl. Sci. Corp. v. Horsfall*, 800 F. Supp. 1497, 1504 (N.D. Ohio 1992), *aff’d in part and vacated in part*, 25 F.3d 1048 (6th Cir. 1994).

likely have the simplest case to prove. “[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff’s damages attributable to the violation, as distinct from other, independent factors.”²⁹⁹ Recognizing extremely remote claims would needlessly complicate the process of awarding damages. On the other hand, non-recognition of extremely remote claims would concentrate recovery in the hands of the most direct claimants.

The second concern addressed by the *Holmes* Court was the possibility of double recovery of damages where more than one claimant is recognized. Identifying the best plaintiff motivates this factor, too. If every party injured in fact were permitted to sue, an apportionment of damages would be nearly impossible. This factor of the test echoes some of the Court’s concerns from the first factor. For instance, the fear of a system becoming overwhelmed with a great number of plaintiffs, some with injuries that follow only remotely from racketeering activity, informs the remoteness requirement.

The overarching goal of *Holmes*, as in *AGC*, was to make certain that the best situated plaintiff brought the case.³⁰⁰ The final policy factor outlined in *Holmes* expressly identifies the concern about multiple plaintiffs. The Court found that the best way to guard against the potential for multiple claims was to suggest that the trial court inquire into whether a more directly injured party was present who should bring the claim. The inquiry to determine the best plaintiff should not be a method of precluding deserved recovery. It should merely be an attempt to find the best plaintiff. It asks whether “the general interest in deterring injurious conduct”³⁰¹ will be better served by more directly injured victims³⁰² who could “generally be counted on to vindicate the law as private attorneys general.”³⁰³ The ultimate policy driving this factor, as in the other two, is the desire to have RICO enforced in the most effective manner.

VI. PROXIMATE CAUSE ANALYSIS IN TOBACCO LITIGATION

Applying the standards enunciated by today’s courts, it is difficult to imagine a set of circumstances that would militate more strongly in favor of a finding of proximate cause and liability than the present tobacco litigation. If the allegations are to be believed, the defend-

299 *Holmes*, 503 U.S. at 269.

300 *See id.*; *see also* *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983).

301 *Holmes*, 503 U.S. at 269.

302 *See id.*

303 *Id.* at 270.

ants in these suits are responsible for one of the most colossal and reproachful frauds in the history of American society.³⁰⁴

A. *The Allegations, the Funds, and the Defense*

In the Philip Morris litigation, Taft Hartley Funds (Funds) sought to recover the millions of dollars they expended to treat the smoking beneficiaries of their plans.³⁰⁵ The Funds alleged that costs were incurred as a result of the fraud perpetrated by the industry in relation to the health risks of cigarettes.³⁰⁶ The alleged fraud related to the conspiracy to both suppress safer cigarettes and deceive the public about the true nature of nicotine and tobacco.³⁰⁷ The Funds also alleged that the defendants' conduct "deliberate[ly] target[ed] health-care payors, such as the [Funds], with misinformation and disinformation regarding the nature of tobacco products."³⁰⁸ Had the Funds known this information, they could have "reduced their medical costs by aggressively discouraging smoking by health plan participants; implementing smoking cessation programs sooner (like nicotine patches, gum, or inhalers); adjusting deductibles, co-payments, or coverage for health plans; or otherwise taken steps to design or operate health plans in a way that would have lowered smoking-related expenses."³⁰⁹ The Funds sought to recover under both the antitrust laws and RICO.³¹⁰

304 See *Blue Cross & Blue Shield, Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 584 (E.D.N.Y. 1999); *supra* note 3.

305 See Brief for Appellants at 12–14, *Tex. Carpenters Health Benefit Fund v. Philip Morris*, 199 F.3d 788 (5th Cir. 2000) (No. 98–41232).

306 See *id.* at 16–17.

307 See *id.* at 15–16.

308 *Id.* at 3–4.

309 Petition for Writ of Certiorari at 9, *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (No. 98–1426). The Fund estimated that

approximately 10% of their total health-care costs have been incurred as a result of tobacco-related illnesses, based primarily on a damages model using widely accepted government and scientific statistics concerning smoking prevalence and risk of disease. The amount of those costs that would have been avoided but for defendants' misconduct constitutes damages. In addition, the Trusts' use of their assets to pay for treating tobacco-related illnesses meant that those assets were not available for other health-related purposes, which would have led to even greater savings by the Trusts.

Brief for Appellants at 11, *Steamfitters Local Union No. 420* (No. 98–1426).

310 See *infra* Part VI.B.1.

Over thirty million Americans participate in health care systems managed by the Funds.³¹¹ These trust funds were established under and are governed by federal law.³¹² They are not themselves insurance companies that pool risk and seek to make a profit; rather, they are non-profit, existing only for the benefit of their beneficiaries. They provide healthcare and other similar benefits to those workers who are a party to collective bargaining agreements.³¹³ Both labor and management administer the funds,³¹⁴ which are governed by a board of trustees with representatives from the worker's union and the employees.³¹⁵ These trustees are fiduciaries and are monitored under the strict guidelines of the Employee Retirement Income Security Act of 1974 (ERISA),³¹⁶ which require them to administer the Funds for the sole benefit of the workers and their dependents.³¹⁷ Any money recovered by the Funds could not be claimed by the smoker-workers themselves.³¹⁸ The trusts are funded by employer contributions that stem from collective bargaining agreements³¹⁹ and play a crucial role in the employment-centered healthcare system in America. The agreement sets the rate of contribution, and it is often based upon a dollars-per-hour-worked rate.³²⁰ The amount of contribution will vary with the amount of work that is covered by the agreement,³²¹ and any changes must be made by the parties to the agreement.³²² Because the Funds pool the money collectively, each

311 See Brief for Appellants at 10, *Steamfitters Local Union No. 420* (No. 98-1426). "Most of these people would lack health care coverage and be dependant upon government programs (or at risk of financial ruin) but for the existence of pooled Taft-Hartley trust funds." *Id.* "A substantial public interest is served by protecting the fiscal integrity" of these Funds. *Gerardi v. Pelullo*, 16 F.3d 1363, 1374 (3d Cir. 1994).

312 See Labor Management Relations (Taft-Hartley) Act § 302(c)(5), 29 U.S.C. § 186(c)(5) (1994).

313 See Petition for Writ of Certiorari at 8-9, *Steamfitters Local Union No. 420* (No. 99-545).

314 See *id.*

315 See 29 U.S.C. § 186(c)(5)(B) (1994); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 325 (1981); *Cutaiar v. Marshall*, 590 F.2d 523, 525 (3d Cir. 1979).

316 See Employee Retirement Income Security Act (ERISA) §§ 402-09, 29 U.S.C. §§ 1102-09 (1994); see also *Amax Coal*, 453 U.S. at 331.

317 See Employee Retirement Income Security Act (ERISA) §§ 403(a), (c)(1), 404(a)(1), 29 U.S.C. §§ 1103(a), (c)(1), 1104(a)(1).

318 See Brief for Appellants at 12, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 98-41232); see also *Amax Coal*, 453 U.S. at 322.

319 See Brief for Appellants at 12, *Tex. Carpenters* (No. 98-41232).

320 See *id.*

321 See *id.*

322 See *id.* at 12-13.

beneficiary, whether a smoker or nonsmoker, is affected by the diminishment of funds available for healthcare expenses.³²³ Under ERISA, the Funds are permitted to sue and be sued in the beneficiaries' names.³²⁴ This right is similar to that of corporations, allowing the Fund to sue for diminishment of assets.³²⁵ Further, the ability to sue rises to the level of a fiduciary duty to enforce the rights of the Funds vis-à-vis those who harm it in any way.³²⁶

The defense of the tobacco companies to the Funds' suits was varied and complex, but their proximate cause or remoteness defense was largely built around a claimed black-letter rule prohibiting recovery for the payor of medical expenses by a third party directly from the tortfeasor.³²⁷ Each circuit's case was built around slightly different theories, but the factual allegations remained essentially the same. Section B focuses upon the proximate cause determinations in each of these cases.

B. *The Circuits' Decisions*

All five circuit courts of appeals who heard Funds cases denied them standing.³²⁸ While the final result was the same in each case, each circuit rested its decision on varying legal reasoning. None of the circuits summarized the facts of the massive fraud perpetrated by the industry. The Third Circuit acknowledged the controlling *AGC* and *Holmes* factors, but erred in two major respects. First, the panel decided that the suppression of safer cigarette products was not an antitrust injury.³²⁹ Second, the panel expressed doubt as to the propriety of utilizing statistical data in assessing damages.³³⁰ The Second Circuit all but ignored the precedents of *AGC* and *Holmes* in its initial

323 See *id.* at 13.

324 See 29 U.S.C. § 1132(d)(1) (1994).

325 See generally *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988); *Ariz. State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715 (9th Cir. 1997); *Custer v. Sweeney*, 89 F.3d 1156 (4th Cir. 1996); *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146 (3d Cir. 1989); *Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 892-93 (2d Cir. 1983); *Mason Tenders Dist. Council Pension Fund v. Messera*, No. 95 Civ. 9341, 1996 U.S. Dist. LEXIS 14822 (S.D.N.Y. Oct. 8, 1996).

326 See *Struble v. N.J. Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 336-39 (3d Cir. 1984).

327 See generally *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 771 (N.D. Ohio 1998).

328 See *The Circuit Court Decisions*, CIV. RICO REP., July 10, 2000, at 3, 3-7.

329 See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 929-30 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000).

330 See *id.* at 930.

decision and declared that the injury was “derivative,” a newly-created label.³³¹ It formulated a new rule of law, holding that one paying the medical costs of another may *only* sue to recover through subrogation.³³² The Ninth Circuit purported to apply the *AGC* and *Holmes* factors, but erroneously found that the Funds’ antitrust and RICO damages duplicated the tort damages smokers might recover.³³³ Like the Third Circuit, the panel also wrongly held that standing, under antitrust, was limited to customers or consumers in a market.³³⁴ The Seventh Circuit admitted that statistical data would help assess the amount of damages, but denied that the insurance company before it had alleged an antitrust injury.³³⁵ The Fifth Circuit’s opinion offered few reasons to justify its decision—it simply agreed with the opinions of the other circuits, despite the conflicts between and among them.³³⁶

1. Third Circuit

The Third Circuit affirmed the district court’s granting of dismissal³³⁷ in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*³³⁸ Plaintiff health care Funds claimed they were directly affected by the defendants’ fraudulent conduct, especially with respect to the suppression of the manufacture of safer tobacco products.³³⁹ The Funds claimed they could have developed programs designed to inform smokers about safer options or treatment programs.³⁴⁰ Additionally, they alleged that the defendants’ misconduct, constituting both antitrust and RICO violations, caused smokers to start smoking, continue to smoke, and become more ill, thus incurring increased

331 See *The Second Circuit: Advance with Text—Retreat with Footnotes*, CIV. RICO REP., July 10, 2000, at 3, 4–5.

332 See, e.g., *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000).

333 See *The 9th Circuit: Right Approach—Wrong Result*, CIV. RICO REP., July 10, 2000, at 3, 5.

334 See *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 963–65 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 789 (2000).

