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Tobacco Litigation: United States versus Big Tobacco--An Unfiltered Attack on the Industry

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NOTE

TOBACCO LITIGATION: UNITED STATES VERSUS BIG TOBACCO—AN UNFILTERED ATTACK ON THE INDUSTRY*

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I. INTRODUCTION 672

II. THE EVOLUTION OF THE CLAIM AGAINST TOBACCO 673
A. *Plaintiffs' Causes of Action Against Tobacco* 673
1. Unreasonably Dangerous Product and Failure to Warn 673
2. Defective Design 675
3. Conspiracy and Fraudulent Concealment 677
4. State Claims Against the Tobacco Industry 678
B. *The Tobacco Industry's Defensive Tools* 679

III. THE UNITED STATES VERSUS THE TOBACCO INDUSTRY 680
A. *The Medical Care Recovery Act: Demanding that Tobacco Companies Pay Their Fair Share* 681
1. Proving Proximate Causation 681
2. Aggregation of Claims Under FMCRA 683
3. A Legal Industry 684
B. *The Civil Racketeer Influenced and Corrupt Organizations Law: Putting an End to Forty-Five Years of Intentional and Coordinated Deceit* 685
1. Proximate Cause and the *Holmes* Policy Factors 686
2. Specific Intent to Defraud 690

IV. BREATHTAKING CONSEQUENCES 691

V. CONCLUSION 693

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** With love to my parents, Bruno and Randa Gravanti, for their unconditional love and support, and to my Trevi Fountain wish-come-true, David Cayce, for his constant encouragement and love.

"We will not succumb to politically correct extortion."
—Gregory G. Little, Associate General Counsel for Philip Morris Cos.[1]

I. INTRODUCTION

Tobacco liability cases have evolved greatly over the past several years. The claims asserted in these cases vary from actions against the tobacco manufacturers for defective manufacture or design of the product to claims against retailers and distributors for breach of implied warranty or negligent distribution. Most recently, however, the war against the tobacco industry has reached unprecedented heights. While the decisions in tobacco cases over the past two years seem to volley back and forth between plaintiff-friendly and industry-friendly rulings much like a tennis match, the United States government has decided to step in with hopes of ending the game altogether.

Recently, the U.S. Justice Department filed a lawsuit against major tobacco companies asking for billions of dollars to recover federal smoking-related health care costs.[2] The complaint alleged that cigarette companies have conspired since the early 1950s to defraud and mislead the American public about the effects of smoking.[3] Notwithstanding the similarity between this claim and other previously litigated States' claims, this lawsuit is the first one of its kind in charging a legal industry with responsibility for health care costs that have been paid for by the U.S. government for years.[4] The main statutes involved in the lawsuit are the Federal Medical Care Recovery Act (FMCRA),[5] which permits the federal government to sue to recoup health care costs, and the Racketeer Influenced and Corrupt Organizations Act (RICO),[6] which allows the government to force companies to disgorge profits made as a result of fraud or misrepresentation. While these approaches seem creative and potentially effective, the U.S. government will have to succeed in proving the availability and applicability of these statutes to this cause of action. This will not be an easy task.

This Note addresses why past individual and state claims have succeeded or failed and what issues make the instant case a difficult one for the government to win. Part II of this Note briefly describes the

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1. Marc Lacey, *Tobacco Industry Accused of Fraud in Lawsuit by U.S.*, N.Y. TIMES, Sept. 23, 1999, at A1.

2. *See* Lacey, *supra* note 1; David S. Cloud & Gordon Fairclough, *U.S. Sues Cigarette Industry in Attempt to Recoup Costs*, WALL ST. J., Sept. 23, 1999, at A1.

3. *See* United States v. Philip Morris, Inc., No. 99-CV2496 (D.D.C. filed Sept. 22, 1999).

4. *See id.*

5. 42 U.S.C. § 2651 *et seq.*, *infra* note 60.

6. 18 U.S.C. § 1962, *infra* note 93.

evolution of suits against the tobacco industry and the grounds for their success or failure. Part III offers an analysis of the claims presented by the federal government in its suit against the tobacco industry. Part IV addresses the likely affect of the instant case on other suits filed under similar legal theories.

II. THE EVOLUTION OF THE CLAIM AGAINST TOBACCO

The evolution of tobacco litigation can be credited in part to the creation of the legal principle of strict liability.[7] Design defect and manufacturing defect, along with failure to warn, are the most prominent legal theories argued under this approach.[8] Other claims have been made, however, under legal theories such as conspiracy, misrepresentation, and fraudulent concealment.[9] This Part explores the various weapons used by individuals and states in their suits against the tobacco industry and explains the rationales for their success or failure.

A. *Plaintiffs' Causes of Action Against Tobacco*

1. Unreasonably Dangerous Product and Failure to Warn

Many of the suits filed by individual smokers against the tobacco industry have involved claims based on the fact that the tobacco products caused cancer or some other disease.[10] Specifically, some plaintiffs have argued that the tobacco products were unreasonably dangerous products and thus, the manufacturers of those products had a duty to warn of the inherent dangers.[11]

These assertions are founded on the language of § 402A of the Restatement (Second) of Torts which states in relevant part:

> One who sells any product in a defective condition unreasonably dangerous to the user . . . is subject to liability for physical harm thereby caused . . . if the seller is engaged in the business of selling such a product, and it is expected to and does reach the user . . . without substantial change in its

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7. Strict liability was first recognized in *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

8. *See* Anna Burdeshaw Fretwell, Note, *Clearing the Air: An Argument for a Federal Cause of Action to Provide an Adequate Remedy for Smokers Injured by Tobacco Companies*, 31 GA. L. REV. 929, 933 (1997).

9. *See id.*

10. *See e.g.*, Insolia v. Philip Morris Inc., 53 F. Supp. 2d 1032; Gilboy v. American Tobacco Co., No. 31-8361 (La. 19th DCA 1999); Henley v. Philip Morris, No. 995172 (Cal. 1999).

11. *See Insolia*, 53 F. Supp. 2d at 1038.

condition.[12]

Products have been found to be unreasonably dangerous when a producer failed to adequately warn of a risk or hazard related to the way the product was designed.[13] Under this legal theory, a plaintiff must show that a reasonable manufacturer would have warned of the product's dangerous effects, which the manufacturer should have known of at the time the product reached the consumers.[14] Thus, a claim against the tobacco industry for the marketing of an unreasonably dangerous product and the failure to warn of such dangerousness was frequently used, since the only requisite showing was proof that a reasonable manufacturer would have warned smokers of those risks which it should have known of at the time the cigarettes were sold.[15]

This approach has become somewhat limited, however, by the passage of the Federal Cigarette Labeling and Advertising Act.[16] The Supreme Court has since ruled in accordance with this Act and has held that failure

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12. RESTATEMENT (SECOND) OF TORTS § 402A (1964).

13. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99 (5th ed. 1984) [hereinafter PROSSER & KEETON].

A product is defective as marketed for purposes of finding it unreasonably dangerous for any of the following three reasons: (1) the presence of a defect in the product that was present in the product at the time the defendant sold it, (2) the failure by the producer of a product to adequately warn of a risk or hazard related to the way the product was designed, or (3) the existence of a defective design. *Id.* at § 99.

Defects due to failure to warn are recognized in the comments: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning . . . as to its use." RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j.

14. *See* RESTATEMENT (SECOND) OF TORTS § 402A, *supra* note 12 and accompanying text.

15. *See* PROSSER & KEETON, *supra* note 13, § 99.

16. The Federal Cigarette Labeling and Advertising Act was created in 1965 and was amended in 1969 by the Public Health Cigarette Smoking Act. It required the following statement to be placed conspicuously on all packages of cigarettes: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. § 1331 et seq.). 15 U.S.C. § 1331 provides in relevant part:

> It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby – (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

to warn claims are preempted by federal laws requiring standardized warning labels on all cigarette packages and advertisements.[17] Thus, this approach has become rather ineffective.

2. Defective Design

Other suits filed by individuals against the tobacco industry involve the claim that the tobacco product was defectively designed.[18] The allegation often made is that the carcinogenic or addictive qualities of the tobacco products constitute a design defect or that those qualities make the products unreasonably dangerous in design.[19] While the products were made and sold in accordance with their intended design, it is alleged that the design itself presented an unreasonable risk of harm.[20]

In determining whether a product is defectively designed, courts have generally adopted one of two tests.[21] The first test is the consumer expectations test.[22] This test is found in the language of section 402A of the Restatement and states that a product is "unreasonably dangerous" under section 402A only if the product is dangerous "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics."[23]

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17. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

18. *See* PROSSER & KEETON, *supra* note 13, § 99; *see also supra* note 12 and accompanying text.

19. *See* RESTATEMENT (SECOND) OF TORTS § 402A, *supra* note 12 and accompanying text.

20. *See, e.g.*, John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830 (1973) (Explaining that the defect in a product may have come about "even though the product was exactly as it was intended to be, because of a poor design . . . .").

21. *See* PROSSER & KEETON, *supra* note 13, § 99.

22. *See id.*

23. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i. The comments to § 402A offer several examples of what is meant by "unreasonably dangerous." Comment i to § 402A specifically mentions tobacco products and states:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey containing a dangerous amount of fusel oil is unreasonably dangerous. *Good tobacco is not*

The consumer expectations test can be challenging for plaintiffs in claims against tobacco companies because of the difficulty of establishing what reasonable consumers know and understand about the hazards of smoking. The consumer expectations test was recently applied in *Insolia v. Philip Morris, Inc.*[24] In *Insolia*, the plaintiffs alleged that the cigarettes manufactured by the defendants were defective because the average consumer did not appreciate the health risks associated with smoking or the addictive nature of nicotine.[25] The court emphasized the notion that the hazardous health effects of smoking did not render cigarettes defective under the consumer contemplation test since average Americans have had for many years a common knowledge of the "habit forming nature of cigarettes."[26] Plaintiffs alleged that Americans had been led to believe that cigarettes were only "habit-forming" as opposed to "addictive," and thus, the American public did not have a full understanding about the highly addictive nature of cigarettes.[27] Nonetheless, the court held that the plaintiffs failed to meet the burden under the consumer expectations test for their products liability claim.[28]

> *unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.* Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i (emphasis added).

24. 53 F. Supp. 2d 1032, 1039 (W.D. Wi. 1999).

25. *See id.* at 1040.

26. *Id.* (citing Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996) ("dangers of cigarette smoking have long been known to the community")); *see also* Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988) ("The normal use of cigarettes is known by ordinary customers to present grave health risks . . . ."); Tompkins v. American Brands, Inc., 10 F. Supp. 2d 895, 905 (N.D. Ohio 1998) ("it was common knowledge even in the 1950s that cigarette smoking was linked to lung cancer . . . "); Paugh v. R.J. Reynolds Tobacco Co., 834 F. Supp. 228, 231 (N.D. Ohio 1993) ("the dangers of smoking . . . have been common knowledge"). The court in *Insolia* emphasized that "all plaintiffs remembered hearing throughout their years as smokers warnings from various quarters about the risks associated with cigarettes but have maintained that no amount or type of warning could have persuaded them to stop." *Insolia*, 53 F. Supp. at 1044-45.

27. *Insolia*, 53 F. Supp. 2d at 1041. Plaintiffs asserted that (1) the industry advertising countermined all sources of health warnings which resulted in most people failing to heed the warnings, (2) the public underrated the hazards of smoking and was materially unaware of many specific risks, (3) the public generally believed that smoking was dangerous but the level of danger was not widely comprehended, and (4) the public had been deceived by the tobacco companies because the companies repeatedly denied that cigarettes were dangerous and addictive. *See id.*

28. *See id.* at 1043. The court relied on the dissenting opinion in *American Tobacco Co. v. Grinnell*, which stated:

> The distinction between addiction and habituation . . . mean[s] only one thing to

The second test often applied in design defect claims is the risk-utility test.[29] This test provides for liability if the risks of injury accompanying a product's use outweigh the utility or social value favoring the continued availability of the product.[30] Under this test, even dangers that were unforeseeable at the time of design may be included in the analysis.[31] However, courts that adopt this test often require that the plaintiff establish the existence of an alternative design that, if used by the defendant, could have reduced the risk of harm.[32] This is a difficult task and often prevents plaintiffs from succeeding under a defective design claim.

3. Conspiracy and Fraudulent Concealment

Yet another weapon being used against the tobacco industry by plaintiffs is the claim of conspiracy and fraudulent concealment on the part of the industry.[33] This claim is based on the allegation that the tobacco industry possessed scientific evidence of the hazardous health risks that accompany the use of tobacco, and the industry intentionally withheld that information from consumers.[34] Moreover, some plaintiffs have asserted claims alleging conspiracy among the tobacco companies for the purpose of keeping damaging evidence from the public.[35]

Some plaintiffs have been successful in alleging that the tobacco companies made misrepresentations to the public about the dangerous effects of smoking or that they intentionally concealed information

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> smokers: it's hard to quit. This is not a new discovery . . . . Anyone who ever smoked for any length of time and tried to stop has found it hard; many have found it impossible. Few understood why, in terms of psychological and biochemical body processes, but the difficulty was surely no less real merely because it could not fully be explained.

