

Brooklyn Law Review

Volume 67

Issue 2

THE SECOND CIRCUIT REVIEW: 2000-2001

TERM

Article 3

12-1-2001

Taking Subrogation Seriously: The Blue Cross-Blue Shield Tobacco Litigation Reconsidered

Mark C. Weber

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Mark C. Weber, *Taking Subrogation Seriously: The Blue Cross-Blue Shield Tobacco Litigation Reconsidered*, 67 Brook. L. Rev. 381 (2001).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol67/iss2/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

TAKING SUBROGATION SERIOUSLY: THE BLUE CROSS-BLUE SHIELD TOBACCO LITIGATION RECONSIDERED*

Mark C. Weber†

INTRODUCTION

On June 4, 2001, a jury in the Eastern District of New York awarded Empire Blue Cross-Blue Shield \$17.8 million against six tobacco company defendants for violating New York consumer protection laws and committing unfair and deceptive business practices.¹ Although state governments achieved a

* ©2001 Mark C. Weber. All Rights Reserved.

† Professor of Law, DePaul University. B.A. Columbia; J.D. Yale. I thank Jeffrey W. Stempel, Stephan Landsman, and Joseph Borders for their comments on the manuscript. Special thanks to Catherine Tetzlaff for her research assistance. By way of disclosure, let me note that I am insured under a Blue Cross-Blue Shield plan, and do not smoke.

¹ Alan Feuer, *Tobacco Jury Awards Insurer*, N.Y. TIMES, June 5, 2001, at A22; see *Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc.*, No. 98 CV 3287 (JBW), 2001 WL 1304370 (E.D.N.Y. Oct. 19, 2001) [hereinafter *Empire*]. Though noteworthy, the award was lower than might have been anticipated in light of the finding of liability. The jury rejected the conclusion that the tobacco companies had engaged in fraud or racketeering, and so did not award punitive damages. The absence of a racketeering finding foreclosed a treble damages award under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994). Empire prevailed on the claims that the companies violated New York consumer protection laws and engaged in unfair and deceptive business practices. *Media Backgrounder: Brooklyn Jury Shatters Big Tobacco's Winning Streak*, Tobacco Products Liability Project, at <http://www.tobacco.neu.edu/PR/Backgrounders/empire-.htm> (last visited June 4, 2001). The relatively modest amount awarded, especially on the subrogation claim, supports the conclusion that even successful individual claims by smokers are not necessarily big money cases, and may need to be pooled in some fashion in order to justify the high litigation expenses they entail. See Mark C. Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation Over Tobacco Injuries*, 33 GA. L. REV. 979, 1009-10 (1999) (discussing need to pool expenses in light of reductions to recovery

\$246 billion settlement against tobacco producers in 1998 for tobacco-related Medicaid expenditures,² the *Empire* case represented the first time a third party medical expense payor case actually went to verdict.³ The result was thus very big news for the federal courts of the Second Circuit and for the judicial system of the United States.

In the Eastern District action, twenty-one Blue Cross-Blue Shield plans asserted both direct injury and subrogation claims against the tobacco companies. *Empire*, whose case came to trial first, received alternative awards of \$17.8 million for direct injury and \$11.8 million as subrogee of the injury claims that could be brought by its members.⁴

The direct injury and subrogation claims merit separate treatment. Direct injury claims have fared poorly on appeal. So far, the United States courts of appeals, including the Second Circuit, have uniformly rejected direct injury claims of third party payors.⁵ Judge Jack Weinstein, who presided over the *Empire* trial and entered judgment, allowed the case to proceed on the direct injury theory, noting distinctions from the Second Circuit case that had failed.⁶ While the third party payors' claims of direct injury have some persuasive power, anyone playing the odds would conclude that the \$17.8 million verdict based on that injury will have rough sailing in the Second Circuit. Still more doubtful would be the fate of any similar verdict based on a violation of RICO,⁷ the specific cause of action that the courts of appeals have most frequently rejected,

due to comparative fault); *see also infra* text accompanying notes 96-99 (discussing pooling effect of insurer lawsuits).

² National Association of Attorneys General Tobacco Documents Master Settlement Agreement, (Nov. 23, 1998), available at <http://www.naag.org/tobacco-public.html> (last visited Oct. 18, 2001).

³ *See* Christopher Mumma, *Tobacco Companies Ordered to Pay \$17.8 Mln to Insurer*, Bloomberg News Archive, at http://www.bloomberg.com/fgc...arkets-quote99_news.ht&s (last visited June 4, 2001) ("The decision is the first instance in which an insurer—a so-called third party—has succeeded in a court case seeking reimbursement from the tobacco industry.").

⁴ *See id.*

⁵ *See* United Food & Commercial Workers Union, Employers Health & Welfare Fund v. Philip Morris, Inc., 223 F.3d 1271, 1273-74 (11th Cir. 2000) (rejecting state law claims); *see also* cases cited *infra* note 9 (rejecting direct injury claims brought under federal statutory causes of action).

⁶ *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 113 F Supp. 2d 345, 371-72 (E.D.N.Y. 2000). *See also infra* notes 31-32 and accompanying text.

⁷ 18 U.S.C. §§ 1961-1968 (1994).

and one that Empire had hoped to prevail upon at trial.⁸ The courts of appeals that have ruled on the question have all found third party payors' claims of direct injury from tobacco too remote to satisfy the test for RICO liability.⁹

The courts of appeals have said nothing about the subrogation claims,¹⁰ however, and for that reason their merits remain very much an open question. Although they were evidently the second choice of the insurer litigants, the modest success of the *Empire* action, contrasted with the abject failure of most direct injury cases, suggests that they will become the favorite approach in the future.