335 See *The Seventh Circuit: Misdirected Economic Analysis*, CIV. RICO REP., July 10, 2000, at 3, 5–7.

336 See *The Fifth Circuit: Inconsistent “Metooism,”* CIV. RICO REP., July 10, 2000, at 3, 7.

337 See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, No. Civ. A. 97–5344, 1998 WL 212846, at *3 (E.D. Pa. Apr. 22, 1998), *aff’d*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000).

338 See 171 F.3d 912, 937 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000).

339 See *id.* at 918.

340 See *id.*

medical costs.³⁴¹ The damages identified equaled the amount of money the Funds spent in health care costs that would have been avoided absent defendants' unlawful conduct.³⁴²

The district court dismissed the complaint because it concluded that the plaintiff's injuries were too remote³⁴³ and the Third Circuit followed the district court's flawed reasoning.³⁴⁴ The Third Circuit held that the claim was insufficiently direct and too speculative to recognize.³⁴⁵ The court's primary mistake was to treat directness as an independent factor in the proximate cause analysis, rather than as a conclusion based on a policy-driven inquiry.³⁴⁶ The result was to immunize the tobacco industry against the best-suited plaintiff to vindicate the wrongdoing of immense and wide-reaching proportions.

Before embarking upon the *AGC* balancing test, the panel divided the injuries to the Funds into "direct" and "indirect."³⁴⁷ The injuries flowing from the victimization of smokers who participated in the Funds' health plans were referred to as indirect injuries.³⁴⁸ The industry also argued that these claims were simply subrogation claims "dressed up in treble-damages federal statutory clothing,"³⁴⁹ meaning that the Funds could *only* recover by asserting the same claim and would be subject to the *same* defenses as the beneficiaries. The Funds

341 *See id.* at 918.

342 *See id.* at 919. The Funds also sought injunctive relief requiring defendants to make their research public, undertake a public education campaign, stop advertising to minors, and provide funds for smoking cessation programs. *See id.* at 918.

343 *See Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, No. Civ. A. 97-5344, 1998 WL 212846, at *4 (E.D. Pa. Apr. 22, 1998), *aff'd*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000).

344 *See Steamfitters Local Union No. 420*, 171 F.3d at 932-33.

345 *See id.* at 933.

346 *See id.* at 932-33; *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 272 n.20 (1992); *see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535-36 (1982) (stating that courts should analyze every showing in light of seven factors, of which relative directness of injury is only one); *supra* note 273 and accompanying text (listing factors).

347 *Steamfitters Local Union No. 420*, 171 F.3d at 919-20.

348 *See id.* at 919.

349 *Id.* In so doing, the defense claimed the general principle is that an insurer may only implement a subrogation claim when suing a tortfeasor on behalf of an insured. *See id.* In a subrogation claim, the insurer must assert an identical claim as the insured would have brought against the tortfeasor. *See id.* In this case, that principle would allow the Funds to recover only from the same type of actions that smokers could have individually brought. *See id.*; *see also Great Am. Ins. Co. v. United States*, 575 F.2d 1031, 1033 (2d Cir. 1978) (explaining that subrogation subjects the plaintiff to the defenses the defendant would be able to employ against the insured).

would be, according to the industry, limited to the tort actions that could be brought by smokers themselves.

Notwithstanding the subrogation argument, the Funds' "direct" claims were treated separately by the panel. The panel characterized the direct injuries as "fundamentally different legal claim[s] from the typical insurer-against-wrongdoer claim that falls under the principle of subrogation."³⁵⁰ These direct injuries were a result of actions taken on the part of the tobacco industry that directly affected the Funds. The Funds claimed that they had to "expend additional costs that would have been paid by the tobacco companies (through reduced revenues and tort damages) if they had not defrauded the Funds and conspired to cover up their wrongdoing."³⁵¹

While the panel took the time to recognize the difference between the indirect and direct injuries of the Funds, it ultimately stated that "we do not find the directness of the Funds' alleged injury dispositive of whether they stated a claim under either federal or state law."³⁵² The panel then narrowed its discussion to the proximate cause issue, noting the Supreme Court's instructions in *AGC* and *Holmes*.³⁵³

a. *Associated General Contractors* Factors Analysis

The panel recognized that "there may be a causal relationship between the conduct of the defendants and the injuries alleged," but continued, "we are uncertain that these injuries are connected to any conduct of the defendants that violates the antitrust laws."³⁵⁴ In stating, "we do not find these factors to be dispositive on the issue of antitrust standing,"³⁵⁵ the panel relied on the fact that, in *AGC*, a causal connection and an intent to harm did not suffice to give the plaintiff antitrust standing.³⁵⁶

Specific intent is not discussed in the Third Circuit's antitrust standing requirements section. While intent to harm does not, on its own, provide standing, it is certainly an informative factor that should have been addressed in the *AGC* factor balancing test.

In comparing the Funds' case with that of the plaintiff in *AGC*, the panel believed that the court's conclusion that "the Union is

350 *Steamfitters Local Union No. 420*, 171 F.3d at 920.

351 *Id.*

352 *Id.*

353 *See id.* at 922-33.

354 *Id.* at 926.

355 *Id.* at 925.

356 *See id.*

neither a participant in the market . . . nor a direct victim of defendants' coercive practices . . . inveigh[ed] against plaintiffs' position."³⁵⁷ The panel focused on the foreseeability of the "indirect" injury and concluded that, under the *AGC* model, "foreseeability was insufficient to overcome the remoteness of the union's injury from the defendants' wrongdoing."³⁵⁸ In focusing its attention upon the "direct" injury, the panel conceded that if the Funds "[w]ere in the market for safer tobacco products that would reduce or prevent people from smoking . . . [, t]hese claims might meet the third factor from *AGC*."³⁵⁹

The panel also conceded that the Funds' direct injury claims "might also meet the fourth factor from *AGC*."³⁶⁰ Hardly a resoundingly positive statement, the panel's tone revealed its efforts to deny proximate cause regardless of the factor analysis. The panel admitted that no more direct party existed who could sue to vindicate the public interest. "Smokers can sue for personal injuries arising from smoking, but they are unlikely (or unable) to press antitrust claims against the tobacco companies."³⁶¹

In continuing with its confusing logic, the panel stated, "Although we acknowledge that plaintiffs' claims of direct injury appear, at least initially, to meet a number of the first four *AGC* factors, we question whether these direct injuries are necessarily more direct than the indirect injuries on which much of our discussion has focused."³⁶² The panel explained that "[a]lthough the alleged *wrongdoing* was more directly aimed at the Funds, the *injury* itself certainly was no more direct than the indirect injury that arose from the defendants' actions toward smokers."³⁶³ This line of reasoning seems to do little to advance the panel's decision, but nevertheless it is included therein.

The Third Circuit glossed over the *AGC* requirement that a more directly injured plaintiff must be identified and that this plaintiff must also have "sufficient incentive" to sue.³⁶⁴

357 *Id.* at 926 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 n.44 (1983)).

358 *Id.*

359 *Id.* at 927.

360 *Id.*

361 *Id.*

362 *Id.*

363 *Id.*

364 *See* *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983).

Before addressing the final *AGC* factors, the court astonishingly reached a conclusion. “At all events, as is clear from our extensive review of all of the *AGC* factors, we find that however plaintiffs characterize their claims—as direct or indirect—they necessarily fail for being too remotely connected in the causal chain from any wrongdoing on defendants’ part.”³⁶⁵ This conclusion should have been the product of a balancing of all the factors, following a full analysis. Instead, the panel summarily concluded that although most of the factors were met, the injury was still too remote.

The panel conflated speculative damages with relative difficulty of proof. It explained that “the Funds’ damages claims are quite speculative (and very difficult to measure).”³⁶⁶ The damages would have had to be calculated, it thought, through aggregation and statistical modeling, which it found to be incapable of “get[ting] the Funds over the hurdle of the *AGC* factor focusing on whether the ‘damages claim is . . . highly speculative.’”³⁶⁷ This logic is circular. Once the plaintiffs present a manner in which to calculate damages, they are no longer speculative. Furthermore, if the fact of damages is proven, the standard for proving the amount of damages is less stringent.³⁶⁸ Additionally, the damage model should not have been rejected until either summary judgment or trial, especially when it had already been declared valid.³⁶⁹

The panel conceded that “*AGC*’s sixth factor does not militate against a finding of antitrust standing, as there is little danger of duplicative litigation or complex apportionment of damages among various groups of plaintiffs.”³⁷⁰ However, the discussion of speculativeness overshadowed a full discussion of this factor.

Shockingly, although the panel found that most of the *AGC* factors were not of particular concern, it stated:

The short of it is that, while we find that the plaintiffs’ antitrust claims barely meet certain *AGC* factors, the fulfillment of these factors is greatly outweighed by the extremely indirect nature of the Funds’ injuries and the highly speculative and complex damages claims. The tortured path that one must follow from the tobacco companies’ alleged wrongdoing to the Funds’ increased expendi-

365 *Steamfitters Local Union No. 420*, 171 F.3d at 928.

366 *Id.* at 928–29.

367 *Id.* at 929.

368 *See* *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

369 *See* *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 771, 784, 786 (N.D. Ohio 1998) (denying in part and granting in part the defendant’s motion to dismiss).

370 *Steamfitters Local Union No. 420*, 171 F.3d at 928 (footnotes omitted).

tures demonstrates that the plaintiffs' claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out.³⁷¹

The main problem with the logic of this conclusion is that *AGC* expressly rejected a directness test that was separate from the policy factors outlined in the holding. "Some courts have focused on the directness of the injury As a number of commentators have observed, these labels may lead to contradictory and inconsistent results. In our view, courts should analyze each situation in light of the factors set forth in the text *infra*."³⁷² *AGC* does not make directness itself a separate factor. It lists all of the policy factors as relevant to select the best plaintiff to sue. The panel mistakenly deselected all plaintiffs.