Insolia, 53 F. Supp. 2d at 1042 (quoting American Tobacco Co. v. Grinnell, 951 S.W.2d 420, 441 (Tex. 1997) (Hacht, J., concurring in part and dissenting in part)).

29. *See* PROSSER & KEETON, *supra* note 13, § 99. "Under this approach, a product is defective as designed if, but only if, the magnitude of the danger outweighs the utility of the product." *Id.*; *see also* Cipollone v. Liggett Group, Inc., 644 F. Supp. 283 (D.N.J. 1986) (holding that collateral benefits of cigarette production, such as employment and generation of tax revenues, are irrelevant; the only relevant risks and benefits were those to smokers directly).

30. *See* PROSSER & KEETON, *supra* note 13, § 99.

31. *See* PROSSER & KEETON, *supra* note 13, § 99.

32. *See* Annotation, Burden of Proving Feasibility of Alternative Safe Design in Products Liability Action Based on Defective Design, 78 A.L.R. 4th 154, § 3 (1990).

33. *See, e.g.*, Allgood v. R.J. Reynolds Co., 80 F.3d 168, 173 (5th Cir. 1996); Jones v. American Tobacco Co., 17 F. Supp. 2d 706, 709 (N.D. Ohio 1998); Witherspoon v. Philip Morris, 964 F. Supp. 455, 459 (D.D.C. 1997); Sonnenreich v. Philip Morris, Inc., 929 F. Supp. 416, 419 (S.D. Fla. 1996); Burton v. R.J. Reynolds Co., 916 F. Supp. 1102, 1103 (D. Kan., 1996).

34. *See Allgood*, 80 F.3d at 171.

35. *See, e.g.*, Jones v. American Tobacco Co., 17 F. Supp. 2d 706, 710-12 (N.D. Ohio 1998).

regarding the hazards of cigarette smoking.[36] Courts have often, however, dismissed these claims under the notion that the harms of tobacco were common knowledge and thus no duty existed on the part of the tobacco industry to supply such information.[37] Moreover, this approach is also vulnerable to a court's finding that causation can not be established.[38]

Conspiracy claims also involve many difficulties in suits by individual and state plaintiffs. While more and more evidence is emerging about what information the tobacco industry had and what efforts were taken to conceal such information,[39] plaintiffs are still having a difficult time establishing sufficient proof for these claims.[40] Furthermore, conspiracy claims are sometimes found to be reiterations of fraudulent concealment claims, which also require proof of reliance and causation.[41]

4. State Claims Against the Tobacco Industry

Even more powerful than suits brought by individuals and classes of individuals are the recent claims made by States against the tobacco companies. These state suits often involve claims based on both federal law[42] and state law.[43] States often try to recover costs paid for medical expenses for their residents who suffered from smoking-related diseases and illnesses.

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36. *See id.* at 721 (holding that plaintiff's did establish sufficient evidence for their fraud and misrepresentation claims to survive defendants' motion to dismiss).

37. *See Allgood*, 80 F.3d at 172 (stating that "dangers of cigarette smoking have long been known to the community"). The common knowledge doctrine has also been used in alcohol cases. *See, e.g.*, Joseph E. Seagram & Sons v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991) (explaining that there is no duty to warn about the dangers of alcohol because dangers were commonly known to the public).

38. *See Allgood*, 80 F.3d at 173 (stating that even if the fraudulent misrepresentation and concealment claims were not preempted by the Labeling Act, the evidence for the claims was insufficient as a matter of law since there was no way to prove that plaintiff saw and relied on defendants' misrepresentations).

39. *See* Fretwell, *supra* note 8.

40. *See, e.g.*, Sonnenreich v. Philip Morris, Inc., 929 F. Supp. 416, 419 (S.D. Fla. 1996) (holding that plaintiff's conspiracy claim failed because the conspiracy claim was based on negligent acts by defendant and the court stated that defendants cannot conspire to be negligent). Under a conspiracy claim, the plaintiff must show at least one specific, unlawful, and overt act committed in furtherance of the conspiracy. *See* Insolia v. Philip Morris, Inc., 53 F. Supp. 2d 1032, 1044-45. Moreover, a conspiracy claim requires proof of causation and reliance. *See id.*

41. *See Insolia*, 53 F. Supp. 2d at 1044.

42. Oftentimes, a state's suit involves a federal claim under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO). *See infra* note 93 and accompanying text. *See, e.g.*, City & County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1134 (N.D. Cal. 1997).

43. State law claims often include claims of fraud and misrepresentation or violations of state consumer protection acts or antitrust laws. *See City of San Francisco*, 957 F. Supp. at 1134; *see also* State of Washington v. American Tobacco Co., No. 96-2-15056-8 SEA (Wash. 1996).

The availability of state-filed causes of action against the tobacco industry was recently forfeited, however, when the states and the tobacco company executives signed a national multi-billion dollar settlement to end litigation by all fifty states.[44] These state suits rely on some of the same legal and statutory tools as the federal lawsuit and, thus, they will be discussed in the context of the federal lawsuit in Part III of this Note.

B. *The Tobacco Industry's Defensive Tools*

To protect itself from individual claims asserted under various legal theories including the ones discussed in the prior sections, the tobacco industry traditionally raises one of two standard defenses: assumption of risk or contributory negligence.[45] These defenses are based on the plaintiff's conduct and can be very successful in destroying a plaintiff's ability to recover damages.[46]

In order to have a successful defense of assumption of the risk, a jury must find the presence of three elements: (1) plaintiff had knowledge of the risk, (2) plaintiff had understanding of the risk, and (3) plaintiff freely and voluntarily chose to proceed with the activity in light of the known risks.[47] For contributory negligence, the defendant must establish that, while defendant violated a duty and would otherwise be liable, the plaintiff was also at fault and, thus, plaintiff's conduct precludes plaintiff from pursuing the cause of action.[48] The rules of proximate cause apply to an assertion of the contributory negligence defense.[49]

Tobacco companies have effectively defended themselves in individual and state suits by exposing a lack of causation or the presence of intervening causes.[50] The element of causation in tort law requires that a plaintiff prove that a specific action or set of actions by the defendant led

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44. *See States Unanimously Accept $206 Billion Settlement, But Challenges Arise to Court Approvals*, Mealy's Litigation Reports: Tobacco, Vol. 12; No. 15, Dec. 3, 1998. For further discussion of the nation-wide settlement between the tobacco companies and the states, see Frank J. Vandall, *Settlement: The Legal Theory and the Visionaries That Led to the Proposed $368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473 (1998).

45. *See* PROSSER & KEETON, *supra* note 13, §§ 65 & 68.