⁸ See Mumma, *supra* note 3 (reporting interview with lawyer for Empire).

⁹ *Regence Blue Shield v. Philip Morris, Inc.*, No. 99-35203, 2001 WL 205996, at *1 (9th Cir. Feb. 28, 2001) (unpublished op., citation disfavored); *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068, 1076 (D.C. Cir. 2001); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 703 (9th Cir. 2001); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 444 (3d Cir. 2000); *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788, 789 (5th Cir. 2000); *Int'l Bd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 823 (7th Cir. 1999) [hereinafter *Int'l Bd. of Teamsters*]; *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 244 (2d Cir. 1999) [hereinafter *Laborers Local 17*]; *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 964 (9th Cir. 1999) [hereinafter *Oregon Laborers*], *cert. denied*, 528 U.S. 1075 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 932 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) [hereinafter *Steamfitters Local Union*].

The courts have rejected treble damages antitrust law claims on similar grounds. *Regence Blue Shield, Inc.*, 2001 WL 205996, at *1; *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 703; *Service Employees Int'l Union*, 249 F.3d at 1076; *Allegheny Gen. Hosp.*, 228 F.3d at 443; *Tex. Carpenters*, 199 F.3d at 443; *Int'l Bd. of Teamsters*, 196 F.3d at 823; *Oregon Laborers*, 185 F.3d at 966; *Steamfitters Local Union No. 420*, 171 F.3d at 933. Some of the cases also included state law claims, which the courts rejected. See, e.g., *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 706; see also *Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip Morris, Inc.*, No. W 1999-01061-COA-R9-CV, 2000 WL 1390171 (Tenn. Ct. App. Sept. 26, 2000) (rejecting various state law claims). *But see* *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001) (answering certified questions regarding state claims so as to permit claims to proceed).

¹⁰ See authority cited *supra* note 9. One court of appeals has found the claims of a multi-employer benefits trust preempted by the Employee Retirement Income Security Act ("ERISA"). *Lyons v. Philip Morris, Inc.*, 225 F.3d 909, 912-14 (8th Cir. 2000). This holding did not dispose of the merits of any subrogation claim that might be brought pursuant to ERISA or some mixture of ERISA and other federal law (such as RICO), and is in any instance not relevant to the claims of the Blue Cross plans. See *infra* text accompanying notes 76-80 (discussing *Lyons*).

On a societal, rather than a tactical level, the important fact about the subrogation claims is that individual litigation has only occasionally been able to achieve compensation for smoking injuries.¹¹ Individual litigants encounter difficulties establishing liability or they run out of money to support litigation long before the case reaches a decision on the merits. Aggregate tobacco litigation of one form or another is far more likely to have a social impact than individual litigation, at least in the near future.¹² Subrogation actions are an important means for challenging tobacco on an aggregate basis. The aggregate harm is clear: Smoking kills 400,000 Americans a year, the equivalent of three jumbo jet crashes a day.¹³ Documents from the tobacco companies themselves provide strong evidence of careless—and worse—conduct in the manufacture and marketing of tobacco.¹⁴ There has been no adequate legislative response to compensate for and deter the losses from smoking, or to achieve corrective justice for wrongs inflicted. It remains to be seen if the tort system will provide a means to rebalance the scales and relieve the victims and the public of some of the costs. Subrogation actions could be the way in which that relief occurs.

Although much has been written about the state attorney generals' third party Medicaid payor actions against the tobacco companies,¹⁵ so far there has been little scholarship concerning the private third party payors and their notable lack of success in asserting direct injury claims.¹⁶ This Article does not address that issue as such, but instead seeks to answer the question of "what if." Assuming the direct injury actions fail, what if the plaintiffs proceed on a subrogation claim? Insurance subrogation in general has been the subject of sporadic academic inquiry,¹⁷ but scholars have not yet had to

¹¹ See *infra* text accompanying notes 98-99.

¹² See *infra* text accompanying notes 97-99 (describing tobacco industry's fear of aggregate litigation rather than individual cases).

¹³ See Weber, *supra* note 1, at 980 (collecting sources).

¹⁴ See *infra* note 68 and accompanying text (listing documentary sources).

¹⁵ See *infra* note 24 and accompanying text (listing illustrative sources).

¹⁶ A noteworthy student contribution on the topic is Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 NOTRE DAME L. REV. 257 (2000).

¹⁷ See, e.g., KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 153-55 (1986) (discussing economic principles

focus on the issue as it relates to third party payors' claims for the costs of tobacco injuries.

This Article addresses that issue by discussing, in Part I, the prospects for a tobacco subrogation claim for treble damages relief under RICO Part II explores the analogous action under state law Finally, Part III discusses questions regarding the presentation of the subrogation claim to the trial court and adjudication of thorny issues such as contributory fault and reliance. The Article concludes that insurer subrogation actions are a viable—perhaps the most viable—means of achieving aggregated liability for the harms caused by smoking.

I. INSURERS' RICO SUBROGATION CLAIMS FOR TOBACCO INJURIES

Subrogation claims differ from the claims of direct injury that the Blue Cross plans have pursued most aggressively in their actions against the tobacco companies, but like those claims, the subrogation actions are being asserted under RICO as treble-damages cases. An analysis of the leading RICO precedent demonstrates, perhaps somewhat surprisingly, that the subrogation claims of the insurers fit comfortably within the proximate cause standards established by the statute. Other issues may still limit the applicability and operation of the RICO treble-damages provision, however.