The Third Circuit also erroneously applied the policy-driven, proximate cause inquiry to claims for injunctive relief. The Supreme Court plainly held that the remoteness factor of *AGC* does not apply to claims for injunctive relief.³⁷³ The Third Circuit's reference to the difficulty in determining damages bears no relevance to a claim for injunctive relief that would require no damage calculation.

b. RICO Analysis

The panel's treatment of the RICO claims was similarly flawed. In examining the claim under *Holmes*, the panel effectively created a

³⁷¹ *Id.* at 930.

³⁷² *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 n.33 (1983) (citations omitted).

³⁷³ *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110–11 n.6 (1986); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972) (citations omitted).

[T]he difference in the remedy each section provides means that certain considerations relevant to a determination of standing under § 4 [the damages statute] are not relevant under § 16 [the injunction statute]. The treble damages remedy, if afforded to "every person tangentially affected by an antitrust violation . . . [would] open the door to duplicative recoveries" and to multiple law suits. In order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors, . . . such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4. Conversely, under § 16, the only remedy available is equitable in nature, and . . . "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16.

Cargill, 479 U.S. at 110–11 n.6 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476–77 (1982)).

new category for proximate cause determinations—"direct."³⁷⁴ *Holmes* explicitly warns against this error.

Our use of the term direct should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text. We do not necessarily use it in the same sense as courts before us have and intimate no opinion on results they reached.³⁷⁵

The court's treatment of directness as an independent factor that supersedes the *most* direct plaintiff factor is particularly problematic, because the Third Circuit sharply departed from prior case law. No other Third Circuit or Supreme Court case could be found that had dismissed a claim citing remoteness without identifying a plaintiff with more direct injuries.³⁷⁶ Furthermore, countless cases hold that analytically "indirect" plaintiffs may, under certain circumstances, recover under both RICO and antitrust theories.³⁷⁷

The court admitted again that no other party was better-suited to bring the RICO claim, but it nevertheless proffered other excuses for denying standing.³⁷⁸ The court first explained that many smokers had already been reimbursed for monetary loss.³⁷⁹ It then addressed whether the plaintiff was the most directly injured, stating "we are unconvinced that [characterization of the Funds as indirect victims, as opposed to direct victims] is sufficient to overcome the concerns about apportioning damages and, most fundamentally, the remoteness of the Funds' alleged RICO injuries from any wrongdoing on the part of the tobacco companies."³⁸⁰ This statement revealed the court

³⁷⁴ See Petition for Writ of Certiorari at 4, *Steamfitters Local Union No. 420* (No. 99-545).

³⁷⁵ *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 272 n.20 (1992) (citations omitted).

³⁷⁶ See Petition for Writ of Certiorari at 3, *Steamfitters Local Union No. 420* (No. 99-545).

³⁷⁷ See, e.g., *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 151-52 (5th Cir. 1997), *vacated as moot*, *Teel v. Khurana*, 525 U.S. 979 (1998); *Isr. Travel Advisory Serv., Inc. v. Isr. Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995); *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994); *Envl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1066-67 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990); see also *Holmes*, 503 U.S. at 272 n.20; *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

³⁷⁸ See *Steamfitters Local Union No. 420*, 171 F.3d at 933.

³⁷⁹ See *id.*

³⁸⁰ *Id.* at 933-34. The Third Circuit's cynicism regarding the existence of RICO claims has not been shared by all courts examining the issues. See *State v. Am. Tobacco Co.*, No. CL 95-1466 AH, 1996 WL 788371, at *4 (Fla. Cir. Ct. Dec. 13, 1996) (surmising that the allegations "would seem to make out a case for the 'mother of all RICO actions'"); see also *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 74 F.

to be doing exactly what *Holmes* warned against—making a remoteness judgment before balancing the policy factors. Further, it failed to address the reality that individual smokers cannot bring RICO³⁸¹ or antitrust suits. The court never disputed the fact that, if the allegations were proven, the nature of both RICO and antitrust violations would reveal intentional costs imposed upon the plaintiffs.

Although analytical directness may often help identify the best plaintiff to sue, it is not the only consideration. The Supreme Court stressed that the plaintiff must also have sufficient incentive to sue.³⁸² To interpret the proximate cause analysis in such a way as to eliminate the best plaintiff to seek redress undermines the “vigorous enforcement”³⁸³ mandate of the statutes.³⁸⁴

Similarly troublesome is the fact that, even if analytical directness were an independent factor to be used in the *Holmes* analysis, dismissal could not be justified with respect to the plaintiffs’ claims that the Funds were directly defrauded and deceived without any intervening party.³⁸⁵ The Third Circuit dismissed this argument, claiming that the injury was still indirect because the actions of the tobacco industry resulted in inaction on the part of the Funds.³⁸⁶ This argument seems to be a semantic distinction. Indeed, the injury was still directly per-

Supp. 2d 221, 233 (E.D.N.Y. 1999) (“Research or treatment which would have been supported by resources of the health care industry have, it contended, gone unfulfilled as a result of the defendants’ racketeering. This is arguably precisely the type of economic injury which RICO was designed to address and deter.”).

381 There is consensus among the circuits to read RICO’s language, “injury to business or property,” to exclude damages for personal injuries, even if those injuries could be pecuniary in nature. The leading decision is *Grogan v. Platt*, 835 F.2d 844, 846–48 (11th Cir. 1988) (excluding the economic aspects of murder, since personal injury is not within RICO), *cert. denied*, 488 U.S. 981 (1988). *See, e.g.*, *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991).

382 *See California v. ARC Am. Corp.*, 490 U.S. 93, 102 n.6 (1989); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983); *Ill. Brick Co.*, 431 U.S. at 736.

383 *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 214 (1990).

384 *See* Petition for Writ of Certiorari at 3, *Steamfitters Local Union No. 420* (No. 99–545).

[The Supreme] Court has *never* countenanced dismissal of a RICO or antitrust claim as too indirect without identifying a more directly injured party with the ability and incentive to sue to remedy the *same* statutory violation. Nor has this Court allowed narrow readings of the RICO and antitrust laws to undermine the broad remedial purposes of the statutes.

Id. (emphasis added).

385 *See* Petition for Writ of Certiorari at 14–19, *Steamfitters Local Union No. 420* (No. 99–545).

386 *See Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000).

petrated upon the Funds. The fact that the industry's actions resulted in inaction, rather than some other type of injury, ought to be immaterial.³⁸⁷

The distinction the panel was setting up appears irrelevant under the statute. The panel was attempting to create a distinction between the Funds being fraudulently induced to spend money and the same Funds being fraudulently induced *not* to spend money.³⁸⁸ In being induced *not* to spend money, the panel argued that the Funds were only indirectly injured. This use of semantics is a stretch of reason and ultimately should be given no credence. Furthermore, the law of the Third Circuit, otherwise, directly conflicts with this distinction.³⁸⁹ An extensive discussion of remoteness in relation to the Funds' direct case was immaterial. They alleged an injury of direct relationship to the conduct of the defendants. With no other party standing between the Funds and the industry, no remoteness concern was present. The panel ignored the thrust of this argument.

The panel again conceded that damage apportionment did not present a serious problem in this case, because "smokers would be unlikely to bring federal claims against the tobacco companies for the same damages claimed by the Funds."³⁹⁰ Nevertheless, the panel continued by noting that

Fund participants who have not been fully reimbursed for their out-of-pocket costs that are traceable to defendants' alleged fraud and conspiracy might bring RICO or antitrust claims. Therefore, as in *Holmes*, a court adjudicating the Funds' RICO claims would need to consider the appropriate apportionment of damages between smokers and others such as the Funds who suffered economic losses as a result of the tobacco companies' alleged fraudulent acts.³⁹¹

On the contrary, the Funds did not seek to recover amounts paid by smokers for medical care. Therefore, those amounts could not form the basis for a supposed danger of double recovery. The panel admitted that duplication was not a serious consideration weighing against standing, but later it suggested that damages for RICO viola-

387 "One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act *or refrain from action* in reliance upon the misrepresentation . . ." *Michael v. Shiley, Inc.*, 46 F.3d 1316, 1334 (3d Cir. 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 531 (1976)) (emphasis added).

388 See *Steamfitters Local Union No. 420*, 171 F.3d at 928.

389 See *Michael*, 46 F.3d at 1334.

390 *Steamfitters Local Union No. 420*, 171 F.3d at 933.

391 *Id.*

tions could present a situation involving apportionment.³⁹² Also, the panel failed to recognize the fact that smokers cannot sue to recover their medical expenses.³⁹³ Given this reality, no danger of duplicative damages is present.³⁹⁴ In order for duplication to arise, more than one plaintiff must be seeking the *same* damages under the *same* law.

Damages are not duplicative within the meaning of this proximate cause factor unless different plaintiffs could bring the same cause of action under RICO or antitrust for the same damages. Put another way, RICO damages would have to duplicate RICO damages, or antitrust damages duplicate antitrust damages, to raise this concern.³⁹⁵

Furthermore, damages need not be apportioned simply because both federal and state causes of actions are present. "'Overlapping' is not legal 'duplication.'"³⁹⁶ *Illinois Brick Co. v. Illinois*³⁹⁷ made this point clearly in stating the concern is about "duplicative recoveries under [section four of the Clayton Act]," not duplication between the Clayton Act and other statutes.³⁹⁸ The Supreme Court later addressed this same issue stating, "*Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion recovery under a single stat-

392 See *id.* at 929 n.10.

393 These expenses would be excluded as flowing from personal injury under RICO and antitrust law. See, e.g., *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991).

394 See Petition for Writ of Certiorari at 21, *Steamfitters Local Union No. 420* (No. 99-545).

[The Third Circuit] did not appreciate that this factor is designed to strengthen statutory enforcement by concentrating each clam [sic] in a single plaintiff, not to weaken enforcement by precluding claims by the sole plaintiff capable of suing. In RICO and antitrust cases involving effects of defendants' misconduct on multiple parties in a chain of causation and injury, [the Supreme Court] typically has granted standing to the party that is *first in line* in suffering economic injury. When standing is denied, it is the pass-on of the economic injury from a nonparty to the plaintiff, not the fact that the causal chain flows through several parties, that creates problems of the type the *Holmes/AGC* factors seek to avoid.

Id.

395 Brief for Appellants at 42, *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000) (No. 98-41232) (emphasis omitted); see also *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 889-90 (10th Cir. 1997) (stating that a court "selects the better plaintiff between two possible types" and that "[c]learly the rule was not intended to immunize [unlawful] tactics or to eliminate a private cause of action challenging those tactics").