46. *See, e.g.*, Steele v. Brown & Williamson Corp., No. 97-0961 CVW3 (W.D. Mo. May 13, 1999) (finding for defendants, the jury stated that the plaintiff knew what he was doing, knew that cigarettes were bad, but continued to smoke).

47. *See* PROSSER & KEETON, *supra* note 13, § 68.

48. *See id.* at § 65.

49. *See id.*

50. *See* Gilboy v. American Tobacco Co., No. 31-8361 (La. 19th DCA 1999) (finding that past bout with tuberculosis may have been the cause for smoker's illness, therefore plaintiff did not sufficiently prove causation); *City of San Francisco*, 957 F. Supp. at 1137-38 (holding that plaintiffs failed to meet the causation requirements for the RICO claim and that actions of the individual smokers were independent, intervening causes of plaintiff's injuries).

directly to plaintiff's injuries.[51] There are two components to causation: cause-in-fact[52] and proximate cause.[53] Thus, plaintiffs in tobacco cases, whether they be individual smokers or states, must establish a causal link between the defendant's actions or omissions and the plaintiff's injury. Lack of causation is the primary reason for the failure of Plaintiff's claims against tobacco companies, and, as this Note will reveal, lack of causation may also be the primary reason for the failure of the federal claim.

III. THE UNITED STATES VERSUS THE TOBACCO INDUSTRY

The most recent attempt to defeat the tobacco industry is a suit filed by the United States Justice Department against several of the tobacco company giants.[54] The main statutes involved in this suit are the FMCRA[55] and the civil RICO law.[56] Never before has a legal industry been charged with responsibility for United States health care costs; thus, this federal lawsuit presents issues that have never before been addressed.[57] There are several reasons why this will be an uphill battle for the United States government to survive what is sure to be an aggressive movement by the tobacco industry to have the suit dismissed. If successful, however, this suit has the power to create the largest assessment of liability against the tobacco industry to date.[58] This Part will discuss in turn the two statutorily-based claims and their respective strengths and weaknesses.

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51. *See* PROSSER & KEETON, *supra* note 13, §§ 41-42.

52. This is also known as "but-for" causation. But for the defendant's acts or omissions, the injury to the plaintiff would not have occurred. *See* PROSSER & KEETON, *supra* note 13, § 41.

53. This type of causation raises the issue whether the defendant should be legally responsible for the injury. *See* PROSSER & KEETON, *supra* note 13, § 42.

54. *See* United States v. Philip Morris, Inc., No. 99-CV2496 (D.D.C. filed Sept. 22, 1999). The suit names Philip Morris Inc.; Philip Morris Companies; R.J. Reynolds Tobacco Co.; American Tobacco Co.; Brown & Williamson Tobacco Co. Inc.; Liggett and Myers Inc.; The Council for Tobacco Research U.S.A. Inc.; and the Tobacco Institute Inc. *See id.*

55. 42 U.S.C. § 2651 et seq., *infra* note 61.

56. 18 U.S.C. § 1962, *infra* note 93.

57. In recent years, many similar actions have arisen where States have brought a direct action against the tobacco companies to recover medical costs they expended on smokers, and district courts have upheld the States' right to sue. *See, e.g.*, State ex rel. Norton v. R.J. Reynolds Tobacco Co., 1997 CV-003432 (Colo. Dist. Ct. Oct. 2, 1998); State ex rel. Kelley v. Philip Morris, Inc., No. 96-84281-CZ (Mich. Cir. Ct. May 28, 1997); State ex rel. Humphrey v. Philip Morris, Inc., No. C1-94-8565 (Minn. Dist. Ct. Feb. 19, 1998); State v. Philip Morris, Inc., No. S-744-97 CC (Vt. Super. Ct. Mar. 25, 1998); State v. American Tobacco Co., No. 96-2-15056-8 SEA, 1996 WL 931316 (Wash. Super. Nov. 19, 1996).

58. Some argue that the potential size of the claim will force the tobacco companies to settle. "The number will be so large the industry can't pay it . . . this case is not made to win, it's made to settle." Cloud, *supra* note 2, at A1 (quoting G. Robert Blakey, Professor, Notre Dame Law School).

A. *The Medical Care Recovery Act: Demanding That Tobacco Companies Pay Their Fair Share*

In its recently filed suit against the tobacco industry, the federal government is hoping to recover health care costs, paid by federal programs such as Medicare, for injuries suffered by smokers.[59] The suit relies on the availability of recovery granted the United States under the FMCRA.[60] The purpose of FMCRA is to enable the federal government to recoup some of the millions of dollars it spends for providing medical care to persons whose injuries are the result of the tortious conduct of a third party.[61] Nevertheless, this claim raises several issues, the resolution of which will determine the success or failure of the government's suit against the tobacco companies. The following subsections discuss some of the issues that are likely to arise and what the federal government will have to overcome to win this battle against the tobacco industry.

1. Proving Proximate Causation

In order to recover under FMCRA, the traditional element of causation under the principles of tort law must be met.[62] The statute explains that the

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59. *See* United States v. Philip Morris, Inc., No. 99-CV2496 (D.D.C. filed Sept. 22, 1999).

60. 42 U.S.C. § 2651 et seq. The Federal Medical Recovery Act states in relevant part:

> In any case in which the United States is authorized or required by law to furnish for hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United states shall have a right to recover from said third person . . . the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished . . . .

42 U.S.C. § 2651(a). FMCRA creates a cause of action on behalf of the government for recovery against a wrongdoer for the reasonable value of the medical treatment furnished to the injured person to whom the government is required by law to give medical care. *See* Sanner v. Government Employees Ins. Co., 376 A.2d 180, 182 (1977); *see also* McCotter v. Smithfield Packing Co., 868 F. Supp. 160, 161 (Ed. Va. 1994); Fanning v. Acromed Corp., 176 FRD 158 (Pa. 1997).

61. *See* United States v. Trammel, 899 F.2d 1483, 1486 (1990). Furthermore, the *Trammel* court explained that the purpose was also to prevent unjust enrichment of victims and tortfeasors and their insurance companies. *See id.*

62. *See* PROSSER & KEETON, *supra* note 13, § 42. Black's Law Dictionary (6th ed.) states:

> The proximate cause of an injury is the primary or moving cause, or that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if

person for whom the government provides medical care must be injured or suffer a disease "under circumstances creating a tort liability upon some third party."[63] This suggests that the federal government's ability to recover costs in the suit against the third party tobacco companies is based on the ability to establish a causal link between the act or omission of the tobacco companies and the injury to each individual.[64]

The issue of proximate cause is one that leads to much disagreement and confusion, and thus is usually determined "on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent."[65] Since the consequences of an act can go endlessly forward in time, proximate cause is a judicial tool created to limit a wrongdoer's liability only to harms that have a reasonable connection to his actions.[66] This limits liability by requiring that there be some direct relationship between the injury asserted and the tortious conduct alleged.[67] Establishing this direct relationship will be difficult for the government in their suit against the tobacco industry.