A. *Subrogation Versus Direct Injury*

“[S]ubrogation is an equitable right whereby a nonvolunteer who has made a payment to another of a debt for which he or she is only secondarily liable succeeds to that party's rights against the third party who is primarily

regarding subrogation); RONALD C. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE (1964); JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES §§ 11.01-.05 (2d ed. 1999 and Supp. 2001); June F. Entman, *More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation*, 68 N.C. L. REV. 893 (1990); Jeffrey W. Stempel, *Recent Case Developments*, 6 CONN. INS. L.J. 207, 233-37 (1999-2000) (discussing subrogation dispute).

responsible for the debt."¹⁸ In the context of Blue Cross-Blue Shield insurance claims against Big Tobacco, the insurance companies paid the smokers' medical bills. Thus the insurers succeed to the smokers' rights against the tobacco companies, whose wrongful conduct supposedly caused the losses. Since nearly all health insurance policies contain subrogation clauses,¹⁹ the claim is one of conventional, rather than equitable, subrogation.²⁰

A subrogation claim differs from the direct injury claims asserted by the Blue Cross plans and other insurers against Big Tobacco. In claiming direct injury to themselves, the insurers allege that they expended their funds to treat tobacco victims, and would not have done so but for the wrongful conduct of the tobacco companies in manufacturing and marketing their harmful products. The loss is thus to the surplus (or other competing expenditures) of the nonprofit plans.²¹ The insurers have argued further that if they themselves had not been the target of fraudulent misrepresentations, they would have done more to diminish smoking among their insureds, and thus would not have suffered losses as great as they did.²² These claims are not the same as the claim that the tobacco companies injured consumers by selling them cigarettes that caused cancer, and that the consumers contractually or equitably assigned (i.e., subrogated) their causes of action for their losses to the entities that paid for treatment.²³ The attraction of direct injury

¹⁸ ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW § 96(b), at 603 (2d ed. 1996).

¹⁹ *Id.* § 96(c), at 605 ("[I]nsurers now routinely include subrogation clauses in health insurance contracts.").

²⁰ *See id.* at 602 ("'Conventional subrogation' arises out of the contractual relationship of the parties."); STEMPER, *supra* note 17, at § 11.02 (suggesting use of "contracted" rather than "conventional" for subrogation by contract); *see also* Health Care Serv. Corp. v. Brown & Williamson Tobacco Corp., 208 F.3d 579, 581 (7th Cir. 2000) ("Doubtless the Blues are subrogated to their insureds' tort claims.").

²¹ *See* Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc., 36 F. Supp. 2d 560, 569-70 (E.D.N.Y. 1999) (describing direct injury claim).

²² *See, e.g., Oregon Laborers*, 185 F.3d at 962; *see also Laborers Local 17*, 191 F.3d at 233 (describing claimed losses "due to the Funds' inability to control costs, to promote the use of safer alternative products, and to establish programs to educate their participants not to use tobacco products").

²³ As the Third Circuit explained:

In plaintiffs' submission, notwithstanding defendants' argument that

theories is their ability to avoid the obstacles facing the smokers' causes of action for negligence, product liability, and fraud.²⁴ Smokers' negligence and product liability actions present, at minimum, difficulties with comparative fault and, to the extent they are based on failure to warn, preemption by federal law.²⁵ Fraud actions typically require a showing of reliance.²⁶

all of the Funds' claims are essentially subrogation claims, their "direct" claim is a fundamentally different legal claim from the typical insurer-against-wrongdoer claim that falls under the principle of subrogation. This direct claim is said to arise not only out of a tortfeasor's actions toward an insured, but also from its actions toward the insurance company (here the Funds) itself. The traditional subrogation principle holds that an "insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss." *Great Am. Ins. Co.*, 575 F.2d at 1034 (quoting W VANCE, VANCE ON INSURANCE 787 n.2 (3d ed. 1951)). Here, the Funds are essentially claiming that they paid for more than "the property insured" (i.e., the health of fund participants) because the defendants caused the Funds to expend additional costs that would have been paid by the tobacco companies (through reduced revenues and tort damages) if they had not defrauded the Funds and conspired to cover up their wrongdoing.

Steamfitters Local Union, 171 F.3d at 920.

²⁴ See Richard A. Epstein, *Subrogation and Insurance, with Especial Reference to the Tobacco Litigation*, 41 N.Y.L. SCH. L. REV. 493, 499 (1997) (discussing state government litigation over Medicaid expenditures and assumption of risk defense). The efforts of the states to recover the Medicaid costs free of the defenses sparked considerable controversy. See, e.g., *id.*; Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601 (1998); Michael Moore, *Tobacco Litigation: A Problem that Needs a Solution*, 41 N.Y.L. SCH. L. REV. 487 (1997); Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935 (1999). See generally *Agency for Health Care Admin. v. Associated Indus. of Fla.*, 678 So. 2d 1239 (Fla. 1996) (ruling that creation of new cause of action free of traditional defenses did not on its face violate due process). This Article sidesteps that debate and assumes that whatever the law may be with regard to state Medicaid costs, Blue Cross subrogation claims will remain subject to defenses applicable to the smokers' own claims.