396 Brief for Appellants at 43, *Tex. Carpenters* (No. 98-41232).

397 431 U.S. 720, 736 (1977)

398 *Id.* at 731.

ute—[section four] of the Clayton Act—would result in no one plaintiff having a sufficient incentive to sue under that statute.”³⁹⁹

Instead of proceeding with the *Holmes* policy considerations, the court declared that indirectness and problems in accurately measuring the amount, not the fact, of damages outweighed the other *Holmes* factors. A subtlety of the third *Holmes* factor was completely overlooked by the panel. The third factor asks whether the indirectness of an injury would make damages *harder* to ascertain than if the case were brought by another plaintiff. The court misread *Holmes* to inquire whether damages *are* difficult to ascertain.⁴⁰⁰ This factor does not address whether the damages will be difficult to determine; rather it focuses the inquiry on whether the indirectness will make it *more* difficult to ascertain the amount of damages than if another, more directly injured party sued.⁴⁰¹ The panel treated difficulty in proving damages as an independent factor, existing without reference to any other plaintiff.⁴⁰² This judgment was absolute rather than relative. While the exact extent of damages would be difficult to prove, it is dangerously illogical to construe a statute to immunize a guilty defendant simply because the breadth and depth of his fraud are too massive to gauge precisely. If the Funds are the most effective enforcers of the law, they should have the opportunity to prove the resulting damages. On one hand, the panel’s reference to smokers’ suits presents an interesting tension; however, it conceded that smokers could demonstrate injuries proximately caused by defendants’ misconduct;⁴⁰³ however, the very same problem of determining how much money was lost due to defendants’ fraud would persist.

In holding that the damage amount was too speculative, the panel rested its decision on the fact that plaintiffs offered statistical evidence in support of its damages claim.⁴⁰⁴ In fact, the Supreme Court expressly upheld statistical evidence to aggregate damages in

399 *California v. ARC Am. Corp.*, 490 U.S. 93, 104 (1989). A central policy objective of RICO is that it be available along with all federal and state criminal and civil remedies. See 18 U.S.C. § 1961 note (1994) (Liberal Construction of Provisions; Superseding of Federal or State Laws; Authority of Attorneys Representing United States) (“Nothing in this title shall supercede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.”). Concerns about duplication arise when one, not two, statutory schemes are invoked. See *ARC Am.*, 490 U.S. at 103–05.

400 See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 932 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000).

401 See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

402 See *Steamfitters Local Union No. 420*, 171 F.3d at 929.

403 See *id.* at 926.

404 See *id.* at 929.

antitrust litigation.⁴⁰⁵ And, as Daniel Givelber points out, “epidemiological studies should provide a sound basis for estimating the cost of medical services provided for smoke-related injuries. Courts can be *more* confident that defendants’ act caused the injury in question than in any individual claims.”⁴⁰⁶ Finally, a plaintiff’s damage model should not be rejected based on the complaint alone, when it has survived a motion for summary judgment in the district court.⁴⁰⁷ The court rested on an incomplete analysis to mask its conclusory judgment.

Hidden toward the end of the opinion is a curious statement by the panel.

At this point in contemporary history, there can be little doubt that the tobacco companies’ products have caused smokers to contract certain illnesses and that the plaintiff Funds (and others) have borne some of the costs of these illnesses by reimbursing their participants for their health care expenditures. It is therefore quite possible that some of these health care providers and payers have had to cut back on their coverage of other medical problems in order to fund the costs of smoking-related illnesses, causing other Funds participants to pay out-of-pocket expenses they otherwise would not have paid.⁴⁰⁸

The panel frankly admitted that the industry had injured the Funds. The Third Circuit also never mentioned the requirement of construing RICO “liberally . . . to effectuate its remedial purposes”⁴⁰⁹ and conspicuously failed to mention the overarching *Holmes* factor—justice.⁴¹⁰

2. Second Circuit

In *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, Laborers Local 17 Fund and several other labor union Funds brought suit in the United States District Court for the Southern District of New York alleging ten distinct causes of action against defendants

405 See *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 573 n.31 (1990). Business damages are often aggregated when RICO and antitrust claims are brought. See, e.g., *id.* (discussing the use of statistical evidence).

406 Givelber, *supra* note 28, at 900 (emphasis added).

407 See, e.g., *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 771, 784 (N.D. Ohio 1998).

408 *Steamfitters Local Union No. 420*, 171 F.3d at 934.

409 Organized Crime Control Act of 1970, 18 U.S.C. § 1961 (1994); see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 (1985).

410 See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (“ideas of what justice demands”).

Phillip Morris and other tobacco companies.⁴¹¹ The allegations in the complaint were similar to those brought by other health care payers—detailing a conspiracy on the part of the tobacco companies to mislead the public with respect to smoking-related health dangers, suppression of information regarding the possibility of developing a safer product, concealment of information regarding the effectiveness of treatments for nicotine addiction, and other unlawful conduct.⁴¹² The defense by the tobacco industry rested principally on the rule of subrogation—that one who pays the costs of another person *cannot* recover for the injury to that third party, under any other theory, unless the third party has suffered a tort injury.⁴¹³

The district court held that proximate cause *had* been established between the plaintiffs' injuries and defendants' unlawful conduct.⁴¹⁴ It applied the *Holmes* factors and held that the injuries were foreseeable and that they were not too remote to be compensated.⁴¹⁵ The Second Circuit granted leave to appeal and reversed the decision of the district court.⁴¹⁶ Although the Second Circuit treated three main issues,⁴¹⁷ this portion of the Note will focus on its misapplication of *Holmes* with respect to only one, the proximate cause analysis.⁴¹⁸

The Second Circuit's proximate cause analysis began with an overview of proximate cause, as if the Supreme Court had not settled the question in *Holmes*.⁴¹⁹ This analysis flatly misinterpreted *Holmes* and the circuit's own precedent by saying that it required analytical directness as a prerequisite to proving proximate cause.⁴²⁰ The circuit

411 See *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F. Supp. 2d 277, 282 (S.D.N.Y. 1998), *rev'd in part*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000).

412 See *id.*

413 See *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 233–34 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000).

414 See *id.* at 233–34 (discussing proceedings below).

415 See *Laborers Local 17*, 7 F. Supp. 2d at 283–85 (holding that the injuries were foreseeable enough to survive a motion to dismiss).

416 See *Laborers Local 17*, 191 F.3d at 234.

417 The total list of issues treated was directness, speculativeness, and a failure to properly apply case precedent to claims for injunctive relief. See *id.* at 239–43.

418 For a discussion of the improper decision of the Second Circuit, especially with respect to the impact of fraud upon the *Holmes* policy decisions, see Recent Case, *Statutory Interpretation—Second Circuit Holds that Health Care Funds Lack Standing to Sue Tobacco Companies under RICO*, 113 HARV. L. REV. 1063, 1065–68 (2000).

419 See *Laborers Local 17*, 191 F.3d at 235–43.

420 See *id.* at 235–36. For applications of the remoteness approach in other cases, see *Bivens Gardens Office Building, Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 906–08 (11th Cir. 1998). See also *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996); *Popkin v. Jacoby (In re Sunrise Sec. Litig.)*, 916 F.2d 874, 879 (3d Cir.

court claimed that the directness must be shown “independent of and in addition to other traditional elements of proximate cause.”⁴²¹ It referred to other elements of proximate cause (like foreseeability) as “additional requirements, not substitutes for alleging (and ultimately, showing) a direct injury.”⁴²² *Holmes*, however, expressly warned against any black-letter formulation such as the Second Circuit imposed on RICO. As *Holmes* explained, directness is not a threshold inquiry, rather a conclusion reached at the end of analysis, following the exploration of the three *Holmes* factors.⁴²³ The court’s characterization of directness as being a necessary factor erroneously added an independent factor to the *Holmes* analysis.

The Second Circuit’s misreading of *Holmes* was based largely upon a misinterpretation of the first *Holmes* factor, which questions whether there are more “directly injured victims [who] can generally be counted on to vindicate the law as private attorneys general.”⁴²⁴ Instead of analyzing whether the Funds were the most directly injured plaintiffs, the court reached a conclusion on directness without even implementing the *Holmes* factors. The court concluded that the injury to the Funds was derived from the harm to smokers.

[W]ithout injury to the individual smokers, the Funds would not have incurred any increased costs in the form of the payment of benefits, nor would they have experienced the difficulties of cost prediction and control that constituted the crux of their infrastructure harms. Being purely contingent on the harm to third parties, these injuries are indirect.⁴²⁵

These steps taken to deny proximate cause flew in the face of established law. The Court in *Holmes* was express about proximate cause analysis being done on a case-by-case basis, and warned against searching for a black-letter rule.⁴²⁶ The Court explained, “[O]ur use of the term ‘direct’ should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text.”⁴²⁷

1990); *Sears v. Likens*, 912 F.2d 889, 892 (7th Cir. 1990); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 29–30 (1st Cir. 1987); *Kempe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443, 1444 (9th Cir. 1986).

421 *Laborers Local 17*, 191 F.3d at 235.

422 *Id.* at 235–36.

423 *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269–70 (1992).

424 *Id.* at 269–70.

425 *Laborers Local 17*, 191 F.3d at 239.

426 *See Holmes*, 503 U.S. at 272 n.20.

427 *Id.*

Indeed, the *Holmes* factor analysis usually results in identifying the most appropriate plaintiff to bring suit, but the Supreme Court did not rule out the possibility that an analytically indirectly injured plaintiff could have standing. In dismissing the suit, citing insufficient directness, the Second Circuit departed not only from the position of the Supreme Court, and those of other circuits, but from its own previous position as well.⁴²⁸

Having decided the appeal on its newly-minted basis—"derivative"⁴²⁹—the Second Circuit proceeded with the *Holmes* factor analysis, claiming that disqualification from standing was acceptable in light of the "policy" factors of *Holmes*.⁴³⁰ However, the court never identified a plaintiff better suited to bring the suit, ignoring the *Holmes* Court's position on denial of standing. The Supreme Court had warned that a plaintiff should be disallowed from proceeding only if "the general interest in deterring injurious conduct" could be better served by more directly injured victims.⁴³¹

The fact that the Second Circuit did not identify a better plaintiff is particularly troublesome in the context of this RICO litigation. By denying standing to the Funds, the court effectively immunized the tobacco industry from RICO claims, since the individual smokers are barred from suit under RICO due to the restriction that injury must be to "business or property."⁴³² Not only were the Funds deprived of their right to be compensated for massive injury due to racketeering activity of the industry, but Congress' intent that RICO be used to remedy systematic fraud also has been undermined.⁴³³ The statute, in fact, was designed to be enforced privately, and the court's rule has

428 See, e.g., *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 541-42 (1983); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Isr. Travel Advisory Serv., Inc. v. Isr. Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995); *Raybestos Prods. Co. v. Younger*, 54 F.3d 1234, 1241-43 (7th Cir. 1995); *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 (8th Cir. 1993); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 912-13 (2d Cir. 1988); *Envtl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1066-67 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990). These and other case precedents demonstrate that standing is often granted to "indirectly" injured plaintiffs.