The federal government is claiming that the tortious conduct of the tobacco companies lies in their failure to disclose the full health risks of smoking, their attempts to suppress research into safer cigarettes, and their overall efforts to mislead the public.[68] Therefore, in order to succeed on this claim, the government will have to establish that the individual smokers relied on information provided by the tobacco companies and that their reliance caused them to continue to smoke (or not to quit). Furthermore, the government will have to show that ultimately, the reliance on the misinformation caused the smokers injury, which required medical care.

The tobacco companies in the instant suit will likely offer evidence of contributory negligence[69] or assumption of the risk.[70] As previously

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> the injury be one which might be reasonably anticipated or foreseen as a natural consequence of the wrongful act.

BLACK'S LAW DICTIONARY 1225 (6th ed. 1990).

63. 42 U.S.C. § 2651(a).

64. *See id.*

65. PROSSER & KEETON, *supra* note 13, § 42 (quoting 1 Street, Foundations of Legal Liability, 110 (1906)).

66. *See* Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 1999 U.S. App. LEXIS 19576, *14 (2d Cir. 1999).

67. *See id.* at *15 (citing Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992)).

68. *See* United States v. Philip Morris, Inc., No. 99-CV2496 (D.D.C. filed Sept. 22, 1999).The lawsuit cautiously and perhaps strategically avoids the issue of whether the federal government was ignorant of the risks of smoking, an issue to be discussed in a subsequent Subpart.

69. *See supra* notes 48 and 49 and accompanying text.

70. *See supra* notes 45 through 47 and accompanying text.

mentioned, these theories have been effective defensive tools for the tobacco industry in many prior cases.[71] These defenses will likely be successful in the present suit as well for the same reasons.[72]

2. Aggregation of Claims Under FMCRA

In addition to the difficulty posed by establishing proximate causation under the statute, there is no mention in FMCRA about the possibility of aggregating multiple claims.[73] This poses a second impediment for the government. This type of claim has never been attempted on a nation-wide level.[74]

Most suits brought under FMCRA are filed on an individual basis,[75] thus, it can be said that the federal government should litigate each claim separately and prove in each individual claim that the tobacco industry's misconduct proximately caused the individual smoker's injury or illness which led to the government expenditures. To allow an aggregation of the claims may result in weaker claims being combined with stronger claims despite lack of essential proof of the required elements.[76] On the other hand, to require the government to pursue each case individually would be a practical impossibility,[77] since the government's suit is based on injuries allegedly caused by the tobacco companies against hundreds of thousands of individual smokers.[78]

Moreover, it has been held that state substantive law is the basis for determining whether tort liability exists for purposes of a claim by the government under FMCRA.[79] The suit filed by the U.S. government

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71. *See supra* notes 50 through 53 and accompanying text.

72. Oftentimes the causation requirement is defeated by the presence of exigent circumstances that may also be found to be the actual and direct cause of the injuries suffered by the individual smokers. *See, e.g.*, Gilboy v. American Tobacco Co., No. 31-8361 (La. 19th DCA 1999) (finding that the fact that plaintiff had been smoking for forty-five years was not sufficient for proving causation since evidence revealed a past bout with tuberculosis and that might have been what led to plaintiff's lung cancer). Furthermore, there is no clear evidence to show that if the tobacco companies had disclosed all the information about the hazards of smoking that the individual smokers would have quit smoking or that the number of smokers would be less. This could be virtually impossible to prove.

73. *See* 42 U.S.C. § 2651 et seq.

74. *See* Cloud, *supra* note 2, at A1. *But see* R.J. Reynolds Tobacco Co. v. Engle, 1999 Fla. App. LEXIS 11937 (3d DCA 1999) (holding that the issue of damages, both compensatory and punitive, may be determined on a class basis).

75. *See, e.g.*, United States v. Trammel, 899 F.2d 1483, 1487 (1990); United States v. Theriaque, 674 F. Supp. 395, 397 (Mass. Dist. Ct. 1987).

76. *Cf.* Richard B. Schmitt, *Stronger Role Urged for Judges in Class Actions*, WALL ST. J., Nov. 1, 1999, at B5.

77. *See* Cloud, *supra* note 2.

78. *See* United States v. Philip Morris, Inc., No. 99-CV2496 (D.D.C. filed Sept. 22, 1999).

79. *See Trammel*, 899 F.2d at 1487.

involves claims against the tobacco companies for injuries to individual smokers across the nation.[80] Thus, the government should have to file each claim individually and in the appropriate state instead of filing one massive claim on a national level.

3. A Legal Industry

What about the fact that the tobacco industry is a legal industry? This suit represents the first time that a legal industry has been charged with the responsibility for medical costs paid by the federal government.[81] This raises an interesting issue relating to the defense of assumption of the risk.[82]

As mentioned in Part II, many juries are disinclined to relieve smokers of the consequences of their own choices.[83] The tobacco industry relies on assumption of the risk as an effective defensive weapon against claims made by smokers under the dangerous product theory.[84] In recent cases against the tobacco industry, state governments have argued that there was no assumption of the risk since the risks and dangers of smoking were not fully disclosed to the American public.[85] It is likely that the federal government will make the same assertion. The assumption of the risk argument is a risky one, however, since it can be effectively used against the state or federal government bringing the suit against the industry.

Since the promulgation of the Federal Cigarette Labeling and Advertising Act,[86] every box of cigarettes sold in the United States has been stamped with the requisite warning label stating that the Surgeon General has determined that smoking is dangerous to the health of the smoker.[87] The question that arises, then, is how the states can assert that, while they authorized the sale of this known dangerous product, the states did not assume the risk that under their own laws, they would have to pay for the damages caused when the risk became a reality?[88] It seems that the states authorized the tobacco companies to sell their products, despite the fact that the states knew of the potential health risks and required a warning label on each box of cigarettes, and the state and federal governments are now suing the tobacco companies for the injuries caused

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80. *See* United States v. Philip Morris, Inc., No. 99-CV2496 (D.D.C. filed Sept. 22, 1999).
81. *See* Lacey, *supra* note 1, at A1.
82. *See supra* notes 45-47 and accompanying text.
83. *See supra* notes 45-47 and accompanying text.
84. *See supra* notes 45-47 and accompanying text.
85. *See, e.g.*, Steamfitters v. Philip Morris, Inc., 171 F.3d 912 (3d Cir. 1999).
86. *See* 15 U.S.C. § 1331.
87. *See id.*
88. *See* Robert H. Bork, *Tobacco Suit is Latest Abuse of the Rule of Law*, WALL ST. J., Sept 23, 1999, at B1.

by those cigarettes sold.[89] The premise on which the states' suits are based is faulty and, thus, the federal government should have no basis for its suit under the same legal theory.