²⁵ Federal law preempts claims based on the inadequacy of warnings on cigarette packages for periods of time after the passage of federal warning requirements. *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 524 (1992). Failure-to-warn claims based on inadequacy of communications other than the package labels may remain viable. See Michael D. Green, *Cipollone Revisited: A Not So Little Secret About the Scope of Cigarette Preemption*, 82 IOWA L. REV. 1257 (1997) (noting that *Cipollone* requires preemption only of claims based on inadequacy of package warnings).

²⁶ See, e.g., *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001) (noting that reliance must be proven in statutory sales misrepresentation action, but permitting use of circumstantial evidence).

Subrogation claims brought by insurers derive from the smokers' rights to sue, and face the same impediments—comparative fault, preemption, reliance—that the smokers' actions do. Although the conventional subrogation that originates in a contractual term of the insurance policy avoids equitable defenses such as unclean hands,²⁷ it remains subject to legal defenses such as comparative fault.²⁸ If an insurer can show a direct injury to itself, the relevant question would be whether it was guilty of comparative fault, and the insurers are far more confident of a negative answer on that question than smokers would be.

Nevertheless, the appeals courts have rejected insurers' direct injury claims altogether, something they have not done with the subrogated causes of action. For example, in *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*,²⁹ the Second Circuit ruled that all the harms that the insurers suffered on account of the tobacco companies' conduct were "entirely derivative of" and "purely contingent on" the harms worked on the smokers themselves.³⁰ Thus the insurers' direct harms, however real, were not proximate enough to support a claim under RICO and other theories of liability.³¹

Judge Weinstein distinguished *Laborers Local 17*, which arose out of a Southern District of New York multi-employer benefits trust action, primarily on the ground that the Blue Cross plans have such a huge role in the health care industry that they are a different class of victim than an individual union local benefits trust.³² Although the Seventh

²⁷ See JERRY, *supra* note 18, at § 96(b), 603.

²⁸ See *Allstate Ins. Co. v. Town of Ville Platte*, 269 So. 2d 298, 304 (La. Ct. App. 1972) (barring subrogation claim on account of insured's contributory negligence); *Prudential Prop. & Cas. Co. v. Dow Chevrolet-Olds, Inc.*, 10 S.W.3d 97, 100 (Tex. Ct. App. 1999) ("Since the Joneses are subject to the defense of contributory negligence, so is Prudential.").

²⁹ 191 F.3d 229 (2d Cir. 1999).

³⁰ *Id.* at 239.

³¹ See *id.* at 244. Other courts have questioned whether such losses are even real, noting that the insurers had the capacity to pass them through to ratepayers. See *Int'l Bd. of Teamsters*, 196 F.3d at 824. For Judge Weinstein's response to this argument, see *Blue Cross & Blue Shield of N.J. v. Philip Morris*, 36 F. Supp. 2d at 569-70 (noting that many businesses have the ability to shift losses to consumers but may recover for wrongful conduct anyway).

³² *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 213, 216-217 (E.D.N.Y. 1999); accord *Blue Cross & Blue Shield of N.J. v. Philip Morris*, 113

Circuit was guilty of rhetorical overkill in describing Judge Weinstein's opinion as "a thinly disguised refusal to accept and follow the second circuit's holding,"³³ the distinction has obviously failed to persuade the other circuits that have passed on Blue Shield plans' direct injury causes of action. If Empire's direct injury claim fails on appeal, as the other direct injury claims have, the subrogation claim is all that remains. Despite its problems, it is the insurers' surest hope, and it may well succeed.

B. *Subrogation Under RICO*

There is no barrier to a subrogee filing suit for treble damages under RICO's general principles, and the leading case from the Supreme Court assumes arguendo that an insurer whose subrogor has received an injury actionable under RICO may sue for the relief.³⁴ A further analysis of the case shows that although remoteness bars a treble-damages claim, subrogation does not bear on the remoteness question.

F. Supp. 2d at 371-72. Presumably, the argument is that this prominent role removes the Blue Cross plans from the "unexpected victim" limit on proximate causation. *See, e.g.,* MARC A. FRANKLIN & ROBERT RABIN, TORT LAW AND ALTERNATIVES 419 (7th ed. 2001) (describing limits on proximate cause pertaining to "unexpected victim"); *see also* Nat'l Asbestos Workers v. Philip Morris, 74 F. Supp. 2d 221, 227 (E.D.N.Y. 1999) ("Injury to the Blues was allegedly more foreseeable, and allegedly more calculated as part of the defendants' racketeering scheme, because of the Blues' dominant and highly visible role as health care providers throughout the nation."). This argument has some persuasive power, given the strong relevance of foreseeability to proximate cause, and the likely congressional knowledge of that fact when it passed RICO. *See* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992) (applying traditional proximate cause analysis to interpret causation requirement in RICO)

³³ *Int'l Bd. of Teamsters*, 196 F.3d at 827.

³⁴ *Holmes*, 503 U.S. at 271; *see also* Ramos v. Patrician Equities Corp., No. 89CIV5370 (TPG), 1993 WL 58428 (S.D.N.Y. Mar. 3, 1993) (allowing surety to assert RICO claims of investors); *Fed. Ins. Co. v. Ayers*, 760 F Supp. 1118, 1119-20 (E.D. Pa. 1990) (allowing subrogated surety to assert RICO for treble damages); *Sec. Inv. Prot. Corp. v. Poirier*, 653 F. Supp. 63, 65-66 (D. Or. 1986) (finding insurer to have standing under RICO); *Gen. Accident Ins. Co. of Am. v. Fidelity & Deposit Co. of Md.*, 598 F Supp. 1223, 1246 (E.D. Pa. 1984) (holding that blanket bond issuer's third-party complaint sufficiently pled RICO counts).

