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Anthony J. Sebok

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I. INTRODUCTION: THE PAST FORETOLD

On February 23, 1993 *The Washington Post* published an article entitled, *"Tobacco's Last Gasp? Towards a Smoke-Free Society."*[1] The article tested the hypothesis that in the near future no one would smoke in the United States. Its focus was on means: how would America reach a point when virtually no one smoked? The predictions ran the usual gamut of policy devices. Although their order of appearance may be random, the list was as follows: legal prohibitions on smoking in public, taxes, social pressure, increased health insurance costs to smokers, and (finally) litigation.

The Washington Post article noted that just one year earlier the United States Supreme Court opened the door to lawsuits based on fraud, but that "so far" tobacco lawsuits had been ineffective.[2] It quoted one lawyer who suggested that, like asbestos, soon the "floodgates" would open and there could be "hundreds of thousands of

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[*] Centennial Professor of Law, Brooklyn Law School. The author would like to thank John Goldberg, Richard Nagareda, and Howard Erichson for their advice and comments. Simon Lee, BLS '06 and Ryan Micallef, BLS '06, provided invaluable research assistance. This Article was written with the support of a Summer Research Grant from Brooklyn Law School.

1. Don Oldenburg, *Tobacco's Last Gasp? Towards a Smoke-Free Society*, WASH. POST, Feb. 23, 1993, at C5.

2. The article was clearly referring to *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

lawsuits."[3] What would be the key to breaking the dam? The lawyer quoted in the article hypothesized that, to get around the fact that many smokers bought cigarettes after warnings were placed on them in the late 1960s, the lawsuits would have to identify some way in which smoking indirectly harmed the plaintiff—such as by enhancing the risk of disease of the children whose parents had smoked or by synergistically increasing the risk of other hazardous substances used by workers who smoked. The lawyer was unsure. But he made this prediction: "The tobacco industry goes the same way of the asbestos industry if it has conspired to hide the facts and sweep them under the carpet."[4]

Eleven years later the predictions made in the *Washington Post* article have unfolded in ways far more interesting than the author of the article might have imagined. First of all, while America is far from smoke-free, the decline of smoking in the United States has continued. In 1993, 24.8 percent of Americans smoked; in 2002, 23.1 percent smoked.[5] The most recent figures confirm a secular trend that began about forty years ago: in 1965, 41.9 percent of Americans smoked, and since then that figure has steadily declined.[6] Legal prohibitions on smoking have increased tremendously since 1993; many major cities, including New York, have banned smoking in most public places.[7] Social pressure has also arguably increased, although one might note that there has been an "anti-anti-smoking" backlash.[8] Cigarette taxes have increased, especially in the past two years. On average, since 1998, state cigarette taxes have doubled to an average of seventy-three cents per pack, with sixteen states charging more than one dollar tax per pack.[9] State taxation does not tell the whole story, since at least thirty-five cents per pack of cigarettes charged by

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3. Oldenburg, *supra* note 1 (quoting Graham T.T. Molitor, president of Public Policy Forecasting).

4. *Id.* (quoting Molitor).

5. Centers for Disease Control and Prevention, *State-Specific Prevalence of Current Cigarette Smoking Among Adults — United States, 2002*, 52 MORBIDITY & MORTALITY WKLY REP. 1277, 1278 (2004). The 2002 figures are the latest available to date.

6. *Id.*; *see also Smoking Prevalence Among U.S. Adults, 1965–2000*, infoplease.com (citing a study by the Centers for Disease Control and Prevention), *at* http://www.infoplease.com/ipa/A0762370.html (last visited Jan. 13, 2005).

7. "About 1,650 U.S. communities restrict public smoking, an increase of more than 20% since 1998 . . . ." Myron Levin, *States Tobacco Scttlement Has Failed to Clear the Air*, L.A. TIMES, Nov. 9, 2003, at C1 (citing Cynthia Hallett, Executive Director of Americans for Non-smokers' Rights).

8 Christopher John Farley, *The Butt Stops Here: Threatening to Snuff out Smoking for Good, the Crusade Against Tobacco Shifts into Higher Gear*, TIME, April 18, 1994, at 58 (discussing "backlash to the antismoking movement").

9. *Id.*

the four major tobacco companies (about 90 percent of the market) is paid to the states indirectly as part of the settlement of a series of lawsuits discussed below. In summary, as predicted by *The Washington Post*, cigarettes cost a lot more than they used to: the average price of a premium pack of cigarettes has more than doubled since 1998.[10]

What about litigation? To state the obvious, so far, Philip Morris is not Manville. Since 1993 the share price for Altria, Philip Morris's parent, has increased by about 300 percent. To be sure, at times the market has had its doubts about the tobacco industry, and the major tobacco manufacturers have seen their market share decline from about 97 percent to 87 percent—but they are not bankrupt.[11]

The comparison with asbestos is instructive. First, as with asbestos, despite initial hopes that class action devices, especially at the federal level, would allow plaintiffs' lawyers to combine resources and litigate multiple personal injury claims in a single procedure, the state and federal courts removed that possibility.[12] However, it is worth noting that the asbestos industry was not defeated by class action litigation, as many have assumed, but instead by the aggregation of individual personal injury suits.[13] This has not happened in tobacco.[14] There have been scores of individual personal

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10. *Id.*

11. *Id.*

12. *Compare* Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (reversing and remanding a district court's order that certified a class defined "solely [by] the injury of nicotine addiction") *with* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821, 864-65 (1999) (reversing and remanding an order to certify a class of plaintiffs alleging asbestos injury). The last remaining personal injury class action in tobacco in the state courts was decertified in *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003). *Engle* is currently on appeal to the Florida Supreme Court. Engle v. Liggett Group, Inc., 873 So. 2d 1222 (Fla. 2004). A nationwide "punitive damages only" class action, *In re* Simon II Litigation, 212 F. Supp. 2d 57 (E.D.N.Y. 2002), has been certified in the Eastern District of New York, but since this case is unique, it is not clear what will happen to it as it works its way through the appeals process.

13. *See* Howard M. Erichson, *Informal Aggregation: Procedural And Ethical Implications Of Coordination Among Counsel In Related Lawsuits*, 50 DUKE L.J. 381, 387 n.3, 412 & nn. 130-31 (2000).

14. Mass tort litigation, in the areas of asbestos, breast implants, and fen-phen, has largely been successful because of an unusual degree of informal aggregation (where a majority of plaintiffs are represented by one plaintiff lawyer). *See* Erichson, *supra* note 13, at 393. The aggregation of individual plaintiff's claims has largely aided the plaintiff attorney by giving added weight to his settlement negotiations. In the example of tobacco litigation, however, the tobacco industry still views each case as a fresh opportunity to reargue the issue of plaintiff's fault. With the tobacco industry's harder stance on settlement, plaintiff attorneys are less inclined to take on a large number of individual tobacco claims, with only a gloomy future of increased costs of discovery (due to a lessening of cost-sharing) and no clear likelihood of a settlement. Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 9 n. 31 (2000).

injury suits brought against the tobacco industry and a handful of victories, but there has been neither a flood of successful personal injury suits nor a practice of aggregation of individual personal injury suits, as with asbestos.[15] Furthermore, with the recent decision by the U.S. Supreme Court in *State Farm v. Campbell*, the threat of punitive damages in individual cases has been severely limited.[16] For the moment, it seems that although the threat of personal injury litigation may never disappear altogether from the tobacco industry's business environment, it will be able to manage the threat.

The disanalogy with asbestos goes much deeper. While the tobacco industry did not face a flood of personal injury litigation, it did encounter a form of litigation that no one could predict in 1993. From 1994 to 1998, the industry faced an unprecedented spate of lawsuits brought by a variety of third parties who claimed that they were harmed financially by the sale of cigarettes. As shall be explored below, these suits were brought under a number of theories; however, the core claim was ultimately that the plaintiffs—usually a health insurer like a state's Blue Cross/Blue Shield program or the state's Medicaid—were victims of wrongs that caused pecuniary losses. Further complicating the analysis is the fact that these claims were never tested before a jury (only one suit, Minnesota's, came close to verdict) and were almost never reviewed by an appellate court on questions of law. Nevertheless, these suits resulted in a spectacular settlement: an agreement by the four major tobacco companies to pay approximately $250 billion to the individual states in the United States over twenty-five years.[17]

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15. For example, this year in New York, a plaintiff was awarded $175,000 in compensatory damages and $8 million in punitive damages in a wrongful death suit against Brown and Williamson. William Glaberson, *$8 Million Award to Widow Punishes Tobacco Company*, N.Y. TIMES, Jan. 10, 2004, at B1. It is likely the punitive damage award will be reduced. *See infra* note 16.

16. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (striking down a jury's $145 million punitive damages award as violative of Due Process in a case where trial court had reduced plaintiff's compensatory damages award from $2.6 million to $1 million); *see also* Henley v. Philip Morris, Inc., 9 Cal. Rptr.3d 29, 38-39 (Cal. Ct. App. 2004) (reducing $25 million punitive damage award to $9 million in case where plaintiff received $1.5 million in compensatory damages); Boeken v. Philip Morris, 122 Cal. App. 4th 684, 692-93 (Cal. Ct. App. 2004) (further reducing a jury's $3 billion punitive damages award, which had already been reduced to $100 million by the trial court, to $50 million, in a case where the plaintiff received only $5.5 million in compensatory damages).

17. *See* W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575, 577 (1999) (stating that four states settled for approximately $36.8 billion and the remaining states forty-six states settled for approximately $206 billion through the "Master Settlement Agreement," for a total of approximately $243 billion); W. KIP VISCUSI, SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL (2002) (analyzing the settlement) [hereinafter VISCUSI, SMOKE-FILLED ROOMS].