429 The Second Circuit thus ignored *AGC's* mandate that labels should be eschewed. See *Associated Gen. Contractors*, 459 U.S. at 536 n.33.

430 See *Holmes*, 503 U.S. at 269-70.

431 *Id.* at 269.

432 18 U.S.C. § 1964(c) (1994 & Supp. IV 1998); see *supra* note 381.

433 See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 519 (1985) (Marshall, J., dissenting) ("Congress' concern [in passing RICO] was not for the direct victims of the racketeers' acts, whom state and federal laws already protected, but for the competi-

handicapped an extremely large group of injured people from vindicating their rights under RICO.⁴³⁴

Just as was noted in the Third Circuit's opinion,⁴³⁵ the Second Circuit also held that the difficulty in proving what percentage of a smoker's injury could properly be attributed to the defendant's fraud weighed in opposition to allowing standing. This causation calculation is not made more difficult by allowing the Funds standing.

The Second Circuit also misread *Holmes* to disallow recovery in cases where damages were speculative.⁴³⁶ *Holmes* was concerned, not with the speculativeness of damages, but with the *relative difficulty* of proving damages. The *Holmes* Court was concerned with accurate allocation, but stopped short of foreclosing recovery. "[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors."⁴³⁷ The Court's concern about difficulty of proof assumes that another party with more easily ascertainable damages would bring the claim. A more direct victim is preferable, because "problems attendant upon suits by plaintiffs injured more remotely" could be avoided.⁴³⁸ *AGC* and *Holmes* sought, not to prevent claims from being brought *at all*, but to encourage "efficient enforcement"⁴³⁹ of the statutes.

Also, the court's absolute judgment that the recovery would be too speculative was premature, as the case had not even reached the summary judgment or trial stage. Discovery had not been completed, and evidence brought out in various state cases had been considered acceptable causation showings. Curiously, the Second Circuit inti-

tors and investors whose businesses and interests are harmed or destroyed by racketeers.").

434 See *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) ("[RICO] bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate.").

435 See *supra* Part VI.B.1.

436 The belief in the danger of speculative damages pervades many of the decisions involving § 1964(c). Courts allow damages to be recovered if the *amount* of the damages is speculative, but refuse to allow recovery when the *fact* of damage is, itself, speculative. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

437 *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992). However, the conduct at issue need not be the sole cause of the injury. See *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337-39 (4th Cir. 1996).

438 *Holmes*, 503 U.S. at 270.

439 *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 732 (1977).

mated that those suits would indeed meet RICO's proximate cause requirements.⁴⁴⁰

In fact, calculating the Funds' damages would actually be less speculative than doing so on an individual basis. The Funds, unlike individuals, can aggregate damage calculations for many plan participants.⁴⁴¹ It is far simpler to draw conclusions based on a larger sample of people and operate on the assumption that, because smoking causes cancer, medical costs will be increased by some amount due to smokers. Ascertaining that same percentage of medical cost increase for one person would be far more challenging and, indeed, speculative. As long as one takes as true the medical information regarding the health risks of smoking, the connection between smoking and increased medical costs cannot be called speculative. While it could be difficult to prove the amount of damages, the Funds are entitled to try. Following proof of the *fact* of damages, the jurisprudence of the antitrust statute requires that courts impose a slightly less onerous standard for proof of the *extent* of damages.⁴⁴²

The final error of the panel was to hold that a danger of duplicative damages would be presented if employers or other health care providers standing further down the causal chain might also sue and recover.⁴⁴³ This argument fails as long as *Holmes* continues to be the standard for proximate cause determinations, because the Funds would stand as more direct victims than other employers.⁴⁴⁴

On petition for rehearing, the Second Circuit withdrew its opinion for consideration, then issued an amended opinion that had the same conclusion, but added two footnotes that largely undercut their original opinion.⁴⁴⁵ These footnotes indicated that the *AGC* and *Holmes* analyses would continue to be the tests for the Second Circuit in antitrust and RICO standing issues respectively, but that these analyses were not controlling in the Funds cases.⁴⁴⁶

440 See *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 236–37 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 799 (2000).

441 See *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 570 (E.D.N.Y. 1999).

442 See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 123–25 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562–63 (1931).

443 See *Laborers Local 17*, 191 F.3d at 240.

444 See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 921 n.4 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000).

445 See *Laborers Local 17*, 191 F.3d at 234 n.3, 239 n.4.

446 See *id.*

3. Ninth Circuit

The factual allegations made by the Oregon Laborers Benefit Funds in *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*,⁴⁴⁷ mirror those of other health care Funds arguing cases before other circuit courts.⁴⁴⁸ The plaintiffs alleged that defendants Philip Morris and other tobacco industry leaders engaged in a decades-long conspiracy to conceal from the public information regarding health risks of smoking.⁴⁴⁹ Among other illegal acts, the defendants allegedly sought to perpetuate the myth that the link between smoking and disease could not be established with certainty.⁴⁵⁰

The plaintiff Funds claimed that they were prevented from taking appropriate action to combat smoking among plan participants.⁴⁵¹ This failure to act was based upon fraudulent representations by the industry. In addition to handicapping the unions due to misinformation, the industry did not allow the rate of smoking to naturally decline, which created costs. Had the smoking rate dropped naturally, there would have been lower costs for the Funds.⁴⁵² Also, the Funds alleged that fraud caused more people to begin smoking (partially due to marketing targeted at children), thereby creating more expenses for the union Fund.⁴⁵³ According to the plaintiffs, had the fraud not occurred, it could have taken different measures to educate and treat smoking participants.⁴⁵⁴ The Funds sought monetary relief in order to make up for the wrongful diminishment of funds.⁴⁵⁵

The Ninth Circuit immediately recognized the current Supreme Court view on proximate cause: "Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient."⁴⁵⁶ However, the court proceeded to misconstrue and misread current law. Relying

447 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 789 (2000). The plaintiffs were six employee health and welfare benefits Funds. *See id.* at 961.

448 The Fund asserted federal RICO, state RICO, both federal and state antitrust, and other various state claims. *See id.* at 962.

449 *See id.* at 961.

450 *See id.* at 962.

451 *See id.*

452 *See id.*

453 *See id.*

454 *See id.*

455 *See id.*

456 *Id.* at 963 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

heavily on the opinions of the Second and Third Circuits, the Ninth Circuit affirmed the district court's denial of standing to plaintiffs.⁴⁵⁷

The court purported to employ the *Holmes* test, but made a proximate cause decision that did not reflect the balancing of policy factors. The court stated, "Both the Second and the Third Circuits have held that a trust fund's claims are 'too remote' to allow recovery and that the actions are therefore barred."⁴⁵⁸ It appeared that the Ninth Circuit made a quick determination based on the decisions of the Second and Third Circuits and then cursorily employed the *Holmes* factor approach in an effort to defend its decision, rather than making an independent judgment.

In trying to determine whether the Funds were the best suited plaintiff to bring the claim, the court examined both the "direct" and "indirect" injuries. The court characterized the "direct" injury as being based on a "one-link" causation chain.⁴⁵⁹ In so doing, the court erroneously construed RICO to require an injury without connections to a third party in order to recover.⁴⁶⁰ The court explained:

[A]ll of plaintiff's claims rely on alleged injury to smokers—without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers. Thus, there is no "direct" link between the alleged misconduct of defendants and the alleged damage to plaintiffs.⁴⁶¹

As previously discussed, AGC sought to create a system under which courts could judge the *policy* merits in allowing a claim to proceed.⁴⁶² The Court expressly rejected labels such as "target" or "zone of interest" and warned against employing a formal direct/indirect analysis when doing proximate cause determinations.⁴⁶³ To characterize the Funds as having been only tangentially injured is to overlook the facts alleged.

The Ninth Circuit's support for its decision rests on thin legal grounds. The court recognized that no other plaintiff would be prop-

457 See *id.* at 964.

458 *Id.*

459 See *id.* at 963.

460 See *id.*

461 See *id.*; see also *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 239 (2d Cir. 1999) (holding that the claims were derivative and damages indirect), *cert. denied*, 120 S. Ct. 799 (2000).

462 See *supra* Part V.C.

463 See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 n.33 (1983).

erly situated to sue,⁴⁶⁴ but explained away this denial of remedies by quoting *AGC*. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."⁴⁶⁵ Nevertheless, the result was the court leaving a very real injury unremedied and immunizing extremely culpable defendants.

In its discussion of the supposed directness of injury, the court then made a surprisingly naïve comment. "[T]here is an identifiable group of persons—smokers—whose self-interest will motivate them to seek recovery of the damages caused by defendants' alleged wrongful conduct. Although the smokers cannot 'vindicate the public interest in antitrust [or RICO] enforcement,' they can 'remedy the harm done by defendants' alleged misconduct.'"⁴⁶⁶ This interpretation reflects little more than intellectual dishonesty on the part of the court in its interpretation of *AGC* and *Holmes*. The statutes provide the remedies. If those statutory avenues are closed to all possible plaintiffs, then the industry has been immunized for its conduct under federal law. No amount of "scolding" done on the part of those harmed by the industry could amount to the remedies afforded by antitrust or RICO law.⁴⁶⁷ *Holmes* and *AGC* refer to vindicating RICO and antitrust law, respectively, when they discuss the most-directly-injured-plaintiff dilemma; they are not referring to state law or other forms of recourse. Because both antitrust law and RICO have "business or property" requirements, smokers may not bring personal injury claims under these statutes.⁴⁶⁸ In addition, under the settled law of the Ninth Circuit, a smoker will usually be unable to recover any medical costs that he did not pay himself.⁴⁶⁹

464 See *Or. Laborers*, 185 F.3d at 964 (admitting that no smokers could sue under RICO, but explaining that "[t]his inability does not, however, necessarily lead to the conclusion that plaintiffs must therefore have standing").

465 *Id.* Actually, in its treatment of the Funds' request for injunctive relief, the court misstated antitrust principles. The panel denied injunctive relief on the ground that the Funds were neither consumers nor competitors in the restrained market. See *id.* at 967. *Contra Chelson v. Oregonian Publ'g Co.*, 715 F.2d 1368, 1371 (9th Cir. 1983) ("Although the dealers here are neither consumers nor competitors in the relevant market, it is clear that their interests would directly be served by enhanced competition in the market.").

466 *Or. Laborers*, 185 F.3d at 964 (citation omitted).

467 For a clear picture of how individual lawsuits against the tobacco industry have fared, see *Mosler v. S/P Enters., Inc.*, 888 F.2d 1138, 1143 (7th Cir. 1989); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 571 (E.D.N.Y. 1999); *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 418–20 (D.N.J. 1993).