1. RICO Principles

RICO establishes a claim for treble damages for “[a]ny person injured in his business or property by reason of a violation of”³⁵ any of a list of prohibited activities,³⁶ including engaging in a pattern of mail fraud or wire fraud,³⁷ threatening and intimidating witnesses,³⁸ and interstate and foreign travel in aid of racketeering.³⁹ The Blue Cross plans allege that the tobacco companies have committed those crimes in the course of making and selling cigarettes and other products.⁴⁰

RICO’s cause of action extends to all specified violations of the law; there is no need for the activity to rise to the level of organized crime. As the Supreme Court has commented:

The occasion for Congress’ action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime. In [the statute], Congress picked out as key to RICO’s application broad concepts that might fairly indicate an organized crime connection, but that it fully realized do not either individually or together provide anything approaching a perfect fit with “organized crime.”⁴¹

If the tobacco companies’ alleged misrepresentations and fraudulent concealment with regard to the dangers of smoking and the addictive character of nicotine constitute a pattern of violation of the underlying criminal code provisions, anyone injured in his or her business or property may assert the treble damages claim under RICO

³⁵ 18 U.S.C.A § 1964(c) (West 2000).

³⁶ See 18 U.S.C. § 1962.

³⁷ 18 U.S.C. §§ 1341, 1343 (1994).

³⁸ 18 U.S.C. §§ 1512, 1513 (1994).

³⁹ 18 U.S.C. § 1952 (1994).

⁴⁰ See *Blue Cross & Blue Shield of N.J. v. Philip Morris*, 36 F Supp. 2d 560, 565-66 (E.D.N.Y. 1999).

⁴¹ *H.J., Inc. v. N.W Bell Tel. Co.*, 492 U.S. 229, 248 (1989); see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) (“[There is] no distinct ‘racketeering injury’ requirement. If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).”).

Or perhaps not quite anyone. As developed more fully below, the Supreme Court has interpreted the causation idea in "injured" to mean proximate causation, rather than cause in fact.⁴² Therefore, the treble-damages plaintiff must show that the relationship between the injurious conduct and the injury is sufficiently direct.⁴³ A similar test applies in antitrust cases.⁴⁴ Indeed, the Court adopted the proximate-cause interpretation of the RICO claim on the strength of the analogy to previous interpretations of comparable language in the treble damages provision of the federal antitrust laws.⁴⁵

2. *Holmes v. SIPC*

Apart from the problem of the defenses applicable to the subrogated claims of the insured, a likely reason that the Blue Cross plans have shied away from the subrogation cause of action is the subrogee's defeat in the Supreme Court's one seemingly analogous RICO subrogation case. In *Holmes v. Securities Investor Protection Corp.*,⁴⁶ defendant Holmes allegedly engaged in fraudulent manipulation of stock prices that kept two broker-dealers from meeting obligations to customers, forcing the liquidation of the brokerages and the payout of insurance funds to their customers by the plaintiff, the federally created corporation that protects customers in the event of brokerage liquidations.⁴⁷ The Securities Investment Protection Corporation ("SIPC") asserted that Holmes was liable to it for treble damages under RICO because the stock manipulation entailed a pattern of violation of the securities fraud laws that bankrupted the brokerages and thus harmed the customers, even though the customers had not invested in the manipulated stock.⁴⁸ Since the SIPC paid out to the customers, it stood as subrogee for their claims.⁴⁹

⁴² *Holmes*, 503 U.S. at 268.

⁴³ *See id.* (discussing requirement of "some direct relation between the injury asserted and the injurious conduct alleged.").

⁴⁴ *Assoc. Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983).

⁴⁵ *Holmes*, 503 U.S. at 267-68.

⁴⁶ 503 U.S. 258 (1992).

⁴⁷ *Id.* at 262-63.

⁴⁸ *Id.* at 263-64.

⁴⁹ *Id.* at 270-71.

The Court rejected the corporation's claim. It held that the RICO treble damages provision requires not just that the defendant's pattern of racketeering activity be the cause in fact of the plaintiff's losses; the conduct must also be the proximate cause of the plaintiff's losses.⁵⁰ The injury was insufficiently direct to constitute proximate cause. The causal chain depended on the stock manipulator causing harm to the brokers, and, as a result, the brokers becoming insolvent. As the Court stated, "[O]nly that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors."⁵¹ The Court quoted the principle that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step,"⁵² and advanced policy reasons for not doing so in *Holmes*. First, it would be difficult to sort out the role of the stock manipulation, as opposed to poor business practices or other causes, for the brokerages' insolvencies. Second, the broker-dealers and the customers would have conflicting claims for treble damages that would somehow need to be apportioned. Third, the broker-dealers' own treble-damages suit would fully vindicate the underlying law's purposes.⁵³

C. *Insurers' Subrogation Claims for Tobacco Injuries Under RICO*

Once one plots out the nature of the relationship of the parties and intermediaries in *Holmes*, it becomes obvious that it is not analogous to the Blue Cross subrogation cases. In contrast to the *Holmes* causal chain:

Defendant Racketeer (Holmes) -> Brokerages -> Customers -> SIPC,

the tobacco causal chain is:

Defendant Racketeer (Tobacco Co.) -> Smokers -> Blue Cross.

⁵⁰ *Id.* at 268.

⁵¹ *Holmes*, 503 U.S. at 271.

⁵² *Id.* (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (*Holmes, J.*)).