One might say that the prediction in *The Washington Post* article in fact came true, just not quite in the way that the lawyer quoted in the article meant. After all, a $250 billion dollar legal result, which has been described as "the largest transfer of wealth as a result of litigation in the history of the human race," is equal to an unprecedented flood of individual suits.[18] But this equation of the tobacco litigation with, for example, asbestos, would conceal yet another critical difference between the way in which these two types of litigation played out. The asbestos industry—an industry whose mendacity has been well documented[19]—has been reduced to a collection of empty trusts "owned" by the plaintiffs who sued them but under the control of the bankruptcy courts. On the other hand, the position of the tobacco industry vis-à-vis the states who filed the "flood" of third-party claims is quite different. The states have not put the tobacco industry out of business, and they do not control the tobacco companies. Instead, the states are now dependent on the tobacco industry's continued success at selling cigarettes since the $250 billion settlement is 90 percent funded by current and future smokers.[20] As an executive at R.J. Reynolds ironically put it, "[T]here's no doubt that the largest financial stakeholder in the [tobacco] industry is the state governments."[21] The states understand well how important it is that tobacco be spared the fate of asbestos. For example, in two recent cases in which it appeared that the industry might face bankrupting court proceedings brought by *private* litigants, the states came to the aid of the tobacco industry and helped the industry to blunt legal maneuvers by private plaintiffs that would have fatally wounded the industry.[22]

Imagine that we were to write an article in 1993 and make the following prediction: Imagine that we predicted a future in which smoking would be increasingly socially unpopular and heavily taxed.

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18. Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Government: Repairing the Damage*, 31 SETON HALL L. REV. 563, 564 (2001); *see* Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 355 (2000) (noting that the settlement is "the largest ever").

19. *See* PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985).

20. DeBow, *supra* note 18, at 569 (citing W. Kip Viscusi).

21. Levin, *supra* note 7, at C1 (quoting Tommy Payne, Executive Vice President for External Affairs at R.J. Reynolds).

22. *States Try to Save Cigarette Maker and Their Own Coffers*, DETROIT NEWS, Apr. 12, 2003, at D6 (reporting that a majority of the nation's state attorneys general filed a brief in an Illinois consumer class action seeking to protect Philip Morris from paying the full amount of a $12 billion appeal bond); John Kennedy, *Tobacco Verdicts Light Up Fears; Lawmakers Are Afraid Settlement Money Might Disappear*, ORLANDO SENTINEL TRIB., Apr. 11, 2000, at D1 (Florida legislature capped appeals bonds retroactively to protect tobacco industry in *Engle* suit).

Further, imagine that we predicted a future in which the tobacco industry would be widely known to have lied about smoking and would be treated as untrustworthy by all parts of society. Finally, imagine that we predicted a future in which very few of the people who smoked in the past received compensation (despite a shared consensus that the tobacco industry engaged in many bad acts, including fraud) and that the state governments *defended* the industry against plaintiffs so that a steady stream of tax money (overt and covert) could be collected by the states although very little of that money was used for the prevention of smoking, smoking cessation, or the public health.[23]

Is there anything wrong with such a state of affairs? The bad guys (the tobacco companies) have been publicly unmasked; no one treats them with equanimity anymore. Smoking, which is a legal habit, is now taxed at unprecedented levels; this seems to be good public policy.[24] The only thing missing is any sense of corrective justice between the smokers and the tobacco industry. The tobacco industry may have been publicly unmasked, and today's smokers may be paying higher taxes, but yesterday's smokers are not being compensated for the wrongful conduct that seemed to form the foundation of the states' litigation. One could see error in this result only by believing in two premises: (1) that the tobacco industry had caused injuries for which they were *legally* liable when the states sued them in the 1990s; and, (2) that if they were legally liable for causing some set of injuries, the parties who have priority on any recovery would be the smokers, as opposed to the states who brought the suits.[25]

My sense is that many are pleased that, as a result of the litigation that resulted in the MSA, the truth about the tobacco

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23. Most states seem to have diverted much of their Master Settlement Agreement ("MSA") payments towards general funds. *See, e.g.*, Kevin Corcoran, *Efforts to Reduce Smoking Take a Hit; Budget Diverts Tobacco Funds to Other Programs*, INDIANAPOLIS STAR, May 13, 2003, at 1B.

24. Taxes on cigarettes can be seen as good public policy if we regard a decline in cigarette purchases and smoking as a sign of good public policy. *See* Brian Swint, *German Cigarette Sales Drop by Quarter After New Tax*, BLOOMBERG NEWS, May 14, 2004 (reporting that cigarette sales have decreased by 25 percent since Germany increased its cigarette tax from three euros to four euros).

25. *See* Dagan & White, *supra* note 18, at 415. Dagan and White posit that government claims against the tobacco industry are valid based on the theory of legal subrogation, where the states suffered an economic loss through their Medicaid programs by paying more money earlier than if their citizens had not smoked. *Id.* at 365. Therefore, states were entitled to recover the economic loss from the tobacco industry. *Id.* Although government intervention is beneficial in preventing and ameliorating injuries, Dagan and White emphasize the point that governmental interference with compensatory awards of injured citizens in the name of public good cannot be "just" unless accompanied by compensation to those citizens. *Id.* at 415-16.

industry's conduct was brought to light and has now pervaded both popular and elite culture.[26] I also suspect that, except for smokers (and perhaps even a few of them), most people view the increased difficulties placed upon smokers (especially the high price of cigarettes) as a good thing.[27] Therefore, if we are happy with these results of the litigation, how should we explain away any anxiety we might feel over the lack of compensation to past smokers who were the target of the tortious conduct? One might take the position that, although the tobacco industry did in fact do some very bad things, individual smokers are not deserving recipients of compensation because they contributed to their own harm. I wonder, however, how many advocates of the state third-party litigation would admit to thinking this about the smokers themselves. The other position one might take is that the MSA was a good "second best" solution: since personal injury cases brought by individual smokers have proven ineffective, securing legal redress for the states was the only remaining approach. As a second-best solution, the states' "third-party" strategy had further attractions. It allowed the lawyers who brought the suits to introduce extremely incriminating documents into public view and restricted access to cigarettes by increasing their price and placing other restrictions on their marketing.

From a practical point of view, the states' third-party litigation is quite attractive. The benefits it offers—shifting cigarette "policy" towards a state of affairs where the tobacco industry is discredited and cigarettes are hard to get—is one that I personally endorse. The cost of the strategy—that the claims of individual smokers are suppressed in favor of state entities—might be worth accepting given the benefits. Yet there may be other, collateral costs that one must consider before drawing any conclusions about the strategy. For example, one might want to know more about the legal foundation of the states' "third party" litigation strategy. Should it matter, for example, that it was based on legal claims that were almost wholly untenable at the time the suits were filed? This was, as I shall argue, almost certainly the case. Given the legal infirmity of the states' third-party litigation strategy, but its obvious attractiveness given the results it produced,

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26. *See* VISCUSI, SMOKE-FILLED ROOMS, *supra* note 17, at 4.

27. New York is an example of a situation where the higher prices of cigarettes, combined with the ban on smoking in bars and restaurants, has lead to an overall decrease in cigarette smokers and also to an additional decline in cigarette consumption. *See* Richard Perez-Pena, *New York Taxes and Ban Make Smokers Give Up*, scotsman.com (May 13, 2004) (reporting that between 2002 and 2003, the percentage of adult smokers dropped from 21.6 percent to 19.3 percent – an approximate 100,000 adults – and also noting a 13 percent decline in cigarette consumption, suggesting that smokers who did not quit were smoking less), *at* http://news.scotsman.com/topics.cfm?tid=663&id=543832004.

should it matter that was essentially a political solution cloaked in a legal pretense? That will be the subject of the remainder of this Article.

II. THE LEGAL ASSAULT ON BIG TOBACCO: THE BEGINNING

To understand why the states' third-party strategy was both necessary and legally infirm, one must understand the history of contemporary tobacco litigation. The history can be divided into three phases. The first wave of litigation sprang from a flurry of early 1950s articles publicizing the relationship between smoking and lung cancer. There was a smattering of reports linking smoking to cancer in the 1930s, but by the 1950s such reports were more credible and widely-read.[28] The earliest plaintiffs brought actions based on this new information under negligence and warranty theories, though neither theory proved successful.[29] The greatest challenge to plaintiffs was not rejection of claims by judges and juries, but instead, that the vast majority of first-wave cases were dropped before even reaching trial.[30] This was because the plaintiffs were unable to spend as much money as the tobacco industry, which used a variety of pretrial litigation tactics to make discovery and motion practice as expensive as possible.[31]

As the first wave of tobacco litigation drew to a close, the Surgeon General released his pivotal 1964 report that officially confirmed the hazards of smoking, and the government subsequently subjected tobacco companies to increasing regulation. In the meantime, Americans had developed an unprecedented concern with toxic risk, which was reflected in the products liability boom that revolutionized the American tort system between the late 1960s and early 1980s. This boom included high-profile cases in which plaintiffs argued that exposure to toxic substances like Agent Orange, DES, the

28. MARTHA DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 9 (2002).

29. Actions in negligence failed because plaintiffs were unable to establish foreseeability, as illustrated in *Lartigue v. R.J. Reynolds Tobacco Co*, 317 F.2d 19, 40 (5th Cir. 1963). Early juries largely accepted the link between smoking and cancer, but the *Lartigue* court refused to embrace the premise that the industry should have insured against "unknowable risks." DERTHICK, *supra* note 28, at 29. In *Green v. American Tobacco Co.*, the Fifth Circuit held *en banc* that the alleged unwholesomeness of a product line, rather than an anomalous defect, did not constitute a breach of warranty claim. 409 F.2d 3, 11 (5th Cir. 1969) (en banc).

30. Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 112 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

31. *Id.* at 115.