468 See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *supra* note 381.

469 See *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70–71 (9th Cir. 1994).

Although first admitting that “actual damages attributable to medical payments made by plaintiffs due to smoking-related injuries would be as easy to ascertain in the present case as in a direct action by the smokers,”⁴⁷⁰ the court went on to conclude that ultimately damage calculation would prove to be a burdensome undertaking.⁴⁷¹ It attempted to bolster its opinion by citing the Second Circuit opinion that discussed the speculative nature of damages incurred by reason of a conspiracy resulting in the Funds *not* taking action to provide smoking cessation programs to its members.⁴⁷² Using the Second Circuit’s words with respect to speculation, the court said, “[t]hese concerns become particularly pointed in a case, like the present one, where the injuries are alleged to derive not simply from defendants’ affirmative misconduct but also from plaintiffs’ fraudulently induced inaction.”⁴⁷³ Again, this distinction is unhelpful because the difference between fraud that induces inaction and fraud that induces action is immaterial in seeking to recover for that fraud.⁴⁷⁴

To sum up its observation regarding speculativeness, the court explained, “[t]he difficulty of ascertaining the damages attributable to defendants’ alleged wrongful conduct and the complexity involved in calculating these damages weigh heavily, if not dispositively, in favor of barring plaintiffs’ actions.”⁴⁷⁵ The Ninth Circuit, like the Second Circuit, misunderstood the effectiveness of statistical modeling and aggregation. Instead of recognizing that those techniques actually increase the accuracy of determining damages by discounting individual variances that cannot be treated on a case-by-case basis, the court felt that these techniques would be insufficient to make a proper damage calculation.⁴⁷⁶ Accordingly, it concluded that the speculative factor weighed against allowing recovery.

The court referred to the likelihood of other smokers’ suits when it found that this *Holmes* factor—duplicative recovery and complex apportionment—also weighed in favor of denial of standing.⁴⁷⁷ Although the court recognized that there “may be some protection from

470 *Or. Laborers*, 185 F.3d at 964.

471 *See id.* at 964–65.

472 *See id.* at 965.

473 *Id.* at 965 (quoting *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 172 F.3d 223, 233–34 (2d Cir. 1999)).

474 *See supra* note 389 and accompanying text.

475 *Or. Laborers*, 185 F.3d at 965.

476 *See id.*

477 *See id.* (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 543–44 (1983))).

multiple recovery in state law," it nevertheless concluded that "this safeguard would not cure the ultimate problem—that the courts would be forced 'to adopt complicated rules apportioning damages among plaintiffs at different levels of injury from the violative acts.'"⁴⁷⁸

The Ninth Circuit opinion essentially mandates that smokers' causes of action be relegated to either state personal injury or other theories to recover medical costs—antitrust and RICO claims are precluded.⁴⁷⁹ The court concluded that "[a]ll three factors of the 'remoteness' test weigh in favor of barring plaintiffs' claims."⁴⁸⁰ While the court cited the *Holmes* test correctly, it radically misconceived its purpose. The Ninth Circuit, like the others before it, effectively deselected all federal plaintiffs, rather than selecting among several options in order to determine the best suited plaintiff. Vindication of the federal interests in enforcing the antitrust laws and RICO should be brought under federal, not state, law.

4. Seventh Circuit

Following closely on the heels of other circuits to take up the issues, the Seventh Circuit affirmed the dismissals of the complaints of insurance companies (not union funds), namely Arkansas Blue Cross and Blue Shield ("Blues") in their case against Philip Morris.⁴⁸¹

a. District Court Analysis

The Blues' suit contained the same allegations of deceit on the part of the industry—including misrepresentations of the health consequences of smoking, suppression of information about the scientific developments toward a safer cigarette, and an active campaign to confuse the public about the information available regarding smoking in general.⁴⁸² This systematic fraud included concealment of information regarding the addictive properties of nicotine and the targeting

⁴⁷⁸ *Id.*

⁴⁷⁹ *See id.* at 966.

⁴⁸⁰ *Id.*

⁴⁸¹ *See Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 820–28 (7th Cir. 1999), *rev'g* Ark. Blue Cross & Blue Shield v. Philip Morris, Inc., 47 F. Supp. 2d 936, 938 (N.D. Ill. 1999). This case is a consolidation of the actions of several plaintiff Funds against Philip Morris, Inc. It included both insurance companies and Funds. *See id.*

⁴⁸² *See id.* at 821; *see also* Ciresi et al., *supra* note 165, at 481–89 (detailing the efforts of many to hold the tobacco industry liable for its fraudulent conduct and the information retrieved through discovery in those cases).

of young people for tobacco sales.⁴⁸³ The conduct was alleged to violate both antitrust and RICO statutes.⁴⁸⁴

The industry proposed the adoption of a black-letter rule regarding remoteness that would bar the claim of a third-party payor of medical expenses,⁴⁸⁵ but the district court found that the Blues' injuries were indeed their own, rather than derivative.⁴⁸⁶ The district court explained that, with respect to the RICO claims, the policy-driven proximate cause inquiry under *Holmes* sufficed to survive a motion to dismiss.

[I]t does not seem to me that a motion to dismiss is the time to decide that plaintiffs will not be allowed to present their proof. I also do not think there is likely to be such difficulty in apportioning damages that a claim should not be allowed to proceed. Finally, I do disagree that plaintiffs are likely to be reimbursed by smokers' actions against defendants. The undeniably high expense undoubtedly prevents all but the very few (those with the worst injuries, and probably very few of those) from attempting such suits.⁴⁸⁷

b. The Seventh Circuit's Response

Despite the careful and correct analysis of the district court, on appeal, the Seventh Circuit reversed its decision.⁴⁸⁸ The court began with a diatribe about the tobacco litigation in general.⁴⁸⁹ The tone of its opening words immediately evidenced an unwillingness to independently evaluate the arguments of the plaintiffs. The opinion begins, "States that sued the tobacco companies have been promised more than \$200 billion in settlement Awed by this success, health insurers . . . have filed me-too suits" ⁴⁹⁰ The panel summarized the failure of these suits before other circuits and characterized the litigation strategy as follows: "They want to recover directly from to-

483 See *Int'l Bhd. of Teamsters, Local 734*, 196 F.3d at 823.

484 See *id.* at 822.

485 Here, as in the other suits, the industry relied upon reasoning like that in the 150-year-old *Slaid* case. See *supra* Part IV.E. It hardly seems appropriate, however, to use the framework of a case between two individuals for the standard in a case between the tobacco industry and those it defrauded, especially when defendants ignored the "willful exception" to *Slaid*. See *supra* text accompanying note 235.

486 See *Ark. Blue Cross & Blue Shield v. Philip Morris, Inc.*, 47 F. Supp. 2d 936, 938 (N.D. Ill. 1999), *rev'd sub nom. Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999).

487 *Id.* at 938.

488 See *Int'l Bhd. of Teamsters, Local 734*, 196 F. 3d at 828.

489 See *id.* at 820-22.

490 *Id.* at 820. "[S]tate judges are more liberal than federal judges with other people's money." *Id.* at 821.

bacco producers precisely in order to bypass the elements of subrogation actions—principally, that the insurer demonstrate the existence of a tort and the lack of any defenses to liability.”⁴⁹¹

The panel’s subrogation argument is wrong in two respects. First, it depends upon an erroneous characterization of the Funds as insurers when, in fact, they are a creature of federal statute.⁴⁹² The Funds are not insurance companies.⁴⁹³ It was wrong to treat the Funds before the Seventh Circuit (and by reference the Funds before other circuit courts) the same as the Blues, who are insurers.⁴⁹⁴ Even if insurers are required to proceed by way of subrogation, the Funds may sue directly. Second, the panel failed to recognize that, even given the availability of a subrogation claim, antitrust and RICO theories would still be viable alternatives open to the plaintiffs.

The panel objected to the tactical decision of the Blues to sue the tobacco companies directly.⁴⁹⁵ It claimed that the suit was an effort to “strip [their] adversaries of all defenses.”⁴⁹⁶ The reasoning of the opinion is confusing. The panel explains:

A third-party payor has no claim if its insured did not suffer a tort; no rule of law requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs. The food industry puts refined sugar in many products, making them more tasty; as a result some people eat too much (or eat the wrong things) and suffer health problems and early death. No one supposes, however, that sweet foods are defective products on this account; chocoholics can’t recover in tort from Godiva Chocolatier; it follows that the Funds and the Blues can’t recover from Godiva either. The same

491 *Id.*

492 The Funds vary from insurance companies in that participants do not pay premiums, rather, the relationship is akin to a trustee/beneficiary relationship. *See FMC Corp. v. Holliday*, 498 U.S. 52, 57–58 (1990). In order to raise contributions to the Funds, a bargaining agreement must be reached. *See id.* Furthermore, workers have no claim to the money collected by the Funds. *See id.*

493 *See* 29 U.S.C. § 1144(b)(2) (1994).

494 *See* Daniel M. Fox et al., *Between Public and Private: A Half Century of Blue Cross and Blue Shield in N.Y.*, 16 J. HEALTH POL. POL’Y & L. 643, 647–48 (1991). Blue Cross has been described as “both a business and, in its roles as collaborator and fiscal intermediary, an ally and even an agent of government.” *Id.*

495 *See Int’l Bhd. of Teamsters, Local 734*, 196 F.3d at 823. This objection was unfounded. The Seventh Circuit itself previously allowed the Blues to bring an antitrust claim directly. *See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1414–15 (7th Cir. 1995). “Blue Cross paid . . . directly, in accordance with Blue Cross’s contractual obligations to its insureds, and if it paid too much because the [defendant] violated the antitrust laws then it ought to be allowed to recover these damages.” *Id.*

496 *Id.*

reasoning applies when the defendant is Philip Morris. If, as the Funds and the Blues say, the difference is that Philip Morris has committed civil wrongs while Godiva has not, then the way to establish this is through tort suits⁴⁹⁷

The unfortunate analogy to the chocolate industry did not strengthen the panel's position. The Blues are victims of fraud and thus are entitled to sue for the damages of the fraudulent conduct. The court argued that 'fraud' requires reliance in its comparison of tobacco and chocolate.⁴⁹⁸ It missed the point, however, that fraud is not limited to misrepresentations.⁴⁹⁹

The Seventh Circuit opinion did not explain in detail the court's reasons for denying standing. Instead, it "just hit the highlights, mentioning only [its] principal reasons for agreeing with" the other circuits.⁵⁰⁰ The opinion referred to the previous circuit court holdings that ruled that the Funds' losses are too remote to permit antitrust recovery.⁵⁰¹

i. Antitrust Claims

The Blues brought the antitrust suit under a direct purchase theory because they purchased health care services and goods from other providers and thus were injured directly when the defendants' conspiracy eliminated competition in the development of safer cigarettes.⁵⁰² "Here, the Blues' antitrust claim focuses on a conspiracy affecting product safety, not price."⁵⁰³ An unreasonable restraint on

497 *Id.*

498 *See id.*

499 *See* *Carpenter v. United States*, 484 U.S. 19, 27 (1987); *United States v. Falcone*, 934 F.2d 1528, 1539 n.28 (11th Cir. 1991) (stating that fraud includes "both schemes to defraud that do [and do not] involve false pretenses or representations").