⁵³ *Id.* at 272-73.

The intermediate step, the one that gave the Court pause in *Holmes*, is missing in tobacco. That distinction is crucial. The Court in *Holmes* declared that "the link is too remote between the stock manipulation alleged and the customers' harm,"⁵⁴ not the insurer's harm. Instead, it was willing to assume, *arguendo*, that the insurer had the perfect right to stand in the shoes of nonpurchasing customers.⁵⁵ Those customers, however, had no claim under the statute. There is no obstacle to a subrogee suing under RICO, but its subrogor must actually have a cause of action under the law. The Court held "not that RICO cannot serve to right the conspirators' wrongs, but merely that the nonpurchasing customers, or SIPC in their stead, are not proper plaintiffs."⁵⁶ Just as the dealers, who were directly harmed, had a claim under RICO,⁵⁷ so too the smokers in the tobacco case will have a claim if they can show the underlying violations of the law. And if they do, their subrogees, the Blue Cross plans, can assert the claim under ordinary subrogation doctrine.

D. *Additional Issues Regarding the Treble Damages Provision*

One additional limit on statutory reach must be noted in discussing RICO subrogation claims for tobacco injuries. Personal injuries are not within the treble damages provision.⁵⁸

⁵⁴ *Id.* at 271 (emphasis added).

⁵⁵ *Id.*

⁵⁶ *Holmes*, 503 U.S. at 274. A district court case also involving subrogated claims asserted under RICO reinforces the irrelevance of the subrogation to the directness of the injury. *Kaiser v. Stewart*, 965 F. Supp. 684 (E.D. Pa. 1997). As in *Holmes*, the plaintiff failed because the subrogors, in this instance, creditors of bankrupt insurance companies, lacked a sufficiently direct injury to sustain a cause of action under RICO. *Kaiser*, 965 F. Supp. at 689.

⁵⁷ *Holmes*, 503 U.S. at 273-74 ("[T]he broker-dealers have in fact sued in this case, in the persons of their SIPA [Securities Investor Protection Act] trustees appointed on account of their insolvency. Indeed, the insolvency of the victim directly injured adds a further concern to those already expressed, since a suit by an indirectly injured victim could be an attempt to circumvent the relative priority its claim would have in the directly injured victim's liquidation proceedings.")

⁵⁸ *See, e.g.*, *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918 (3d Cir. 1991); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299-1300 (6th Cir. 1989) (holding that neither personal injury nor mental suffering are injury to business or property as defined by RICO); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 509 (1985) (Marshall, J., dissenting) (stating that RICO does not provide treble damages for personal injury

Rather, the damages are available only for injuries to "business or property"⁵⁹ Therefore, the damages to be trebled in the RICO subrogation action are the non-personal injury losses of the smokers. Whether the hospitalization and medical costs, particularly those traceable to fraud or misrepresentation, constitute property losses rather than personal injuries is a RICO-interpretation issue that is beyond the scope of this Article.⁶⁰

The disposition of the remedy is a final issue to be considered. Although the general rule is that a subrogee may sue only for the amount that it has paid out to the insured, when a statute confers the right to punitive remedies, the subrogee may assert the claim the statute provides.⁶¹ The amount in excess of the actual expenditures may need to be held in trust for the person actually injured, however.⁶² It is a matter of RICO interpretation whether the goals of the statute are best served by allocation of the amount of damages in excess of the actual insurer losses to the victims of tobacco-related illnesses.

claims); cf. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (finding personal injury claims to be outside scope of antitrust treble damages provision). For Judge Weinstein's effort to distinguish some of these cases and explain his disagreement with others, see *Nat'l Asbestos Workers v. Philip Morris*, 74 F Supp. 2d 221, 229-38 (E.D.N.Y. 1999) and *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 74 F Supp. 2d 213, 218-20 (E.D.N.Y. 1999).

⁵⁹ 18 U.S.C.A § 1964(c) (West 2000).

⁶⁰ In one analogous case, a court permitted a claim under civil RICO for the costs of defective cardiac pacemakers and the charges for implanting and removing them, though not for personal injuries as such. *In re Cordis Corp. Pacemaker Prod. Liab. Litig.*, No. MDL850, 1992 WL 754061, at *3 (S.D. Ohio Dec. 23, 1992); see also *Int'l Bd. of Teamsters*, 196 F.3d at 823 ("[G]etting a product that causes deferred injury and medical expenses, causes a loss of one's money, which is 'property.'").

⁶¹ See *Cincinnati Ins. Co. v. Brookwood Med. Ctr.*, 689 So. 2d 47, 50 (Ala. 1997) (permitting action pursuant to statute by employer's workers' compensation carrier for punitive award for worker's death). *But see Fidelity & Deposit Co. of Md. v. Bradley*, No. CV 940544726, 1997 WL 804898, at *6 (Conn. Super. Ct. Dec. 22, 1997) (rejecting subrogee's claim for double and treble damages pursuant to statute).

⁶² See *Cincinnati Ins. Co.*, 689 So. 2d at 50 (quoting statute). Determining whether the same result would obtain under RICO requires an analysis of RICO's statutory purposes that is beyond the scope of this article.

II. INSURERS' SUBROGATION CLAIMS FOR TOBACCO INJURIES UNDER STATE LAW

If the RICO subrogation claim fails on account of the personal injury exclusion or some other basis, a claim still remains under state law, under either consumer fraud statutes or common law fraud, negligence, or product liability. State law grounded the \$11.8 million alternative verdict in the *Empire* case. Matters of remedies and of federal jurisdiction come into play in discussing state law subrogation claims for tobacco injuries.