Dalkon Shield, and Bendectin resulted in disease.[32] In these cases, activist judges modified traditional doctrines of tort law and procedure, especially as they related to causation, enabling victims to recover at least a portion of the cost of their injuries.[33] Asbestos litigation was at the fore of these cases. The first cluster of asbestos cases represented the heaviest onslaught of litigation the tort system had ever faced.

The second wave of tobacco litigation, spanning 1983-1994, found its roots in asbestos litigation. A team of veteran asbestos attorneys who gained experience on the link between lung cancer and cigarette smoking tackled one of the most well-known cases from this era.[34] Plaintiffs' lawyers believed that by focusing on tort rather than warranty they could rely on strict liability to concentrate on tobacco's inherent danger rather than on the foreseeability of harm to smokers. Tort, however, turned out to have its own pitfalls for plaintiffs. The victories of the defendants in *Cipollone v. Liggett Group, Inc.* and *Horton v. American Tobacco Co.* illustrate how the second wave was distinct but still not more successful than its predecessor. The plaintiff in *Cipollone* brought an action for breach of express warranty and negligent failure to warn. At trial, the jury found that the defendant had been negligent in failing to warn before 1966 but also held that the plaintiff "voluntarily and unreasonably encountered a known danger," and was therefore 80 percent responsible.[35] In *Horton*, the plaintiff alleged design defect and persuaded the jury that the design of cigarettes made them unreasonably dangerous, yet because of the assumption of risk argument, the jury awarded the plaintiff no damages.

Subsequent to 1994, plaintiffs brought three types of actions in third wave tobacco litigation: cases by individuals, nationwide class actions, and state health care reimbursement cases. The third wave was characterized by a complex interaction between two changes in

32. Plaintiffs' success in these cases (either at trial or settlement) can be seen as part of a larger pattern through which mass torts became a tool for resistance to corporate power. *See, e.g.*, THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 2-3 (2001); Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 853-54 n.18.

33. *See* PETER SCHUCK, AGENT ORANGE ON TRIAL 178-89 (1985); MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS 211-14, 217-20 (1996). In some of these cases (DES and Dalkon Shield), judicial activism seemed justified in retrospect, while in others (Agent Orange and Bendectin), the weakening of traditional doctrinal rules resulted in a situation where, in retrospect, corporate defendants who were not the cause of plaintiffs' injuries settled cases simply to escape the risk of an unpredictable jury verdict.

34. Rabin, *supra* note 30, at 119. Plaintiffs' attorneys for *Cipollone v. Liggett Group* represented plaintiffs in several asbestos cases.

35. Cipollone v. Liggett Group, 693 F. Supp 208, 213, 215 (D.N.J. 1988).

legal strategy. First, plaintiffs began to shift the emphasis of their claim from the product (the cigarette) to the product's marketing (lying about the cigarette). The increased emphasis on allegedly fraudulent acts of the tobacco industry came about partly as a reaction to the failure of those legal theories that emphasized the defective nature of the cigarettes as a product and partly out of the increase in information relating to fraud that the first two waves of litigation generated.

Third wave plaintiffs had access to evidence of fraud unavailable to earlier plaintiffs. In the early 1990s, Merrell Williams, a paralegal working for the firm representing tobacco giant Brown and Williamson, procured documents containing evidence of the industry's knowledge of the health risks and addictive nature of smoking. Brown and Williamson fired Jeffrey Wigand, its head of research and development, in 1993 after he spent years battling the company's refusal to acknowledge publicly the health risks of smoking and nicotine's addictive qualities. Both Wigand's and Williams's revelations appeared in the *New York Times*, the *Wall Street Journal*, in Congressional hearings on tobacco, and in the hands of antitobacco activists.[36] These documents surfaced at the same time as several executive leaders in the tobacco industry, in Congressional hearings, denied knowledge of nicotine's addictive qualities. This information energized individual smoker cases because it gave juries a reason to ignore the tobacco companies' assumption of risk defense—if the tobacco industry set out to fool smokers, it was argued, then smokers could be forgiven for acting foolishly. It also created a new dynamic in the calculation of damages: in a number of cases, juries indicated that they thought that smokers still bore part of the blame for smoking, but they then granted multimillion dollar punitive damage awards to punish the industry for anti-social conduct.[37]

The second change in legal strategy in the third wave was that plaintiffs attempted to recast their suits as class actions, thus turning them into mass claims on behalf of all smokers. In the first and second waves of tobacco litigation, courts determined liability on a case-by-case basis, whereas in the third wave, cases like *Castano v. American Tobacco Co.* combined individual claims and challenged the

36. Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO 184 (Robert L. Rabin and Stephen D. Sugarman eds., 2001).

37. Williams v. Philip Morris, 48 P.3d 824, 835, 842 (Or. App. 2002) (upholding an $800,000 compensatory and $79.5 million punitive award); Boeken v. Phillip Morris, Inc., No. BC 226593, 2001 WL 1894403, at *1, *15 (Cal. Super. Ct. Aug. 09, 2001) (upholding a $5.5 million compensatory damages award and reducing a $3 billion punitive damages award to $100 million).

entire industry in tort.[38] The *Castano* suit alleged a classwide injury of addiction and also claimed that the tobacco industry had committed either fraud or negligent misrepresentation when it failed to warn smokers of the risk of nicotine addiction. Why the switch in emphasis from cigarettes' carcinogenic dangers to their addictiveness?[39] It is probably safe to assume that the architects of the *Castano* suit believed that addiction was an easier injury to establish on a class-wide basis than the diseases caused by cigarettes, and hence they tailored the claim by the class to fit the predominance and superiority requirements of Rule 23 of the Federal Rules of Civil Procedure.[40]

Ultimately, the Fifth Circuit decertified the *Castano* class of nearly 45 million smokers, but kept open the possibility that a plaintiff class could be certified at the state level.[41] The court noted two problems. First, the diversity of state laws, especially as they related to fraud, would make it impossible to define common questions of law for a single trial.[42] Second, the district court that certified the class erroneously determined that common issues of fact were likely to predominate the class action. The Fifth Circuit noted that, especially in a suit based in part on allegations of *fraudulent* misrepresentation, the question of individual reliance would probably predominate the resolution of the whole suit.[43]

After the Fifth Circuit's denial of class certification, several plaintiffs filed "son of *Castano*" cases in state courts, almost all of

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38. Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

39. It is an interesting question to what extent the tort system should be available for suits against manufacturers of addictive substances that are not physically injurious. Imagine, for example, a product like Nicorette, which was marketed much like cigarettes. There, the plaintiffs might have brought suit for fraudulent or negligent misrepresentation, and demanded compensatory damages (the price of the product) and punitive damages. But it is clear that in *Castano* the addiction claim was a hook designed to open up the tobacco defendants to consequential damages for personal injuries arising from cigarettes' cancerous effects.

40. The shift from alleging tobacco-related injuries to addiction did not mean that the plaintiff class abandoned the quest for compensation for tobacco-related injuries. The damages sought by the class in *Castano* included all the damages one would have expected from a suit against the tobacco industry: compensatory and punitive damages, attorneys' fees and equitable remedies including "a declaration that defendants are financially responsible for notifying all class members of nicotine's addictive nature, a declaration that the defendants manipulated nicotine levels with the intent to sustain the addiction of plaintiffs and the class members, an order that the defendants disgorge any profits made from the sale of cigarettes, restitution for sums paid for cigarettes, and the establishment of a medical monitoring fund." *Castano*, 84 F.3d at 737-38.

41. *Id.*

42. *Id.* at 743 (citing Georgine v. Amchem Prods., 83 F.3d 610 (3d Cir. 1996)).

43. *Id.* at 745-46.

which were dismissed or remain stagnant in state courts.[44] The failure of "son of *Castano*" cases at the state level was mirrored by their contemporary, *R.J. Reynolds Tobacco Co. v. Engle*.[45] The *Engle* plaintiffs sued the tobacco industry on theories of product liability and fraud. In 1996, a Florida intermediate court of appeals upheld the certification of a class of up to 700,000 Florida smokers suffering from tobacco-related diseases.[46] The issues at the subsequent trial were whether the industry had engaged in deceptive conduct, whether cigarettes as designed and marketed were unreasonably unsafe, whether there was a causal link between the plaintiffs' diseases and smoking, and whether punitive damages were warranted. The jury answered "yes" to each question and found in mid-2000 that the plaintiff class was entitled to $144.8 billion in punitive damages.[47] On appeal, the same appellate court that had upheld the statewide class certification reversed its 1996 decision and decertified the class in May 2003.[48]

As mentioned above, once decertified, individual cases became rare, and where there were spectacular verdicts, the industry was confident that it could get the large punitive damage awards reduced and then pay off the compensatory awards if necessary.[49] The real

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44. Rabin, *supra* note 36, at 188.

45. 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

46. *Id.* at 42.

47. *Tobacco Suit Award: $145 Billion: Florida Jury Hands Industry Major Setback*, WASH. POST, July 15, 2000, at A1.

48. Liggett Group, Inc. v. Engle, 853 So. 2d 434, 470 (Fla. Dist. Ct. App. 2003). The appellate court also held that the trial court had permitted enough errors on the part of the plaintiffs that the defendants were entitled to a new trial, *id.* at 465-66, and it held that the punitive damage award produced by the trial violated the U.S. Constitution. *Id.* at 470.