It is interesting to note that the government continues to benefit greatly from the sale of cigarettes.[90] While the federal government is going after the tobacco industry through this suit, it is also intensifying its campaign to raise taxes on cigarettes.[91] If the federal government's lawsuit is successful, the government will make money both from the sale and promotion of cigarettes and from the damages awarded to recover for medical costs as a result of the sale of cigarettes. The government should either continue benefitting from the revenue raised by cigarette taxes, thereby forfeiting any rights it may have to recover damages for medical costs caused by the sale and consumption of cigarettes, or the government should seek recovery for medical costs and declare that cigarettes are illegal.[92] The government should not be able to pursue both.

B. *The Civil Racketeer Influenced and Corrupt Organizations Law: Putting an End to Forty-Five Years of Intentional and Coordinated Deceit*

The federal government is also seeking relief under the civil RICO law[93] with hopes of recovering profits allegedly made by the tobacco

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89. *See id.*

90. Taxation on the sale of cigarettes is a primary source of money for state governments. "The States have made far more money taxing cigarettes than they spend on medical care." *Id.*

91. *See* Cloud, *supra* note 2, at A1. "Accompanying the attack on the industry, the White House and congressional Democrats are intensifying their campaign to raise cigarette taxes. The move is being pushed as the solution to a problem of writing a budget for the fiscal year . . . . Mr. Clinton's longstanding proposal to raise tobacco taxes by 55 cents a pack would raise a much-needed $8 billion next year." *Id.*

92. For a clever discussion of a similar argument involving Florida's use of its Third Party Liability Act to recover damages while taxing cigarettes at an extremely high rate, see Richard N. Pearson, *The Florida Medicaid Third-Party Liability Act*, 46 FLA. L. REV. 609, 631 (1995).

93. *See* 18 U.S.C. § 1962 (1999). The Civil Racketeer Influenced and Corrupt Organizations law states in relevant part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the

companies as a result of fraud.[94] The government is alleging that the tobacco industry collaborated to defraud the public.[95] As previously discussed, the federal government will likely encounter a difficult challenge in its claim under FMCRA due to problems with proximate cause, aggregation of claims and the legal status of the industry. Similar issues are raised under the government's claim based on RICO, and most prevalent among them is the issue of proximate cause. Just as in the FMCRA claim, the federal government will have to overcome these issues if it is to be successful in its suit. This Part will expose the issues present in the government's pursuit of a claim under RICO, and will attempt to predict the likelihood of success or failure on the government's part.

1. Proximate Cause and the *Holmes* Policy Factors

The Supreme Court has stated that a plaintiff's standing to sue under RICO requires "a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well."[96] Furthermore, statutory standing under RICO encompasses common law principles of proximate cause because Congress implicitly incorporated those principles into the RICO statute.[97] As previously mentioned, one of the tools used to limit a tortfeasor's liability is the requirement of direct injury.[98] Just as in the claim under FMCRA, this will be a difficult requirement for the government for purposes of bringing its claim under RICO.

> conduct of such enterprise's affairs through a pattern of racketeering activity . . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Id. Furthermore, the RICO provision for civil actions states:

> Any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

Id. § 1964(c).

94. *See* United States v. Philip Morris, Inc., No. 99-CV2496 (D.D.C. filed Sept. 22, 1999).

95. *See id.*

96. Holmes v. Securities Investor Protection, Corp., 503 U.S. 258, 268 (1992).

97. *See id.* at 267-68 (citing Associated Gen. Contractors, Inc. v. Carpenters, 459 U.S. 519, 532-33 (1983) [hereinafter *AGC*]).

98. *See* Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc., 1999 U.S. App. LEXIS 19576, *15 (2d Cir. 1999).

Proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient."[99] The U.S. Supreme Court in *Holmes v. Securities Investor Protection Corp.*,[100] identified three policy factors to guide courts in their application of the general principle that plaintiffs with indirect injuries lack standing to sue under RICO.[101] First, the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors.[102] Second, to allow claims to be brought by indirectly injured parties would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the actual tortious acts, in order to avoid the risk of multiple recoveries.[103] Third, when there are directly injured parties who can remedy the harm on their own account, there is no need to deal with the problems created in suits by plaintiffs injured more remotely.[104] An issue that remains unclear is whether all factors are necessary, or if meeting only one or two will suffice.

In *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*,[105] plaintiffs brought a claim under RICO against several tobacco companies alleging that the tobacco companies had engaged in advertising and campaigning designed to mislead the public, and the plaintiffs specifically, as to the hazards of smoking.[106] Plaintiffs alleged that, due to the tobacco companies' misrepresentations, the funds failed to implement smoking cessation programs, which ultimately led to injury to the plaintiffs' infrastructure and financial stability.[107]

The U.S. Court of Appeals for the Second Circuit considered the Holmes policy factors and held that the plaintiffs' allegations of economic injuries incurred by the funds were purely derivative of the physical injuries incurred by the participant smokers, and thus were too remote to permit recovery.[108] With respect to the first factor, the court found that the chain of causation was too complicated by third parties from whom plaintiffs' injuries derive, thus the injuries were indirect.[109] As to the

99. *Holmes*, 503 U.S. at 268 (citing PROSSER & KEETON § 41).
100. 503 U.S. 258 (1992).
101. *See id.* at 268-69 (citing *AGC*, 459 U.S. at 540-44).
102. *See id.* at 269 (citing *AGC*, 459 U.S. at 542-43).
103. *See id.* (citing *AGC*, 459 U.S. at 543-44).
104. *See id.* (citing *AGC*, 459 U.S. at 541-42).
105. 1999 U.S. App. LEXIS 19576, *4 (2nd Cir. 1999).
106. *See id.* at *7.
107. *See id.* at *28.
108. *See id.* at *36.
109. *See id.* at *31. "It will be impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the counter effect that the tobacco companies' direct fraud would

second policy factor, the court found that the risk of duplicative recovery did exist since the employers of the smokers could bring suits against the defendants as tortfeasors.[110] With reference to the third policy factor, the court found that while the individual smokers were precluded from bringing claims under RICO, the smokers still had sufficient independent incentive to pursue their own causes of action for any additional types of injuries such as pain and suffering.[111] Therefore, the court found that all the policy factors supported the conclusion that plaintiffs had failed to establish proximate causation and, thus, did not have standing to sue under RICO.[112]

Similarly, in *City & County of San Francisco v. Philip Morris, Inc.*,[113] a federal claim for violation of RICO, the plaintiffs alleged that defendant tobacco companies had engaged in a conspiracy to mislead plaintiffs and their residents about the hazards of smoking.[114] According to plaintiffs, this led to increased spending by plaintiffs to provide medical care to residents suffering from diseases caused by smoking.[115] Plaintiffs asserted that the injuries claimed resulted from the defendants' misrepresentations to and concealment of information from the plaintiffs and from defendants' breach of duty[116] toward the plaintiffs, not solely from the defendants' acts toward third parties.[117]

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have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs." *Id.* at *30.