A. Remedies in Common Law Tobacco Subrogation Actions

Unless the state has the equivalent of RICO remedies under its own statutes,⁶³ the insurer must forgo treble damages and attorneys' fees. Punitive damages may also be beyond reach, for the general rule is that a subrogee may recover only its actual expenditures on behalf of the subrogor, not a punitive award that exceeds the outlays.⁶⁴ Nevertheless, state supreme courts may determine that the policies of their states justify departure from the rule, just as a statutory right to recovery in a given jurisdiction might support punitive awards.⁶⁵

If punitive damages are available to the subrogee, apportionment problems arise. Should the insurer have to give the punitive award to the insured? The traditional rule is that if a subrogee somehow receives damages greater than the amount it paid, the amount goes to the subrogor (minus reasonable litigation expenses, if applicable).⁶⁶ If a state

⁶³ A number of states have their own versions of RICO. See, e.g., ARIZ. REV. STAT. ANN. § 13-2314.04 (West Supp. 2000); N.D. CENT. CODE § 12.1-06.1-05 (1997).

⁶⁴ *Wasko v. Manella*, No. CV 930308152S, 2000 WL 1683417, at *2 (Conn. Super. Ct. Oct. 13, 2000); *S. Ry. Co. v. Malone Freight Lines, Inc.*, 330 S.E.2d 371, 408-09 (Ga. App. 1985); *Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc.*, 437 N.E.2d 1360, 1371 (Ind. App. 1982); *Colonial Penn Ins. Co. v. Ford*, 411 A.2d 736, 737 (N.J. Super. 1979); *Nat'l Union Fire Ins. Co. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 133 (Tex. Ct. App. 1997).

⁶⁵ See *Cincinnati Ins. Co.*, 689 So. 2d at 50.

⁶⁶ See JERRY, *supra* note 18, § 96(d), at 609 (collecting cases); see also ROBERT E. KEETON, *INSURANCE LAW* 160-61 (1971) (supporting approach). See generally Jay S. Bybee, Comment, *Profit in Subrogation: An Insurer's Claim to Be More than Indemnified*, 1979 BYU L. REV. 145 (discussing apportionment of overage).

chooses to depart from that rule and allows the insurer to keep some of the punitive damages, how much should the insurer keep? A Blue Cross plan typically pays the doctor and hospital bills only in part, leaving a deductible and co-payment that the insured must absorb, and it pays nothing for pain and suffering or lost wages or other costs of the injury. The subrogation action is one in which the insurer steps into the shoes of the insured, but in the Blue Cross-tobacco situation, it occupies only part of the figurative footwear.

Denying punitive awards altogether solves the apportionment problem by eliminating the need for any division of the money, but that draconian measure is not the most just solution. In smokers' individual cases, some juries have concluded that the tobacco companies' conduct reached the standards for outrageousness that would support an award of punitive damages;⁶⁷ the documentary record from the companies themselves demonstrates appalling misconduct.⁶⁸ The cost of matching the tobacco defendants' scorched-earth litigation tactics means that few tobacco victims with meritorious claims are likely to bring them.⁶⁹ Class action litigation is one way of vindicating the rights of the victims. However, the federal courts have rejected that avenue of relief,⁷⁰ and the state courts remain split, so relief of that kind will be sporadic.⁷¹ The policy underlying punitive damages

⁶⁷ The primary example is the Florida class action judgment, but some individual suits have also yielded punitive awards. See James Sterngold, *A Jury Awards A Smoker With Lung Cancer \$3 Billion From Philip Morris*, N.Y. TIMES, June 7, 2001, at A14.

⁶⁸ See STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996). Additional documents of interest are found at http://www.tobacco.neu.edu/mn_trial/index.html (last visited Feb. 9, 2002) and <http://www.tobacco.org/Documents/documents.html> (last visited Feb. 9, 2002). The deposition of Jeffrey S. Wigand, which was dramatized in the 1999 movie *The Insider*, may be viewed at http://www.tobacco.neu.edu/Extra/hotdocs/wigand_depo.htm (last visited Feb. 9, 2002).

⁶⁹ See Weber, *supra* note 1, at 1009 (discussing high costs of tobacco litigation and their implications).

⁷⁰ See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing certification of a nationwide class of nicotine-dependent persons, their estates, and family members); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998) (affirming decertification of class action for medical monitoring of tobacco victims); *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469 (E.D. Pa. 1997).

⁷¹ Compare *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (permitting state-wide class action of smokers to go forward) with *Small v.*

supports the availability of some procedural mechanism for obtaining the relief in a case where the facts justify it.⁷² If insurer litigation is the best—or perhaps the only—mechanism for obtaining punitive recoveries, the problems with apportionment should not be permitted to stand in the way. The courts should allow the claims and adopt either a rule compelling remittance to the victims (minus an appropriate deduction for reasonable costs of recovery)⁷³ or a rule calling for proportional distribution based on the proportion of the costs of the injury borne by the victim and the insurer.