49. Since the MSA, the tobacco industry has won twelve cases and lost six. *See* Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality*, 30 J.L. MED. & ETHICS 224, 231 (2002); Boerner v. Brown & Williamson Tobacco Co., No. 03-3557, 2005 U.S. App. LEXIS 223, at *6 (8th Cir. Jan. 7, 2005) (affirming $4,025,000 in compensatory and $15 million punitive award); Boeken v. Philip Morris, No. BC 226593 (Cal. Super. Ct. June 6, 2001) (awarding $3 billion in punitive damages, later reduced to $50 million); Henley v. Philip Morris, No 995172, 1999 WL 221076, at *1 (Cal App. Dep't Super. Ct. Apr. 6, 1999) (awarding $1.5 million compensatory and $50 million punitive, later reduced to $25 million); William-Branch v. Philip Morris, No. 9705-03957 (Or. Cir. Ct. 1999) (awarding $8 million compensatory and $79.5 million in punitive, later reduced to $32 million punitive); Whitely v. RJ Reynolds Tobacco, No. 303184 (Cal. Super. Ct. March 27, 2000) (awarding $1.7 million compensatory and $20 million punitive); Engle v. RJ Reynolds Tobacco, No. 94-08273 CA-22, 2000 WL 33534572 , at *13-14 (Fla. Cir. Ct. Nov. 6, 2000) (class action awarding $144 billion in punitive); Ramos v. Philip Morris Cos., 743 So. 2d 24, 27 (Fla. Ct. App. 1999) (discussing an award of $300 million in an airline attendants' class action for second hand smoke in the case of *Broin v. Philip Morris Cos.*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994)); Philip Morris USA, Inc. v. Eastman, Case No. 2D03-2357, 2004 Fla. App. LEXIS 6421 (Fla. Dist. Ct. App. May 7, 2004) (affirming award of $3.2 million in compensatory damages and no punitive damages); Frankson v. Brown & Williamson Tobacco Corp., 2004 NY Slip Op 50605U, 1 (N.Y. Sup. Ct. Jan. 9, 2004) ($175,000 in

impact of the third wave of tobacco litigation resulted from settlement of the state healthcare reimbursement cases. In 1994, Mississippi began a Medicaid restitution action against the tobacco companies. The suit, which was filed in chancery, contended that the state should recover restitutionary damages from the tobacco companies because they were unjustly enriched when state Medicaid payments saved them the money they should have paid smokers. Within a year, scores of other states filed similar lawsuits using the same claim of unjust enrichment. Not all states chose to follow Mississippi's legal theory, however. Minnesota's Attorney General filed a suit in 1994 alleging that the tobacco companies violated Minnesota's consumer protection statutes designed to shield consumers from industry fraud and deception.[50] Minnesota argued that the consumer fraud statute gave standing to the state to recover Medicaid expenses that had accrued because of consumer fraud.[51]

III. LOSING BATTLES AND WINNING THE WAR

To fully appreciate the ingenuity that produced such a remarkable victory for the opponents of Big Tobacco, one must come to terms with the way that the state reimbursement claims changed the legal grounds of their complaints against the industry. The architects of the Mississippi case, for example, shifted the focus from the harms caused to smokers to the harms caused to the healthcare system. They did this for two reasons. First, they believed that by focusing on the states' losses, the question of smokers' own conduct would be completely mooted, thus removing the single most important weapon in the tobacco industry's arsenal.[52]

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compensatory damages and $8 million in punitive damages awarded); Thompson v. Brown & Williamson Tobacco Corp., No. 00-CV-220555 (Mo. Cir. Ct. Nov. 4, 2003) (smoker awarded $1.05 million in compensatory damages and no punitive damages).

50. G.L. Wilson & J.A. Gillmer, *Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance Under Statutes*, 25 WM. MITCHELL L. REV. 567, 568 (1999). These acts were the Prevention of Consumer Fraud Act, the Unlawful Trade Practices Act, the False Statement in Advertising Act, and the Uniform Deceptive Trade Practices Act. *Id.*

51. The Mississippi lawsuit was settled in July 1997 for $3.3 billion over twenty-five years. Florida next settled its suit with the industry in August 1997 for $11.3 billion, then Texas settled its suit in January 1998 for $15.3 billion, and finally Minnesota settled its suit on the eve before the jury was about to render its verdict for $6.1 billion. Following this trend, the Attorneys General from forty-six states (including the four that already settled) negotiated a $206 billion industry global settlement in reimbursement for Medicaid and related healthcare costs. Rabin, *supra* note 36, at 193.

52. DeBow, *supra* note 18, at 563.

> [T]he states could not successfully frame their claims against the tobacco companies in terms of either the traditional tort doctrine of subrogation or the codified version of the doctrine that allows most state governments to seek reimbursement for medical

Second, and equally as important, by making the state the plaintiff, all the issues of class certification raised in the *Castano* context would be mooted as well, since instead of millions of plaintiffs, there would be only one. Concerns over common issues of fact, which doomed earlier class actions to fail the predominance and superiority tests of federal and state class action statutes, would be finessed. A state could argue that, although the question of whether a state could recover against the tobacco defendants might involve contested factual issues resolvable only through the testimony of potentially numerous individual smokers, since those smokers were not parties to the suit, their due process rights were not at issue and there was no *Castano*-type numerosity or superiority barrier to the state's suits.

The move towards the single, unitary plaintiff comes with some risks. The easiest way to describe the risk is that, even if, as lawyers for the states believed they could demonstrate after exhaustive discovery, the tobacco companies had lied to smokers and sold them a product that was deliberately designed to cause injury and addiction, what *standing* did the states have to bring a claim? There are a number of ways of establishing standing. The most obvious would have been for the states to bring suit under the equivalent of "contractual" subrogation, a right that they have under state law.[53] However, given the shortcomings of subrogation, the states turned to other legal theories.[54] Each had its own problems.[55]

For example, those states that claimed a right to indemnity simply misunderstood the meaning of that claim. As stated in Section

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> expenditures. Subrogation . . . would put tbe states in the shoes of smokers - who, as we know, had uniformly failed in their lawsuits against the tobacco companies up to that point.

Id. Or, as Mississippi Attorney General Mike Moore put it: "This time, the industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette. Yet it has paid the medical expenses of thousands of indigent smokers who did." Mike Moore, *The States Are Just Trying to Take Care of Sick Citizens and Protect Children*, 83 A.B.A. J. 53, 53 (1997).

53. *See, e.g.*, N.Y. SOC. SERV. LAW § 367-a(2)(b) (2004) (statute providing for the subrogation of social service officials in the State of New York for their medical expenditures); 18 N.Y. COMP. CODES R. & REGS. tit. 18, § 542.1 (2004) (regulations providing the same); MD. CODE ANN., HEALTH-GEN. I § 15-120 (2003) (same); 62 PA. CONS. STAT. § 1409 (2004) (same).

54. Subrogation claims, applied to tobacco litigation, would be vulnerable to the same defenses that the industry could have raised in the context of individual smoker's suits. The most significant of these would have been a defense based on the statute of limitations, which would have begun to run presumably at different times based on each smoker's knowledge and a defense based on the fault of each smoker or their assumption of risk. William H. Pryor, Jr. et al., *Report of The Task Force on Tobacco Litigation Submitted to Governor James and Attorney General Sessions*, 27 CUMB. L. REV. 577, 589-90 (1996-1997).

55. Dagan & White, *supra* note 18, at 376 n.90, have enriched the discussion by the exhaustive review of the same issues.

76 of the Restatement (First) of Restitution, indemnification may be demanded where "a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other."[56] The classic case of indemnification occurs in tort, when one party who has a duty to an injured victim pays that victim (either as a result of judgment or settlement) and then sues another party who also owed a duty to the victim for the entirety of the amount paid to the victim.[57] The duty to indemnify cannot arise just because the payor "volunteers" to satisfy an obligation owed by another.[58] This is made explicit in the draft Restatement (Third) of Restitution and Unjust Enrichment Section 26. It clearly states that indemnification is a duty that arises between parties who breached a joint duty that resulted in an injury to the victim, the compensation for which was provided by the one party now seeking indemnification from the other.[59] Beyond this, the common law in most states does not permit indemnification except under very limited circumstances. For example, when the parties are not joint tortfeasors, Iowa common law only permits indemnification where there is an express contract, vicarious liability, or the breach of an independent duty between the indemnitor and the indemnitee.[60] For this reason, Iowa's Supreme Court summarily affirmed the dismissal of the indemnity claim.[61]

Even if the claim for indemnification could be made sensible as a matter of doctrine, it would still have put the states right back where they did not want to be—in the position of having to prove that the tobacco companies owed a duty to compensate the smokers on whose behalf the states had expended funds for medical care. The existence of an obligation between the indemnitee and the victim who received money from the indemnitor is a prerequisite for the existence

56. RESTATEMENT (FIRST) OF RESTITUTION § 76 (1937).

57. WILLIAM PROSSER ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 51 (5th ed. 1984).

58. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 708-09 (3d ed. 2002).

59. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 26 (Council Draft No. 3, 2001) ("A claim to indemnity or contribution arises when the claimant has discharged all or part of a common liability. A claim under this Section must be distinguished, therefore, from the analogous claim that arises when A and B owe independent duties to a third party, C, or when A, acting with adequate justification, renders a performance to C for which B would have been liable to C directly").

60. Daniels v. Hi-Way Truck Equip., 505 N.W.2d 485, 490 (Iowa 1993).

61. State *ex rel.* Miller v. Philip Morris, Inc., 577 N.W.2d 401, 405-08 (Iowa 1998); *see* State v. Philip Morris, Inc., No. 96122017, CL211487, 1997 WL 540913, at *10-12 (Md. Cir. Ct May 21, 1997) (finding that the State of Maryland had no right to assert claims on its own name against the tobacco company for allegedly causing harm to third-party smokers).

of a duty to indemnify.[62] The tobacco industry could then argue that indemnification for the entire class of smokers who received medical care could not be presumed, but would have to be proven on a case-by-case basis, thus putting the states in exactly the same place they would have been if they had pursued multiple subrogation claims.