500 *Int'l Bhd. of Teamsters, Local 734*, 196 F.3d at 822.

501 *See id.*

502 *See* Brief of Plaintiff-Appellants at 11, 35-40, Complaint A116 ¶ 271, *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560 (E.D.N.Y. 1999). Furthermore, that the tobacco manufacturers knowingly passed on costs to health care payers makes the injury foreseeable. "If true, the allegations demonstrate that the defendants have been reaping profits at the health industry's expense." *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 584 (E.D.N.Y. 1999).

503 Brief of Plaintiffs-Appellees at 36, *Int'l Bhd. of Teamsters, Local 734* (Nos. 99-3396, 99-3397); *see, e.g.*, *Chelson v. Oregonian Publ'g Co.*, 715 F.2d 1368, 1371 (9th Cir. 1993) ("[A]lthough the dealers here are neither consumers nor competitors in the relevant market, it is clear that their interests would directly be served by enhanced competition in the market."); *see also* *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1333-34 (7th Cir. 1986) (holding that customer or competitor status is not a requirement for antitrust standing).

competition to produce a superior product, however, has been held to constitute an antitrust injury.⁵⁰⁴ Also, under the Sherman Act, limiting output is illegal per se.⁵⁰⁵ Accordingly, the plaintiffs' allegations are within the parameters of the antitrust laws.

ii. An Incomplete *Associated General Contractors* Analysis

The panel moved through a perfunctory discussion of antitrust law, failing to mention most of the *AGC* policy factors, but concluding that no direct antitrust injury was alleged.⁵⁰⁶ It claimed that "[i]nsurers' injury arises only indirectly. . . . Permitting the insurers to recover creates a risk of multiple recovery, for smokers could file antitrust actions on their own behalf."⁵⁰⁷ The court reasoned that "the direct purchaser—the consumer who either paid too much for the product, or did not have access to a better product at the same price—is the smoker."⁵⁰⁸ While smokers are also direct purchasers and were directly injured by antitrust violations, this conclusion does not take into account the role of the Blues as direct purchasers in the market for a safer cigarette, which was a restrained market. The panel's decision shortsightedly mentions only the output of cigarettes. "[T]he Funds and Blues do not say that the output of cigarettes is too low as a result of a conspiracy; they say it is too high!"⁵⁰⁹ The panel failed to address the fact that the defendants' conspiracy to suppress development efforts to manufacture a safer tobacco product, which reduced the production of such products down to nothing, resulted in a loss to the Blues' business or property. This loss took the form of money that they would not have spent but for the illegal conduct.

The characterization of the Blues as only derivatively injured has little merit, because the Blues sought to recover money they paid on behalf of their insureds. This reality is important especially with respect to the *AGC/Holmes* inquiries into whether there is a "readily identifiable class of more directly injured persons able to vindicate the statute."⁵¹⁰ Because the Blues paid the costs directly, no need arises to trace the effects of the wrongdoing through any other party. In this

504 See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500–01 (1988).

505 See *Hartford-Empire Co. v. United States*, 323 U.S. 386, 406–07 (1945).

506 See *Int'l Bhd. of Teamsters, Local 734*, 196 F.3d at 823.

507 *Id.*

508 *Id.*

509 *Id.* at 825.

510 *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268–69 (1992); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532–35 (1983).

case, no one is more directly injured or better suited to bring the case.⁵¹¹

Both smokers and non-smokers bear the costs of the fraud the tobacco companies perpetrated upon the American public, since smokers do not pay directly for medical treatment, and non-smokers cannot recover for the indirect payments that are higher due to increased premiums. The third-party insurers are left paying the price for the tobacco companies' fraud. The District Court for the Eastern District of New York aptly explained:

Recognizing a direct cause of action on the part of the Blues is consistent with the role plaintiffs play in today's society. In the same way that a spouse or parent has an obligation to provide for the medical injuries of his spouse or child, non-profit medical providers such as the Blues have an obligation to supply medical care to their covered populations. More and more, medical providers such as the Blues have assumed the responsibility for ensuring that individuals have access to medical care. For the nearly [seventy] million people, one out of every four Americans, who rely on the Blues to provide their medical care, plaintiffs occupy a type of *parens patriae* relationship with their insured which is analogous to the parent-child relationship.⁵¹²

This unique stature in the health care system led the District Court for the Eastern District of New York to correctly say, "[the Blues] stand in the best position to remedy the wrongs defendants have allegedly inflicted upon the American health care system."⁵¹³

iii. Damage Apportionment and Calculation

The panel concluded, without a careful analysis, that the suit posed a "horrible problem of damages calculation—and difficulty in calculating damages because the plaintiff's injury [was] remote from

511 See *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 576 (E.D.N.Y. 1999).

Only the Blues possess the equitable and legal claim to the costs they have incurred in the medical care and treatment of tobacco users and passive breathers of cigarette smoke. Only the Blues can claim the "injury to business or property" required by the RICO statute. The Blues are the "proper" plaintiffs; they have the necessary incentive and means to vindicate society's interest in enforcing the statute.

Id.

512 *Id.* at 581.

513 *Id.* at 585.

the antitrust violation"⁵¹⁴ As already discussed, this conclusion ignored the role of the Blues as direct purchasers.

The court also claimed that computing damages would be difficult due to the nature of smokers' risk-taking and other intervening causes.⁵¹⁵ This argument is particularly problematic because the existence of intervening causes, as discussed previously, does not defeat claims against one or more tortfeasors. As the District Court for the Eastern District of New York explained:

[T]he Blues are likely to have extensive documentation with respect to the medical care they have provided to their insured. . . . The aggregation of millions of alleged injuries in the instant suit can be expected to yield more accurate results with respect to the causation issue since projections based upon a large statistical base will be available, thus reducing the size of the possible error.⁵¹⁶

There is no danger in having a duplicate recovery because this case was brought under a direct purchase theory, so no other plaintiff could recover for this injury. Therefore, the need to apportion damages also will not arise. "Here, there is no question of double counting: plaintiffs seek only to recover the money they themselves paid, not the money someone else paid. It is not double counting that defendants seek to avoid, but any counting at all."⁵¹⁷ The need to apportion damages will also not arise, but even if it did, the single satisfaction rule and the defense of payment would operate to prevent more than one payment for the same injury.⁵¹⁸

iv. Speculativeness of Damages

Given the vastness of the harm they have caused, it is hollow for the defendants to argue that damages are too "speculative" or to question what products defendants would have produced but for the

514 *Int'l Bhd. of Teamsters, Local 734*, 196 F.3d at 823.

515 *See id.*

516 *Blue Cross & Blue Shield of N.J., Inc.*, 36 F. Supp. 2d at 575 (citations omitted). The argument simplified holds: If smoking causes lung cancer in nine out of ten smokers, it can be said to be more certain that nine out of ten lung cancer insureds have that lung cancer due to smoking rather than that smoking by one individual caused that individual's lung cancer.

517 Brief of Plaintiffs-Appellees at 21, *Int'l Bhd. of Teamsters, Local 734* (Nos. 99-3396, 3397).

518 The single satisfaction rule would prohibit duplicative damages from being collected from a single defendant. *See Morley v. Cohen*, 888 F.2d 1006, 1012-13 (4th Cir. 1989) (citing both RICO and antitrust cases); *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-601 (2d Cir. 1989) (RICO).

conspiracy, how many smokers would have switched to safer products, what health effects would have been, and so forth.⁵¹⁹

The Seventh Circuit's discussion of speculativeness of damages, however, sharply varied from the other circuits. It frankly admitted that "statistical methods could provide a decent answer—likely a more accurate answer than is possible when addressing the equivalent causation question in a single person's suit,"⁵²⁰ but the panel then backtracked and continued, "[n]o, the problem for insurers is determining what it means for a financial intermediary to be injured by paying for medical care."⁵²¹ Instead of focusing on whether *relative* difficulty of proof would make damages harder to calculate than they would be with another plaintiff, the panel re-characterized the issue as whether paying out costs (even if they are increased due to fraudulent conduct) is indeed an injury to the insurers' business or property.

The panel's reasoning is troublesome. It said, "Everyone dies eventually, usually after illness. An insurer must cover these costs even if the cause is natural. To determine damages, therefore, it is essential to compare the costs the insurers actually incurred against the costs they would have incurred had cigarettes been safer."⁵²² The panel seems to have convinced itself that, despite the mounds of evidence about the tobacco industry's decades-long suppression of information about the nature and effects of cigarette smoking, insurance companies would have had to pay those amounts anyway, because "everyone dies."

v. A Flawed *Holmes* Analysis

The Seventh Circuit's most glaring errors appeared in its discussion of RICO and the proximate cause requirements. The panel began by stating, "[t]he injury for which the plaintiffs seek compensation is remote indeed . . ."⁵²³ This statement reflects the precise mistake that the *Holmes* court warned against—making a remoteness declaration without first proceeding through the multi-factor analysis. This "remoteness" conclusion was made based on the fact that the Funds do not deal directly with the tobacco companies and culminated in the characterization of the Funds' injuries as mere "re-

519 Brief of Plaintiffs-Appellees at 26, *Int'l Bhd. of Teamsters, Local 734* (Nos. 99-3396, 99-3397).

520 *Int'l Bhd. of Teamsters, Local 734*, 196 F.3d at 823.

521 *Id.*

522 *Id.* at 823-24.