110. *See id.* at *32-33.

111. *See id.* at *35-36. "Although these will not be RICO claims, they will remedy the harm done by defendants' alleged misconduct. Moreover, these actions will promote 'the general interest in deterring injurious conduct' which Holmes noted as the objective of this policy factor." *Id.* (quoting Holmes v. Securities Investor Protection, Corp., 503 U.S. 258, 269(1992)).

112. *See Laborers*, 1999 U.S. App. LEXIS 19576 at *36.

113. 957 F. Supp. 1130 (N.D. Cal. 1997).

114. *See id.* at 1134.

115. *See id.* Specifically, plaintiffs' claim alleged: (1) violation of 18 U.S.C. §§ 1341 and 1342 in that defendants used U.S. mail and wires to engage in schemes to defraud and mislead the public by suppressing information regarding the hazards of smoking and by making fraudulent misrepresentations, (2) violation of RICO § 1962(a) due to defendants' use of proceeds of their racketeering activities to invest in enterprises engaged in racketeering, and (3) violation of RICO § 1962(d) in that defendants conspired to violate RICO § 1962(a), (c). *See id.* at 1136; *see also* Fretwell, *supra* note 8.

116. Plaintiffs alleged that defendants undertook a direct duty to cooperate in protecting the public health, to assist in researching the effects of tobacco on health, and to disclose accurate information to the plaintiffs and plaintiffs' residents. *See City of San Francisco*, 957 F. Supp. at 1137.

117. *See id.* at 1137. Defendants suggested that the plaintiffs were relying on a complex causal chain to connect defendants' acts to the plaintiffs' alleged damages. *See id.* The chain described by the defendants is as follows: (1) defendants made misleading statements regarding the harmful effects of smoking cigarettes and manipulated the level of nicotine in the cigarettes, (2) as a result,

The court held that the mere fact that defendants' misrepresentations were made directly to the plaintiffs did not suffice to meet the causation requirements under RICO.[118] Furthermore, the court emphasized that the defendants' alleged violations of duties to the plaintiffs could not be linked directly to the plaintiffs' increased health care expenses due to the existence of the essential intervening link of the individual injured smokers.[119]

The court applied the Holmes policy factors and concluded that, (1) it would be extremely difficult to ascertain the amount of damages attributable to the defendants' conduct due to the high number of alternative factors that could have affected plaintiffs' damages, (2) there was, however, no risk of multiple recoveries since individual claims for personal injury are barred under RICO, and (3) since the smokers did not pay for the medical expenses themselves, the smokers did not have an incentive to assert their own individual claims.[120] While only the first of the Holmes policy factors was met, the court nonetheless held that the plaintiffs' injuries did not meet the proximate cause requirement and dismissed the RICO claims.[121]

The arguments likely to be set forth by the government in the instant case seem similar to those established in *City of San Francisco* and in *Laborers*, and thus, should lead to the same result. In the instant case, the government is alleging that the tobacco companies misrepresented the health risks of smoking, causing individuals to continue smoking or not to quit smoking, which led to increases in numbers of smokers suffering from smoking related diseases.[122] According to the federal government, this increase ultimately led to higher medical expenditures by federal programs such as Medicare.[123] In applying the Holmes policy factors to the instant case, as they were applied in the previous cases, it seems that the damage claims are highly speculative and that the injury is indirect.[124] Moreover,

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many more of plaintiffs' residents smoked and they smoked for longer periods of time, (3) these smokers developed health problems from using cigarettes, (4) these residents then sought medical care from plaintiffs, and (5) plaintiffs spent money to provide health care for these residents. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at 1138.

121. *See id.*

122. *See* United States v. Philip Morris, Inc., No. 99-CV2496 (D.D.C. filed Sept. 22, 1999).

123. The federal suit focuses on recovering costs borne exclusively by federal programs including programs for veterans and federal workers as well as Medicare, which covers the elderly and disabled. *See* Cloud, *supra* note 2, at A1.

124. As to the first factor, it will be virtually impossible to determine the amount of the government's damages caused by defendants' actions because of the existence of other, independent factors. As to the second factor, there will be no risk of multiple recoveries since, as in *City of San*

the directly injured individual smokers have ample avenues through which they can remedy any harm caused to them. Therefore, the federal government should have no standing to sue under RICO.

2. Specific Intent to Defraud

The government has stated that the acts and omissions on behalf of the tobacco companies represent a specific intent to harm the public.[125] The federal government is alleging that the industry collaborated and took steps to purposefully deceive the American people.[126] Will specific intent alleviate the requirement of direct injury in the instant case?

This argument has been presented in several RICO cases.[127] For example, in *Laborers*,[128] the plaintiffs averred that even if their claim failed to meet the direct injury test, they should still have standing to sue because an exception exists in cases where there is specific intention to harm.[129] Plaintiffs asserted that "where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote . . . unless the wrongful act is willful for that purpose."[130] The court reasoned that that view had been specifically rejected.[131] The court held that specific intent did not overcome the requirement that there be direct injury to maintain an action under RICO.[132] Therefore, the court in the instant case will likely hold that the specific intent of the defendants as asserted by the government does not relieve the government of proving direct injury. Without establishing direct injury, the federal government should not have standing to sue under RICO.

Francisco, the individual smokers do not have a cause of action to recover medical expenses which were paid for by the government and further, because individual claims for personal injury are barred under RICO. *See City of San Francisco*, 957 F. Supp. at 1138. As to the third factor, here too, as in *City of San Francisco*, the individual smokers have no incentive to pursue individual claims since they did not pay for the medical expenses out-of-pocket. *See id.*

125. *See* Lacey, *supra* note 1, at A2.

126. *See* Cloud, *supra* note 2, at A1.

127. *See, e.g.*, Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc., 1999 U.S. App. LEXIS 19576, at *7 (2d Cir. 1999).

128. *See* 1999 U.S. App. LEXIS 19576 at *4.

129. *See id.* at *36-37.

130. *Id.* at *37 (quoting I J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 55-56 (1883)).