Many states pled that the tobacco industry assumed a duty of care to them or other insurance-type entities when they "undertook" to protect them by offering to monitor and study the health effects of tobacco use.[63] Besides the implausibility of the factual predicate of this claim (one can interpret the various lies issued to the public by the tobacco industry as many things, but it is hard to shape them as promises to the states), the common law only allows standing to plaintiffs who have been *physically* harmed as a result of a breach by a defendant to follow on an undertaking to provide care.[64]

A number of states, including Mississippi, sued under a theory of unjust enrichment. In many states this claim was barred under the doctrine that unjust enrichment is only available in the absence of any other remedy.[65] In the jurisdictions where it was allowed to go forward, the claim was dismissed either because courts found that the alleged benefit conferred by the states onto the tobacco companies was too speculative to be actionable or was the result of mere volunteerism.[66] Despite extensive briefing, the unjust enrichment claim in Mississippi never received substantive review by any court before the case settled. Professor Douglas Rendleman's exhaustive review of the claims in equity made by the lawyers working for the state takes a dim view of the cause of action from the perspective of

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62. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 26 (Council Draft No. 3, 2001).

63. RESTATEMENT (SECOND) OF TORTS § 323 (1965) (stating that "one who undertakes, gratuitously or for consideration, to render services" for the protection of another person may be subject to tort liability if such undertaking is performed negligently and causes injury).

64. RESTATEMENT (SECOND) OF TORTS § 324A (1965); State v. Am. Tobacco Co., 14 F. Supp. 2d 956, 973-74 (E.D. Tex. 1997); State v. Am. Tobacco, Inc., No. 96-2-15056-8 SEA, 1997 WL 714842, at *7 (Wash. Super. Ct. June 6, 1997) (no duty to government insurer); Laborers' & Operating Engrs. Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc., 42 F. Supp. 2d 943, 951 (D. Ariz. 1999) (no duty to nongovernmental insurer).

65. This was the holding of courts in Iowa, Washington, and West Virginia. *See infra* note 66.

66. *See* Iowa v. R.J. Reynolds, No. CL 71048 (Iowa Dist. Ct. Aug. 26, 1997), *at http://stic.neu.edu/Ia/dec8-26.htm*; *Philip Morris Inc.*, 1997 WL 540913, at *17; State v. Am. Tobacco, Inc., No. 96-2-15056-8 SEA, 1996 WL 931316, at *9 (Wash. Super. Ct. Nov. 19, 1996); McGraw v. Am. Tobacco Co., Civ. A. No. 94-C-1707, 1995 WL 569618, at *3 (W. Va. Cir. Ct., June 6, 1995).

Mississippi law.[67] As Rendleman notes, the unjust enrichment claim assumes that the state stepped in to pay an obligation that the tobacco companies would have been obliged to pay, which is exactly the issue that the state had hoped to avoid when it abandoned the subrogation argument:

> The plaintiff's first step in unjust enrichment is showing defendant's enrichment as a benefit. The tobacco companies argue they were not enriched. A defendant must have "economic benefit" as a prerequisite to restitution. . . . Only if the tobacco companies were liable to the smokers for damages would the State's Medicaid payments to the smokers be an "economic benefit" to the tobacco companies. The tobacco companies would have been enriched if the State had paid an obligation the tobacco companies really owed. A restitution-indemnity plaintiff who discharges a duty to the defendant owed may recover from the defendant. . . . The State cannot recover its payments for the smokers' health care costs from the tobacco companies as restitution-indemnity unless the tobacco companies were liable to the smokers.[68]

The unjust enrichment argument, as argued in states like Mississippi, was really the indemnity argument recast all over again, and it bore all the problems that we saw above in proving that the tobacco industry had breached its duties to the smokers of the state.

Hanoch Dagan and James White argue that the unjust enrichment claims were a blind alley that the states should have never pursued, since the legal basis for their claims was in equitable (or legal) subrogation."[69] The key difference between a claim in equitable subrogation and contractual subrogation is the presence in the latter of a contractual right granted to the subrogee by the subrogor to pursue the third party who injured the subrogor for damages not to exceed the benefit granted by the subrogee to the subrogor. While many insurers insist that their insureds provide them with the right of subrogation by contract, the absence of a contract between insured and insurer does not make subrogation impossible—it just becomes equitable.[70]

The difference between the right to indemnification and the right to equitable subrogation is more difficult to define. The

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67. Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 852-98 (1999).

68. *Id.* at 899-900.

69. Dagan & White, *supra* note 18, at 374-76 ("We believe that the states had only one meritorious claim against the tobacco manufacturers, namely subrogation to the claims of their citizens against the tobacco manufacturers in tort"). Dagan and White also consider the equivalency of legal and equitable subrogation. *Id.* at 384.

70. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 26 cmt. d (Council Draft No. 3, 2001). Dagan and White use the term "legal subrogation;" however, since they admit that the terms are equivalent, I will use the term adopted by the Reporter for the Restatement.

Restatement (Third) of Restitution draws the distinction by placing the two categories of recovery in two separate sections: Section 25 (Indemnity) and Section 26 (Equitable Subrogation). The main difference between indemnification and equitable subrogation is that indemnitors and indemnitees are joint tortfeasors, while equitable subrogation "deals with claims between parties whose duties to the third person are not only independent but may be of different character and origin."[71]

Dagan and White think that the courts made many terminological and substantive mistakes when confronted by the states' reimbursement claims. In addition to using incorrect terminology, they argue, those courts that treated the states' equitable subrogation claims as unjust enrichment claims and wrongly dismissed the claims simply because there were other remedies available.[72] This is in accord with arguments Dagan has made elsewhere about the doctrinal independence of unjust enrichment claims, which cannot be treated in any detail in this Article.[73] More important for the current discussion is Dagan and White's view that when the states filed suits under the banner of unjust enrichment, they were really asking for subrogation, which is the remedy for a situation in which there has been unjust enrichment.[74]

Dagan and White correctly observe that the reason so many lawyers and judges, such as in the Mississippi suit, elected to label their equitable subrogation action "unjust enrichment" was that they were scared that the invocation of the label "subrogation" would immediately invite the same panoply of defenses invoked against the individual smokers whose health care the states had funded.[75] Of course, as illustrated in the above review of Rendleman's critique of the Mississippi unjust enrichment suit, the problem of proving a wrong to the smokers would not have been magically eliminated had the state cases been properly tried as unjust enrichment claims. Dagan and White's more precise description of the suits as noncontractual subrogation merely brings this problem into sharper focus. The problem with any noncontractual subrogation claim by the states is that, for the tobacco industry to be obliged to pay the states for personal injuries suffered by their insureds (the smokers), the

71. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 26 cmt. a (Council Draft No. 3, 2001).

72. Dagan & White, *supra* note 18, at 376 n.90.

73. HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 5-6 (1997).

74. Dagan & White, *supra* note 18, at 384.

75. *Id.* at 376.

states would have to prove that their insureds had good claims in tort. Except for Florida, which stripped away all affirmative defenses in state subrogation claims against the tobacco industry, this would require a factual inquiry into every smoker's knowledge and choices.[76]

Because no court actually tried a case based on legal or equitable subrogation, it is not clear whether courts would have required hundreds of thousands of "mini trials" to determine the merit of affirmative defenses such as assumption of risk, comparative fault (or contributory negligence) or—because almost all suits alleged reliance—reasonable reliance. While Dagan and White clearly admit that the states' subrogation claims would have exposed the states to the same defenses that bedeviled smokers in individual cases, they do not discuss whether they thought that the plaintiffs could avoid the logistical nightmare of trying each defense one-by-one. Instead, they suggest that given the record up to 1997, the states could not have realistically claimed that their medical treatments relieved the tobacco industry of liabilities to 100 percent of all the smokers in all the states. At most the states could have argued that their actions limited the tobacco industry's potential liability to around 50 percent of all smokers, since a little less than half of all smokers had won trials against the industry.[77]

Dagan and White's reconstruction of the unjust enrichment/subrogation argument is the best case that was never made for the MSA, but it reveals certain conceptual problems that are shared with the less sophisticated arguments made by the states themselves. First, as Dagan and White concede, the question as to whether the states had a good claim for subrogation as a remedy to unjust enrichment was "peripheral" compared to the examples they offered to illustrate the doctrine of subrogation.[78] In fact, the latest version of the draft of the Restatement (Third) of Restitution suggests that, on balance, the states would not have been able to claim that their payments for the medical care of their citizens were recoverable from the tobacco industry.[79] The question of whether the states and

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76. Medicaid Third Party Liability Act, FLA. STAT. ch. 409.910 (1998).

77. Dagan & White, *supra* note 18, at 376 n.91.

78. *Id.* at 396.

79. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 26 illus. 35 (Tentative Draft No. 2, Apr. 1, 2002). The example involves a union health and welfare fund that sues tobacco companies to recover monies expended on health care. *Id.* It is based on two federal cases that unions brought against the tobacco industry and that were decided in 1998 and 1999 on theories of noncontractual subrogation substantially identical to that endorsed by Dagan & White. The only difference is that in the illustration the subrogee is a labor organization with contractual obligations to provide health care as opposed to a government with legal obligations to provide health care.

the tobacco companies were "locked together" in such a way that a court could conclude that any act by the states to ameliorate diseases associated with smoking should be viewed as an amelioration of obligations that the tobacco companies owed to others is deeply policy-driven and highly controversial.[80]

The problem is not just the question of affirmative defenses, as Dagan and White concede. It is also one of causation. The claim that the states paid for an obligation that the tobacco companies would have otherwise owed to the states' smokers assumed that the benefits that the states gave (or would give) to smokers—health care—ameliorated damage caused by the tobacco companies' tortious conduct. Assuming that the states could overcome the affirmative defenses and establish liability, they would still need to have found some way to connect the provision of medical care to the reduction of tobacco companies' liabilities.