523 *Id.* at 825.

verberation[s] from smokers' decisions."⁵²⁴ According to the Seventh Circuit, smokers voluntarily assume the risks of smoking.⁵²⁵

While this might be true for some of the adult population, it fails to address the problem of youth smoking.⁵²⁶ A child who is not old enough to appreciate the risks of smoking certainly cannot assume those risks.⁵²⁷ "A greater degree of care is generally owed to children because of their lack of capacity to appreciate risks and to avoid danger."⁵²⁸ Given that information about addiction is fairly new, this argument is especially problematic with respect to then-children smokers.⁵²⁹ The allegations regarding the industry's targeting of the youth market and the manipulation of nicotine levels should have sufficed to convince the panel that assumption of the risk was not a proper ground in making a policy decision about remoteness.⁵³⁰

Due to the RICO violations, the Blues also suffered injury to their business or property by paying increased sums of money for their plans' participants. In fact, the injury alleged falls squarely within the ambit of the business or property requirement as interpreted by the Supreme Court. In *Reiter v. Sonotone Corp.*,⁵³¹ the Court explained: "When a commercial enterprise suffers a loss of money it suffers an injury in both its 'business' and its 'property' A consumer whose money has been diminished by reason of an antitrust violation has

524 *Id.* at 821.

525 *See id.* at 822.

526 "Most people who suffer the adverse health consequences of using cigarettes and smokeless tobacco begin their use before they reach age 18, an age when they are not prepared for, or equipped to, make a decision that, for many, will have lifelong consequences." Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,398 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897).

527 Astonishingly, the court failed to discuss the facts of youth smoking. A child is certainly incapable of appreciating and assuming such a deadly risk. John Stuart Mill addressed children in the law in *On Liberty*. He believed liberty belonged "only to human beings in the maturity of their faculties . . . [not children] below the age which the law may fix as that of manhood or womanhood." JOHN STUART MILL, *ON LIBERTY* 10 (Alburey Castell ed., Harlan Davidson 1947) (1859).

528 *McDaniel v. Sunset Manor Co.*, 269 Cal. Rptr. 196, 199 (Cal. Ct. App. 1990); *see also* PROSSER & KEETON, *supra* note 172, § 18, at 115 ("Capacity exists when the minor has the ability of the average person to understand and weigh the risks and benefits.").

529 *See Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 430 (Tex. 1997) ("[A]s late as 1988 . . . the danger of addiction from smoking cigarettes was not widely known and recognized in the community in general, or, particularly, by children or adolescents.").

530 *See id.*

531 442 U.S. 330 (1979).

been injured 'in his . . . property' within the meaning of [section four]."⁵³² RICO is an appropriate remedy precisely because the statute was "intended to remedy the range of economic costs of racketeering, including those economic costs racketeers inflict when they choose to achieve their aims through a pattern of violence and physical injury or by fraud calculated to injure the person."⁵³³ The racketeering-caused injury to the plaintiff is separate and distinct from the harm to the smokers. The Blues need not prove that smokers would prevail against the defendant in order to maintain an action.

The *Holmes* factor test is granted one paragraph in the opinion, in which the panel states, after declaring that the injury is too remote, that the "chain of causation [is] long, the risk of double recovery palpable because smokers can file their own RICO suits, and the damages wickedly hard to calculate."⁵³⁴ The Seventh Circuit ignores the central objective of both *AGC* and *Holmes*, that is, determining the best federal enforcer between two possible victims.

The errors of the panel's assessment are stark. To begin, a conclusion of remoteness should follow the factor inquiry. The court failed to ask whether a more direct plaintiff could sue. It erroneously claimed smokers could file their own suits—which is plainly false with respect to RICO claims.⁵³⁵ A simple declaration that the damages would be "wickedly hard" to calculate does nothing to explain why such an assessment would be so challenging as to outweigh the opportunity to vindicate the plaintiffs' injuries under the statute.

5. Fifth Circuit

The Fifth Circuit is the latest circuit court to hear a health Fund's case against the tobacco industry. In *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, the court dismissed the plaintiffs' allegations as remote.⁵³⁶ The plaintiffs' claims mirrored those alleged by other Funds, namely, that as a result of violations of RICO and antitrust law, they suffered injury to their business or property.⁵³⁷ The Fifth Circuit summarily dismissed the claims, relying exclusively on the decisions of the other circuits. It agreed with the other dismissals and said it had

⁵³² *Id.* at 339.

⁵³³ *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 221, 231 (E.D.N.Y. 1999).

⁵³⁴ *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 825 (7th Cir. 1999).

⁵³⁵ *See Int'l Bhd. of Teamsters, Local 734*, 196 F.3d at 826.

⁵³⁶ 199 F.3d 788, 789 (5th Cir. 2000).

⁵³⁷ *See id.* at 789. The Funds invoked federal antitrust and RICO, as well as state law claims. *See id.*

“no need to write further.”⁵³⁸ The panel did briefly explain their decision by saying, “the [F]unds’ lawsuits constitute an illegitimate end-run around principles of subrogation.”⁵³⁹ As above, the panel’s assertion that the claim could only be brought as a subrogation claim ignores established law. The Supreme Court and the Fifth Circuit both hold that the plaintiff who brings a case may determine upon which legal theory to rely.⁵⁴⁰ Ironically, Judge Jones, author of the panel’s opinion, also wrote the 1990 opinion in *Kidd v. Southwest Airlines, Co.*, which explained *Fair v. Kohler Die & Speciality Co.*’s statement that the plaintiff is “the master to decide what law he will rely upon.”⁵⁴¹ The availability of a subrogation claim, therefore, ought not to extinguish the right of a plaintiff to bring a RICO case or make a RICO claim somehow “illegitimate.”

CONCLUSION

Aside from the numerous errors of law previously discussed in this Note, other reasons may be marshaled to show why the circuits’ responses to the tobacco litigation were improper.

The alleged fear of a flood of litigation following a judgment against the tobacco companies is factually unfounded. In fact, the statute of limitations has run on most of the claims that could possibly be brought. Legally, smokers cannot bring individual claims under RICO, because under the statute, personal injuries are not recoverable.⁵⁴² As far as other industries (chocolate, alcohol, et cetera) are concerned, it is highly unlikely that any other plaintiffs could prove the necessary elements to bring a RICO claim. Unless fraud is far more widespread in America than anyone supposes, the tobacco industry is unique. Any other antitrust claims are also unlikely; there have been very few situations involving such widespread collusion spanning an entire industry, as is evident in the case of the tobacco industry.

The *Holmes* decision could not be a more clear outline of the proper approach for courts to make proximate cause determinations.

538 *Id.*

539 *Id.* at 790.

540 *See Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 22–26 (1913); *see also Kidd v. S.W. Airlines, Co.*, 891 F.2d 540, 544 (5th Cir. 1990) (explaining that a plaintiff may chose a state forum even if a federal forum would have been open to her).

541 *Kidd*, 891 F.2d at 544; *see also Fair*, 228 U.S. at 25 (holding that the plaintiff determines the law upon which he will base his claim), *cited with approval in Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 n.7 (1987).

542 *See* 18 U.S.C. § 1964 (1994 & Supp. IV 1998); *supra* note 381 and accompanying text.

The Second, Third, Seventh, and Ninth Circuits' misapplication of *Holmes* and the subsequent piggybacking of the Fifth Circuit illustrate the very dangers that the Supreme Court warned against.

The development of proximate cause principles revealed throughout history illustrates that, at bottom, proximate cause is a policy-based decision. This being so, the response of the circuit courts to the tobacco litigation represents an effort to blame remote causation for their decisions that policy dictates that tobacco companies should be immunized against the insurance companies they defrauded. The result is a convolution of proximate cause principles and an utter failure to follow Supreme Court precedent.

The failure to identify the best plaintiff to represent the public interest is the worst mistake made by each panel. Even decisions denying antitrust or RICO standing stress the importance of the identifiability of another plaintiff who would bring the most effective suit.⁵⁴³ Standing should never be denied if doing so will be "likely to leave a significant antitrust violation undetected or unremedied."⁵⁴⁴ The absence of another plaintiff in the tobacco suits is a relevant factor weighing on the side of allowing the suits to proceed on both antitrust and RICO theories. The Supreme Court did not fathom a situation in which one plaintiff would be declared too remote without naming another plaintiff better situated to bring the case. In this particular case, to eliminate the ability for anyone to represent those interests and to obtain a judgment against the industry is a travesty.

In a complex economy, injuries to business and property are often mediated through effects on third parties. If a claim involving a straightforward and well documented causal chain can be disqualified simply because the chain can be described as indirect, then the RICO and antitrust statutes will be eviscerated.⁵⁴⁵

The circuits defend their decision to deny standing with, among other reasons, the claim that there is a danger of duplicative damages and the claim that damages would be too difficult to compute. In fact, damages could be estimated with considerable precision, and there is no danger of duplicative recovery because, as has been demonstrated, there are no other viable plaintiffs. Additionally, the nature of the injury to the insurers is distinct from the injury to the insured,

543 See generally *Serfecz v. Jewel Food Stores*, 67 F.3d 591 (7th Cir. 1995) (antitrust); *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994) (RICO).

544 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983).

545 *Petition for Writ of Certiorari at 3-4, Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (No. 98-1426).

although they arise from the same nexus of fact. Finally, both the single satisfaction rule as well as the defense of payment would protect the industry against having to pay damages more than once for a single injury.⁵⁴⁶

To conclude:

Defendants' misconduct constitutes one of the worst legal and moral outrages of this era. Defendants have succeeded in perverting established scientific, public health, economic, governmental, and legal mechanisms for dealing with a major social problem, through deception, fraud, and anticompetitive conduct, with the single ultimate goal of preserving their profits, no matter what the cost.⁵⁴⁷

The tobacco litigation was and continues to be a grandiose disappointment to those involved and those studying it. The judges had before them more than sufficient evidence linking the industry to countless acts of fraud and deception. Their response has been to avoid doing the hard job of holding a powerful industry accountable for its serious misconduct. Some of the circuits suggested that perhaps the solution lay within the power of the legislature. That answer revealed an utter unwillingness to interpret the statutes before them and, in so doing, to remedy very clear violations of both RICO and antitrust law. The tobacco industry has proven itself powerful enough to sway the minds of Congressmen and Senators voting on regulation of the industry. In fact, Attorney General Janet Reno has recently had to ask a reluctant Congress for funding just to proceed with the government's case against the tobacco industry and has urged Congress not to "allow politics to interfere with the conduct of litigation and the final determination of the liability of the tobacco companies."⁵⁴⁸ For the judiciary to throw the issues back to the legislature was to ignore the facts and law before them. The victims are not only the smokers who relied to their detriment on the representations and claims of the tobacco industry and became addicted to its deadly product, but also future litigants who will suffer the effects these cases have worked upon antitrust law and RICO interpretations.

546 See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971); *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-601 (2d Cir. 1989).

547 Brief for Appellants at 7, *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (No. 98-1426).

548 Department of Justice, *Weekly Media Availability with Attorney General Janet Reno Also Participating: David Ogden, Asst. Attorney General for the Civil Courts*, at <http://www.usdoj.gov/ag/speeches/2000/100500agavail.htm> (last modified Oct. 6, 2000).