131. *See id.* at *37. The notion that specific intent alleviated the requirement for direct injury was specifically rejected in *AGC*. *See id.* at *37 (citing *AGC*, 459 U.S. at 545) (explaining that "although buttressed by an allegation of intent to harm, the complaint was insufficient . . . for several reasons, including the fact that the plaintiffs alleged merely indirect injuries and were therefore barred from recovery as lacking proximate cause); *see also* Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 929 (9th Cir. 1994)(holding that "nothing . . . suggests that allegations of specific intent to cause RICO harm override the necessity to evaluate the directness of injury").

132. *See Laborers*, 1999 U.S. App. LEXIS 19576 at *39.

IV. BREATHTAKING CONSEQUENCES

If the federal government is successful in its suit against the tobacco industry, the decision's effect will greatly inflate the federal government's power to control various industries.[133] The government could use this tactic to increase regulation in an industry or to gain more revenues from an industry by threatening a federal suit with potentially devastating liability. If the damages claimed by the federal government are awarded, the tobacco companies will likely be unable to pay them, and thus, not be able to continue their businesses.[134] Under the FMCRA claim, the government is seeking to recover government costs amounting to twenty billion dollars per year for almost ten years of treating smoking-related diseases and illnesses.[135] Furthermore, the claim under RICO could be even more massive because the statute places no limits on how far back the government can go in forcing companies to disgorge profits made as a result of fraud.[136] The combined potential liability will be the highest in history. Therefore, if successful, the federal government could effectively destroy the tobacco industry.[137] The tobacco companies have no option but to settle this suit and perhaps that is just what the federal government is seeking.[138]

Does this suit, then, really represent an effort to use litigation against an industry for political gain and as a means of getting money to fund government programs? Perhaps yes. "No business can feel secure in the United States when the enormous power of the Justice Department can be unleashed against them for the purpose of raising revenue and scoring political points... this is nothing more than taxation through litigation."[139]

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133. *See* Bork, *supra* note 88. "The Justice Department's complaint is only the most recent, and it will be by no means the last, effort to use litigation to bludgeon private firms in order to accomplish a prohibition that government could not muster the political support to legislate." *Id.*

134. The lawsuit claims that the government has spent more than $20 billion a year to treat ill smokers, and has done so for the past forty-five years during which time the tobacco companies were deceiving the public about the dangers of smoking. *See* Cloud, *supra* note 2. The industry's liability could potentially exceed the $246 billion settlement reached between the states and the tobacco industry. *See id.*

135. *See id.*; *supra* note 60 and accompanying text.

136. *See* Cloud, *supra* note 2, at A1; 18 U.S.C. § 1962 (1999).

137. "The number will be so large the industry can't pay it... this case is not made to win, it's made to settle." *See* Cloud, *supra* note 2, at A1 (quoting G. Robert Blakey, Professor at Notre Dame Law School).

138. *See id.*

139. *See* Lacey, *supra* note 1, at A1. Perhaps the suit is being used to bring about tighter restrictions on the industry through litigation since Congress has failed to enact legislation that would do so, thus making political gain the motive. On the other hand, perhaps the suit is being used to extract much needed money for funding of federal programs or for simply balancing the

What other industries may find themselves between the government's cross-hairs? Gun makers have already faced a barrage of state suits and could be the next victims of a federal suit.[140] Some of the arguments presented in these gun suits, however, are different from those asserted in the tobacco suits. The city of Chicago, for example, is suing under the notion of "public nuisance," stating that gun manufacturers were flooding the city's suburbs with weapons, which created an illicit flow of guns into the city.[141] Nevertheless, if the RICO and FMCRA claims are successful in the federal tobacco case, the government could file a similar suit against the gun industry based on the same legal theories. The federal government spends billions of dollars a year on injuries caused by guns and, therefore, could argue that those costs should be recovered. Furthermore, the government could assert that the gun industry has engaged in a conspiracy to mislead Americans about the dangers associated with gun possession.

Makers of lead paint have become the most recent targets of state suits for liability for medical costs.[142] Suits against paint manufacturers are likely to be a reunion of sorts for some of the most important lawyers involved in the state tobacco settlements.[143] In a suit filed by Rhode Island, the state is seeking reimbursement for money spent on the health costs of sickness and injury caused by lead paint.[144] Furthermore, the state is alleging that the paint makers promoted the use of lead paint while covering up the dangers it posed to children.[145] Sound familiar?

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budget, resulting in an economic motive. The federal government has subsidized tobacco farmers for decades, has reaped billions of dollars in taxes on the sale of cigarettes and has declined to make tobacco illegal, therefore many question how the government can attack an industry on which they rely so heavily for revenue. *See id.*

140. *See* Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998, at A1; *see also* Barry Meier, *Local Governments Attack Gun Industry With Civil Lawsuits*, N.Y. TIMES, July 22, 1999, at A16.

141. *See* Butterfield, *supra* note 140. The suit demands $433 million to cover police and hospital costs attributable to handgun violence during the last five years. *See id.* Claims based on the unreasonable dangerousness of the guns have also been filed claiming that gun makers failed to incorporate sufficient safety devices in their weapons. *See id.*

142. See Milo Geyelin, *Former Makers of Lead Paint Are Sued by Rhode Island*, WALL ST. J., Oct. 13, 1999, at A3; Richard A. Oppel, Jr., *Rhode Island Sues Makers of Lead Paint*, N.Y. TIMES, Oct. 14, 1999, at A18.

143. *See Geyelin*, *supra* note 142, at A3; *Oppel*, *supra* note 142, at A2.

144. *See id.* Most sickness suffered due to lead paint occurs in children. *See id.*

145. *See id.*; *see also* Barry Meier & Richard Oppel, Jr., *States' Big Suits Against Industry Bring Battle on Contingency Fees*, N.Y. TIMES, Oct. 15, 1999, at A1. This growing wave of lawsuits by cities and states against makers of cigarettes, guns, and now lead paint raises controversial issues about the role of lawyers and the fees they earn in these legal actions. The trend is for states and cities to hire lawyers paid on a contingency basis, thus only getting paid if the case is won or settled. *See id.* In massive suits such as those against the tobacco and gun industries, a lawyer's contingency fees are likely to be at least seventeen percent of any verdict or settlement received. *See id.*

V. CONCLUSION

Many a plaintiff has lost his battle against the tobacco industry for injuries that resulted from the use of tobacco. States have been somewhat more successful in their endeavor to recover damages from the tobacco companies for injuries to both their citizens and their states. Is the federal government the plaintiff who will finally bring the tobacco industry to its knees? If the government's claims under FMCRA and RICO are successful, the tobacco industry is sure to suffer an insurmountable loss. This result could effect the futures of other industries who become politically and socially unpopular and are forced to pay the piper or forfeit their businesses. The government should not be permitted to use this tactic. If the government wants to regulate an industry, it should do so through legislation, not litigation