For example, unless one can demonstrate that the alleged *wrongful* conduct harmed smokers, the restitution claim is unproven. This causation question takes on different dimensions depending on how one understands the tortious conduct for which the tobacco companies would have been liable to smokers. If the conduct was the manufacturing of a defective product, then although it might be presumed that the act of manufacturing cigarettes is connected in some way to various illnesses, questions of specific causation would still arise. That is, one would still need to ask how many of the states' insureds who had illnesses that could have been caused by tobacco actually suffered those illnesses as a result of smoking. If the conduct was a failure to warn, then questions of causation could be raised as to whether the defective warning was a cause of the states' insureds' decision to smoke. If the conduct was framed as the making of fraudulent statements or the creation of an environment of misinformation, then questions of causation could be raised about whether the misinformation was relied upon to the detriment of the states' insureds, or whether, but for the misinformation, the insureds would have smoked nonetheless. And how would one prove the effects of wrongful conduct on smokers except by conducting a factual inquiry into the effects of the wrongful conduct on *individual* smokers?[81]

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80. Dagan & White, *supra* note 18, at 393 ("Subrogation should be allowed even where the parties' interests are not strongly enough locked in to present a core case if there are substantial concerns for third party effects and as long as there are no significant concerns regarding subjective devaluation or conflict of interests.").

81. This was exactly the conclusion of the Florida Supreme Court when it struck down the portion of Florida's highly unusual legislative modification of that state's right to subrogation in cases involving smokers who received state health insurance, which would have allowed the

While it might be possible to estimate the scale of damages in a class action financial injury suit based on statistical sampling, it is not clear that a claim for reimbursement of medical expenses expended to ameliorate personal injuries that could ripen into liabilities can be measured through statistical sampling.[82]

IV. CONSUMER PROTECTION AS TROJAN HORSE

In almost all of the various causes of action reviewed above, the problem of individuation kept reappearing. It threatened the probable success of the claims not only because individuation was connected with the presentation of affirmative defenses, but because it placed the states in the extremely difficult position of proving a causal relationship between their loss (the provision of medical care) and the tobacco companies' wrongs. One cannot help but wonder why the tobacco industry did not view the various indemnification, unjust enrichments, and noncontractual subrogation claims as winnable, and therefore worth fighting, as it did in the *Engle* case in Florida. The answer may be that the tobacco industry was concerned about a further set of claims that might have evaded the problems of individuation: the states' consumer protection claims under various state statutes.[83] In the Minnesota litigation, for example, the courts stripped away all claims for subrogation and unjust enrichment, leaving the state with only statutory consumer protection and antitrust actions. Minnesota was one of the early settlements that helped open the floodgates to the MSA.[84]

While some commentators view the state consumer protection claims as purely make-weight, I think that the claims, while facially weak, reflected a potentially significant shift in how courts were

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state to forego identifying which recipients of state medical assistance had been injured by the tobacco industry. Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1254 (Fla. 1996).

82. One court is proposing to do just this. *See In re* Simon II Litig., No. 00-CV-5332, 2002 U.S. Dist. LEXIS 25632, at *167-*179 (E.D.N.Y. Oct. 22, 2002).

83. State consumer protection claims survived motions to dismiss in Iowa, Maryland, Minnesota, and West Virginia. *See* Iowa v. R.J. Reynolds, No. CL 71048 (Iowa Dist. Ct. Aug. 26, 1997), *at http://stic.neu.edu/Ia/dec8-26.htm*; State v. Philip Morris Inc., No. 96122017, CL211487, 1997 WL 540913, at *10-12 (Md. Cir. Ct. May 21 1997); State *ex rel.* Humphrey v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996); McGraw v. Am. Tobacco Co., Civ. A. No. 94-C-1707, 1995 WL 569618, (W. Va. Cir. Ct. June 6, 1995).

84. *See generally Humphrey*, 551 N.W.2d 490. The Minnesota case settled literally after the judge instructed the jury but before they could begin deliberating. David Phelps & Deborah Caulfield Ryback, *Jury Instructions Spurred Settlement Talks*, STAR TRIBUNE (Minneapolis & St. Paul), Nov. 25, 1998, at 1D. According to one news report, the jurors felt angry at having been usurped and were also surprised by the size of the settlement, suggesting that they would not have awarded such a large sum. *Id.*

beginning to think about the relationship between tortious conduct and the right to recovery by third-party plaintiffs such as the state.[85] Minnesota's claim, for example, differs little from the claim made by nongovernmental health insurers under New York's consumer fraud statute in a case that has currently been certified to the New York Court of Appeals.[86]

The question posed by Minnesota's statute, as in New York and in numerous other states, was whether the issue of the conduct of individual smokers—which had been the stumbling block in every type of subrogation as well as common law restitution suit—could be finessed by eliminating reliance as a matter of law through the introduction of a statutory consumer fraud scheme. In the Section that follows, I will examine why the lawyers for states framing their claims under consumer fraud statutes hoped that the absence of reliance would be the "silver bullet" that would persuade the tobacco industry to settle. They created a claim for mass restitution based on proof of fraudulent intent without proof of reliance or injury. This claim succeeded to the extent that it provided a legal framework around which to build the MSA. However, the idea of mass restitution based on proof of fraudulent intent without proof of reliance or injury is still incomplete, and the states' litigation has left a doctrinal legacy of confusion about the limits of this sort of claim. I shall illustrate the current limitations of mass restitution based on proof of fraudulent intent without proof of reliance or injury by examining the most recent wave of consumer fraud cases based on the sale of "light" cigarettes in Illinois and Missouri.

Of the states that pursued suits under consumer fraud statues, Minnesota's was the most important for a number of reasons. First, because it was one of the important early settlements, the legal theories it used must have been considered by the tobacco industry when it decided to settle all outstanding state suits. Second, in 1996 the Minnesota Supreme Court dismissed the state's tort claims and limited its claims in equity to injunctive relief (including restitution) only, which meant that the only claims under which the state could recover for the personal injuries suffered by smokers were the statutory claims.[87] When they went to trial in 1998, these claims yielded a $6.1 billion settlement. Finally, as we will see below,

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85. *See, e.g.*, Dagan and White, *supra* note 18, at 376 n.90 (States "may" have been entitled to injunctive relief and "possibly even civil penalties" but it is doubtful they could have recovered money damages under the various consumer fraud statutes).

86. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc., 344 F.3d 211 (2d Cir. 2003).

87. *Humphrey*, 551 N.W. 2d at 498.

Minnesota's consumer fraud statutes were fairly typical in that they did not require proof of individual reliance. They thus removed from the tobacco industry one of its most important defensive advantages, the demand that the states "individuate" their reimbursement claims.

The Minnesota consumer protection statutes broadly prohibited deceptive conduct in business and consumer transactions. The Consumer Fraud Act, for example, prohibited false and misleading statements and false promises made in connection with the sale of any merchandise.[88] The Unlawful Trade Practices Act similarly said that "no person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin" of the merchandise.[89] The False Advertising Statute prohibited advertisements containing "untrue, deceptive or misleading" representations "with intent to sell or in anywise dispose of merchandise... to increase the consumption thereof, or to induce the public in any manner . . . ."[90] The Deceptive Trade Practices Act prohibited a sweeping range of deceptive conduct "in the course of business, vocation, or occupation." [91]

Section 8.31 of the Minnesota Statutes vested in the attorney general the duty to investigate and enforce violations of Minnesota's consumer protection laws.[92] The attorney general was entitled to seek an injunction and civil penalties for each violation of the laws enumerated in this section.[93] Section 8.31, subdivision 3a, also created a private right of action. The statute permitted any "person" injured by a violation of the consumer protection statutes to sue for "damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court."[94] The attorney general was also permitted to bring an action for damages under this subdivision.

Typically, in common law fraud, the plaintiff must prove that he or she relied upon the defendant's alleged misrepresentations—that is to say, that the fraudulent conduct was the cause of the

88. MINN. STAT. § 325F.68-.70 (1998).

89. *Id.* § 325D.09-.16.

90. *Id.* § 325F.67.

91. *Id.* §§ 325F.69, 325D.13, 325F.67, 325D.44.

92. *Id.* § 8.31, subd. 1.

93. *Id.* § 8.31, subd. 1-3a.

94. *Id.* § 8.31, subd. 3. Blue Cross, a bealth care organization, was implicitly found to fall under the definition of person when the Minnesota Supreme Court held that it had standing to sue under all four consumer protection laws. State *ex rel.* Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 495-97 (Minn. 1996).

plaintiff's injury.[95] Like many other states, Minnesota relaxed the common law's requirement of proof of reliance when it drafted its consumer fraud statutes.[96] When it affirmed the state's right to sue under the consumer fraud statutes, the Minnesota Supreme Court noted that "these statutes are generally very broadly construed to enhance consumer protection."[97] The court cited *State v. Alpine Air Products, Inc.*, a case recently decided in which the same court held the Attorney General did not have to prove reliance when suing under Section 8.31, subdivision 3a.[98] The Supreme Court's decision was crucial to the state's case. It set the stage for the trial judge's rejection of the tobacco companies' motion for summary judgment, which was based, in part, on the claim that the state had not introduced evidence of individual reliance.[99]

The elimination of reliance as an element of a claim under the consumer fraud statute was not fully established in Minnesota in 1996 or 1997, but it is clear, in retrospect, that the state was not unreasonable in assuming that the principle could be fairly inferred from both the language of the statutes and the case law. In fact, in 2001, the Minnesota Supreme Court confirmed the proposition in another tobacco-related case. In *Group Health Plan v. Philip Morris*, an HMO sought damages in federal court under the same consumer fraud statutes used by the Attorney General in 1996, and the district court judge certified to the Minnesota Supreme Court the question of whether the HMOs had to plead and prove individual reliance by the insureds on either the defendants' statements or conduct.[100] The court held that their 1996 decision in the state reimbursement case, as well

95. DAN B. DOBBS, THE LAW OF TORTS § 474 (2000).

96. Minnesota's Consumer Fraud Act stated that a false statement must he made "with the intent that others rely thereon," but a violation is established regardless of whether "any person has in fact been misled, deceived, or damaged" as a result. MINN. STAT. § 325F.69, subd. 1 (1998). Similarly, the False Advertising Statute stated that a defendant is guilty of a misdemeanor, and the act may be enjoined, if the defendant disseminates a misleading advertisement "with the intent to increase the consumption thereof, or to induce the public in any manner." *Id.* § 325F.67. A complainant under the Deceptive Trade Practices Act did need to "prove . . . actual confusion or misunderstanding" before a violation will be found. *Id.* § 325D.44, subd. 2. And the Unlawful Trade Practices Act contained a legislative finding of reliance, establishing that "the legislature of the state of Minnesota hereby finds: that the trade practices defined and prohibited by sections 325D.09 to 325D.16 are detrimental . . . [and] that they mislead consumers." *Id.* § 325D.09.

97. *Humphrey*, 551 N.W.2d at 496.

98. 500 N.W.2d 788, 790 (Minn. 1993).

99. Wilson & Gillmer, *supra* note 50, at 567, 570 n.11.

100. Group Health Plan v. Philip Morris, 621 N.W.2d 2, 4 (Minn. 2001).

as *Alpine Air Products*, held that Minnesota's legislature had not intended to require proof of reliance in its consumer fraud statutes.[101]

However, the Minnesota Supreme Court acknowledged in its 2001 decision something else that should have also been apparent to the states and the tobacco companies in 1997. It noted that the elimination of the reliance element by the legislature could not be understood as an elimination of the requirement that a plaintiff suing under statutory consumer fraud must prove that the defendant's attempt to induce reliance *caused* harm to the plaintiff:

> Although we conclude that the legislature has eliminated the requirement of pleading and proving traditional common law reliance as an element of a statutory misrepresentation in sales action, the parties are correct that causation remains an element of such a claim. Section 8.31, subdivision 3a, authorizes a damages action only by someone injured *by* a violation. This language denotes a causal relationship between the alleged injury and the wrongful conduct that violates the statute. Causation is, therefore, a necessary element of an action to recover damages under section 8.31, subdivision 3a. Moreover, where, as here, the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct in violation of the misrepresentation in sales laws, as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes. Therefore, in a case such as this, it will be necessary to prove reliance on those statements or conduct to satisfy the causation requirement. Indeed, while the HMOs might disagree with the use of the word reliance, they appear to concede that, as part of their necessary proof of a causal nexus between their damages and the defendants' wrongful conduct, they must demonstrate that defendants' conduct had some impact on their members' use of tobacco products that caused their damages.[102]

The courts in Minnesota had noted earlier that, in every case brought under consumer fraud, the plaintiff had to prove some sort of "legal nexus" between the conduct prohibited by the state and the injury suffered by the plaintiff.[103] Other states that have, like Minnesota, liberally "relaxed" their reliance requirements, have reintroduced a "proximate cause" requirement into the plaintiff's case-in-chief, that, in effect, requires proof that the defendant's deceitful behavior "caused" the plaintiff's injury in a legally significant way.[104]

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101. *Id.* at 12-13.

102. *Id.* at 13-14 (citation omitted).

103. LeSage v. Norwest Bank Calhoun-Isles, N.A., 409 N.W.2d 536, 539 (Minn. Ct. App. 1987).

104. *See* Int'l Fidelity Ins. Co. v. Wilson, 443 N.E.2d 1308, 1314 (Mass. 1983) ("This court has rejected the proposition that a plaintiff must show proof of actual reliance on a misrepresentation under [the Consumer Protection Act] . . . . What the plaintiff must show is a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception."); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 745 (N.Y. 1995) (holding that while New York State General Business Law section 349, which prohibits deceptive business practices, "does not require proof of justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a

The problem with the Minnesota litigation is that the state's Supreme Court spoke only to the question of standing and reliance in 1996. It did not say anything about whether individualization of proof would be required to establish proximate cause or the proper legal nexus. That issue was decided in the negative by the trial judge in the Minnesota reimbursement case and was not appealed by the tobacco industry because they settled the case soon afterward. It is, of course, possible that a plaintiff might still need to prove causation on an individual basis even if it need not prove reliance under a consumer fraud claim. In fact, the two questions relate to quite different issues.[105] A reliance requirement says to a plaintiff that only a certain kind of injurious interaction is legally culpable—that is, acts, that are not only intended to deceive but also cause injury by achieving deception, are actionable. The requirement that the plaintiff prove proximate causation asks a much more conventional question. It simply asks the plaintiff to establish that the defendant's proven wrongdoing was close enough in the causal chain of events to the injury suffered by the victim such that it could be attributable to defendant.

To understand why proximate causation is different from reliance in consumer fraud cases, consider *Oliveira v. Amoco Oil Co.*[106] In this case, Plaintiff, a consumer of Amoco's "Ultimate" gasoline, filed a class action on behalf of himself and all similarly situated consumers in Illinois who purchased Amoco Ultimate gasoline.[107] Oliveira alleged that Amoco had misled consumers by advertising that its more expensive Ultimate gasoline had benefits that it did not have.[108] Amoco moved to have the complaint dismissed on the grounds that Oliveira, as named plaintiff, could not state a claim for which relief could be granted because he conceded at deposition that he had never read an advertisement that contained the alleged misrepresentations.[109] Oliveira's answer was that Illinois's consumer

material deceptive act or practice that caused actual, although not necessarily pecuniary, harm"); Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985) (stating that plaintiff in consumer fraud action must prove that defendant's deceptive behavior was a "producing cause," "an efficient, exciting, or contributing cause, which, in natural sequence, produced the injuries or damages" (quoting Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975))); Weinberg v. Sun Co., Inc., 777 A.2d 442, 446 (Pa. 2001) (finding that plaintiff must prove reliance and causation in false advertising claims under Pennsylvania consumer fraud statute).

105. In the "Lights" litigation, some courts would deny that reliance and causation are, in fact, two separate issues. *See* Craft v. Philip Morris, No. 002-004006A (Mo. Cir. Ct. Sept. 13, 2004).

106. 776 N.E.2d 151 (Ill. 2002).

107. *Id.* at 155.

108. *Id.*

109. *Id.* at 156.

fraud statutes did not require reliance, and thus it did not matter whether he or some other members of the class were deceived.[110] Oliveira argued that what mattered was that because Amoco intended to deceive some purchasers of the gasoline, and did, *all* purchasers of the gasoline had to pay a higher price. That is to say, Amoco's conduct, which was prohibited by the Illinois legislature, caused him and others like him injury, even if that conduct did not cause that injury through deception.

The Illinois Supreme Court rejected Oliveira's argument on the grounds that, even if Illinois's consumer fraud law did not require proof of reliance, it did require that each person who claimed injury under it prove that his injury was proximately caused by the defendant's violation of the law.[111] The court held that if Oliveira were to satisfy his *prima facie* case against Amoco, he would have to show how Amoco's attempts to deceive the public caused *him* to be deceived.[112] The court did not challenge Oliveira's allegation that he might have paid more for Ultimate gas than he otherwise would have "but for" Amoco's misrepresentations to the public. The court's point was that the wrong suffered by Oliveira and the wrong allegedly committed by Amoco were not aligned. For instance, if Oliveira had been struck by a motorist who had made a careless left-hand turn for no other reason than to buy Ultimate gasoline because of an advertisement that contained a misrepresentation, Oliveira's personal injury, although caused in a "philosophical sense" by Amoco's consumer fraud, would not be treated by any court as actionable under consumer fraud. Oliveira's claim for excess payments at the pump was found likewise to have failed the test of proximate cause.

The problem with proximate cause is that it is often fact-intensive. The inadequacy of Oliveira's complaint against Amoco may seem obvious in retrospect, and the Illinois Supreme Court had no trouble saying that none of the class members Oliveira represented could survive a motion to dismiss based on the facts he pled.[113] But what about the reverse? Can a jury decide that damages were proximately caused to hundreds of thousands of persons as the result of the violation of the consumer fraud statutes without a case-by-case examination of each claim? When the Minnesota Supreme Court confronted this question in the 2001 HMO case certified for their review, they ducked it. While they were confident that proof of

110. *Id.* at 155-56. Like Minnesota, reliance is not required under Illinois's Consumer Fraud and Deceptive Business Practices Act. Connick v. Suzuki Motor Co., 675 N.E.2d 584, 593 (1996)

111. Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 164 (Ill. 2002).

112. *Id.*

113. *Id.*

individual *reliance* by the HMOs was not required in order to prove proximate cause or the "causal nexus" between violation of the state's consumer fraud statutes and the HMOs' injuries as insurers, they could not say what sort of proof would be sufficient.[114]

The district court that certified the reliance question to the Minnesota Supreme Court ultimately decided that the HMOs' claims were like Oliveira's. The HMOs offered statistical proof of the effect of smoking on the general population and argued that one could extrapolate from this well-known public health data that the tobacco industries' violation of Minnesota's consumer fraud statutes was the proximate cause of an ascertainable loss to the HMOs.[115] The court rejected this attempt:

> In short, Plaintiffs' reliance on studies and surveys relating to smoking rates, disease rates, and the medical costs associated with smoking in general could only be relevant to causation if the Court adopted a strict liability regime in which Defendants were held liable for all of the costs of smoking related illness regardless of whether those costs were connected to any legally opprobrious conduct. While the holding of the court in *Group Health* provides an expansive reading of Minnesota consumer protection law, it does not endorse such a strict liability system.[116]

The court rejected the plaintiffs' nonindividuated proximate causation case because it did not take into account the relationship between the wrong alleged—consumer fraud—and the injury suffered—increased medical expenses. The court's point was that the causal links between the wrong and the remedy in consumer fraud cases involving third-party payors, such as state health insurers or HMOs, are just as complex and difficult as proving the casual links in a subrogation or restitution claim.

Nonetheless, because of the court's 1996 statement that individual reliance would not have to be proven in a case brought by an insurer for damages under consumer fraud statutes, both the states and the tobacco companies believed—wrongly, I would argue—that even if all the other causes of action could be defeated or delayed, the consumer fraud claims would still be the tobacco companies' Achilles heel.

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114. Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2, 38-40 (Minn. 2001).

115. Group Health Plan, Inc. v. Philip Morris, Inc., 188 F. Supp. 2d 1122, 1129 (D. Minn. 2002), *aff'd*, Group Health Plan, Inc. v. Philip Morris USA, Inc., 344 F.3d 753, 763 (8th Cir. 2003).

116. *Group Health Plan, Inc.*, 188 F. Supp. 2d at 1129.

V. CONCLUSION: CONSUMER PROTECTION AS REGULATION

I have argued that the tobacco companies' reasons for settling the state reimbursement suits, complex and obscure as they were, had a lot to do with the threat of the consumer fraud claims that formed the backbone of many of the states' suits. My point is not that the states' consumer fraud claims were ultimately "stronger" than the restitution claims that have received so much subsequent (and critical) review. As the district court's opinion in *Group Health Plan, Inc.*, suggests, recovery by a third party payor under the Minnesota statute was not possible, and recovery by means of individual lawsuits—while possible—was not a viable alternative.

My point is that the consumer fraud claims reflected a different sort of threat to the tobacco industry, and one that bore a tighter connection to the settlement achieved under the MSA. The states' consumer fraud claims were weak because they merely tried to combine under the mantle of the state or a health insurance plan the personal injury and common law fraud claims that would otherwise have been brought by smokers, either singly or as a class. These claims could not be treated as identical for the same reason that class actions based on personal injury or common law fraud failed. As a substantive matter, wrongs relating to personal injury or deceit depend on variables which are not susceptible to class treatment.

The elimination of reliance in certain consumer fraud statutes, such as Minnesota's, was clearly designed to overcome one element—from the common law tort of deceit—which would otherwise have barred its application to large groups of victims.[117] On the other hand, states that have eliminated the element of reliance have not eliminated the need of plaintiffs to prove that their injuries were "proximately caused" by the fraudulent conduct.[118] The problem, as illustrated by the plaintiffs' loss after remand in *Group Health Plan*, is that many attempts to deceive have no effect on their targets or have only very attenuated effects on persons who were not intended to be victims (but were foreseeable).[119] Unless one presumes classwide effect, how can courts treat the proximate cause element of the deceit in consumer fraud as a common question of fact? Presumption of deleterious consequence—commonly known as "fraud on the

117. *Group Health Plan, Inc.*, 621 N.W.2d at 32.

118. *Id.* at 34.

119. *See* Shannon v. Boise Cascade Corp., 208 Ill. 2d 517, 524 (Ill. 2004) (dismissing claim for deceptive advertising because complaint "failed to allege that representative plaintiff was in any manner deceived by defendant's advertising").

market"—is accepted in securities fraud class actions but is explicitly rejected by courts that have interpreted their states' consumer fraud statutes "liberally" as not requiring reliance.[120] The individuation problem seems to be inevitable in the context of class actions for smoking, whether under common law or statutory consumer fraud. What the tobacco companies may have recognized is that there was a solution to the individuation problem when it emerged in statutory consumer fraud law, and that this solution could result in the state allowing suits that would serve not to repair the wrongful losses caused by the tobacco companies' fraud, but rather to force the tobacco companies to give up their wrongful gains.

The consumer fraud class actions can escape the individualization problem by changing the definition of the wrong suffered by the victims. The recent struggle in the courts over whether to certify class actions in cases involving "light" cigarettes illustrate this dynamic.

The litigation seeks damages for deceptive marketing of low tar and nicotine cigarettes (known as "Lights").[121] The essence of the claims is that the tobacco companies marketed these cigarettes in a manner that led consumers to believe that they were safer than regular cigarettes. Plaintiffs claim that given the manner in which users smoked Lights, they were just as dangerous as regular cigarettes. The suits demand that the cigarette manufacturers return to the purchasers of Lights—depending on the jurisdiction—either their "out of pocket" losses (the difference of the price of the cigarettes and the value of what they received) or their "benefit of the bargain" (the difference between the price paid for the cigarettes and their value of what was promised).

The tobacco companies have responded with a number of arguments; however, only one is directly related to the individuation problem described above. The defendants argue that, even if the plaintiffs in the class do not have to prove reliance, they do have to prove that they were each harmed by the alleged

120. *See* Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 156 n.1 (Ill. 2002) (noting that "plaintiff's theory of causation bears marked similarities to the 'fraud on the market' theory found in federal securities case law"); Aspinall v. Philip Morris, Inc., 813 N.E.2d 476, 490 n.23 (Mass. 2004) (rejecting that plaintiff's theory of liability under Massachusetts's consumer fraud statute (which does not require proof of reliance) was a "novel 'fraud on the market' type theory").

121. *See generally, e.g.*, Price v. Philip Morris, Inc., 341 Ill. App. 3d 941 (Ill. App. Ct., 2003), Craft v. Philip Morris, No. 002-004006A (Mo. Cir. Ct. Sept. 13, 2004); *Aspinall*, 813 N.E.2d 476; Brown v. The American Tobacco Co., Inc., Order of January 21, 2005 (JCCP Case #4042, San Diego (CA) Superior Court).

misrepresentations.[122] A few courts have denied class certification on this ground.[123] A slightly larger number of courts have certified class actions and one case has already been tried.[124] The argument for permitting class certification has been set out by the Massachusetts Supreme Judicial Court, which heard an interlocutory appeal on the question.[125] It held that the tobacco companies' argument against certification would "eviscerate" the Massachusetts consumer fraud statute and thus could not possibly be within the intention of the legislature that passed the law.[126] In order to avoid this result, the court distinguished between the wrong suffered by each class member, which is common to all, and the actual damages suffered by the class members, which the plaintiff would still have to prove as to the class as a whole and perhaps as to each member of the class.[127]

This is not the place to critically analyze the *Aspinall* decision. What I want to point out is how the Massachusetts court, to save its consumer fraud statute from irrelevancy in the context of tobacco litigation, honestly (but subtly) shifted the definition of the injury suffered by the smokers. The court defined the injury as the failure by the tobacco companies to deliver what they had promised. According to the court, no one (or practically no one) who bought Lights actually got a cigarette that performed as advertised.[128] Whether or not they bought Lights to achieve the effect that had been fraudulently advertised was irrelevant, since reliance is not part of the cause of action. Whether or not they suffered actual injury is a question to be determined after certification. According to the court, the injury arose from the fact that the consumer purchased a product that did not do

122. *See, e.g.*, Brief of Appellant Philip Morris USA Inc. at 16, Marrone v. Philip Morris, C.A. No. 03CA0120-M (Dec. 3, 2003) (Lights cases are not like a "utility overcharge case where everyone could show that the electric company charged more than what is permitted by law").

123. *See, e.g.*, Philip Morris USA, Inc. v. Hines, Case No. 4D02-941, 2003 Fla. App. LEXIS 19771, at *8-*9 (Fla. Dist. Ct. App.); Curtis v. Philip Morris Cos., Inc., No. PI 01-018042, slip opn. (Minn. Cty. Ct. Jan 16, 2004).

124. Price v. Philip Morris, No. 00-L-112 (Ill. Cir. Ct. Mar. 21, 2003) ($7.1 billion in compensatory and $3.0 billion in punitive damages awarded). *Price* is now on appeal to the Illinois Supreme Court.

125. *Aspinall*, 813 N.E.2d at 481.

126. *Id.* at 489 (discussing the interpretation of MASS. GEN. LAWS ch. 93A).

127. *Id.*

128. The court noted that there might be a very small group of smokers who "fortuitously" smoked a Light in a way that would have produced its advertised effect, but noted that this number of consumers was "very few in number and impossible to identify." *Aspinall*, 813 N.E.2d at 489 n.21.

what it was supposed to do and that was placed into the marketplace because the defendant wanted to deceive *someone*.[129]

The irony is that, by defining the injury suffered by the class of consumers at such a high level of abstraction, the courts that have allowed certification in the Lights cases have turned their states' consumer fraud statutes (at least in the context of tobacco litigation) into exercises of public law. Each member of the *Aspinall* class claimed that they were the target of fraud. The wrong for which the tobacco companies will have to defend themselves in the class actions that have been certified is that they attempted (and perhaps succeeded) in defrauding the public. These wrongs are quite serious. But whether they have any connection to the claims in private law—for either compensation or restitution—which characterized the tobacco litigation that led to the MSA is something about which I am quite doubtful.

Thus, to the extent that the tobacco companies accepted the MSA in response to the threat posed by statutory consumer fraud suits, the remedy to which they agreed fits surprisingly well with the law under which they settled. The remedy described at the beginning of this Article—the imposition of costs which, in scale, resembled nothing like damages or reimbursement to those who were allegedly harmed—look more like a public law remedy of penalties conjoined with regulatory oversight. Similarly, the fact that the state—and not the smokers—are the chief recipients of the funds might make more sense now as well. The MSA, which looks like a private law remedy, in fact was the result of a form of public law regulation in disguise.

129. *Id.* In *Craft v. Philip Morris*, No. 002-004006A, at 43 (Mo. Cir. Ct. Sept. 13, 2004), the judge, in a very carefully written opinion, made the same argument: he noted that unless the cause of injury is "presumed," regardless of individual proof of injury in class certification, Ohio's consumer fraud statute would be "eviscerated."