B. *Jurisdiction in Common Law Tobacco Subrogation Actions*

Whether for punitive damages or compensatory relief, insurer claims that are not appended to a RICO or other federal claim fall outside federal jurisdiction, in the absence of complete diversity.⁷⁴ Diversity may exist in some Blue Cross cases, though the plaintiffs could fairly easily defeat it by naming a nondiverse defendant such as a distributor, who would be liable under product liability and negligence theories, or an advertiser, who might have entered into a conspiracy to defraud or violate state consumer protection laws.⁷⁵

Lorillard Tobacco Co., 720 N.E.2d 892 (1999) (rejecting smokers' consumer fraud class action). The Florida case resulted in a \$144.8 billion punitive damages award that is now under appeal. See *Engle v. Am. Tobacco Co.*, No. 94-08273 CA-3 (Fla. Cir. Ct., Dade County Nov. 6, 2000) (Final Judgment and Amended Omnibus Order), at Tobacco Control Resource Center & The Tobacco Products Liability Project, http://tobacco.neu.edu/Extra/Engle/kaye_11-6-00.PDF (last visited Feb. 9, 2002).

⁷² The policies behind punitive damages include punishment and retribution, deterrence, and encouragement to potential plaintiffs to uncover wrongdoing by providing additional funds to finance litigation. See DAN B. DOBBS, *LAW OF REMEDIES* § 3.11(2)-(3) (2d ed. 1993).

⁷³ A litigant whose actions confer benefits on another is traditionally granted a reasonable fee out of the benefits conferred. See, e.g., *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 163-67 (1939) (explaining basis for fee award).

⁷⁴ See generally 28 U.S.C. § 1332 (1994) (establishing diversity jurisdiction).

⁷⁵ See *Scott v. Am. Tobacco Co.*, No. Civ.A.97-1178, 1997 WL 749415 (E.D. La. Dec. 2, 1997) (remanding case to state court in light of tobacco distributor defendants' co-citizen status with plaintiffs). See generally Weber, *supra* note 1, at 1001-05 (discussing federal jurisdiction in tobacco class action suits).

One court has found that the Employee Retirement Income Security Act⁷⁶ ("ERISA") preempts the third party claims of a multi-employer benefits trust that provided insurance to tobacco victims, and that therefore any such claims fall within federal jurisdiction and must be decided under the interpretations of that statute.⁷⁷ The court's reasoning was breathtakingly broad: It would sweep every subrogation claim by a multi-employer trust against a tortfeasor into federal court, no matter how small the case or localized the occurrence. Any auto accident in which the injuries have been paid for by the plan and the plan sues the negligent driver becomes a federal case.⁷⁸ The court's conclusion rests on a comparison between actions by the trust against the employee-beneficiary (clearly covered by ERISA and subject to federal jurisdiction) to actions by the trust against a third party,⁷⁹ in which the trust merely assumes the role the beneficiary would otherwise occupy in the state's tort liability system.

However dubious this comparison is, it does not affect the Blue Cross plans, which are not multi-employer trusts. Though the insurance is typically provided as a benefit of employment, it is not subject to the web of pervasive ERISA regulation that covers multi-employer trusts. Hence, in the absence of a RICO claim there is no ground, apart from diversity, for federal jurisdiction, and if the RICO claims fail,

⁷⁶ 29 U.S.C. §§ 1001-1461 (1994).

⁷⁷ *Lyons*, 225 F.3d at 912-14.

⁷⁸ The court attempts to avoid this conclusion by distinguishing subrogation cases brought in the name of the beneficiary. *Id.* at 913. How a subrogation case is captioned is a matter of state law, see JERRY, *supra* note 18, § 96(h), at 620-21, that does not affect the impact that the litigation has on core ERISA relationships. *But see Lyons*, 225 F.3d at 913 (relying on distinction). Scholarly commentary supports a much more conservative view of ERISA preemption than that espoused by *Lyons*. *E.g.*, Jeffrey W Stempel & Nadia von Magdenko, *Doctors, HMOs, ERISA, and the Public Interest After Pegram v. Herdrich*, 36 TORT & INS. L.J. 687, 690 (2001); accord James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999-2000 Term*, 16 LAB. LAW. 151, 195 (2000); Thomas R. McLean & Edward P. Richards, *Managed Care Liability for Breach of Fiduciary Duty After Pegram v. Herdrich: The End of ERISA Preemption for State Law Liability for Medical Care Decision Making*, 53 FLA. L. REV. 1 (2001).

⁷⁹ See *Lyons*, 225 F.3d at 913. The opinion does not discuss whether the benefits trust may maintain an action for subrogation under the federal common law of ERISA. Although the opinion is somewhat obscure, the plaintiffs apparently did not pursue that claim. See *id.* at 911-12.

the state courts should be able to develop the subrogation, underlying tort, and procedural principles that will apply to the Blue Cross cases.⁸⁰

III. PRESENTING THE SUBROGATION CLAIM

The conditions on recovery that the subrogation borrows from its underlying claims bring to the fore the very practical problems of trying the combined subrogated claims of thousands (or even millions) of tobacco victims. The *Empire* case reached verdict in a reasonable period of time, but the issues relating to the trial will likely be the source of years of appeals. Any underlying tobacco case comprises issues of exposure, reliance on tobacco company representations (and the subsidiary issues relating to tobacco companies' willful misconduct and congressional preemption of some warning claims), the dangers of tobacco products, when those dangers were known, damages, possible comparative fault, and additional questions relevant to punitive remedies.

Individual subrogation litigation would be possible in theory, with the insurance companies presenting smokers' damages cases seriatim. However, a more attractive proposition to the plaintiffs, the court system, and perhaps even the defendants would be a combined trial on the relevant elements and defenses of the smokers' subrogated claims, with the nature and amount of the losses proven primarily through expert opinion and statistical evidence. Moreover, given the reality of litigation costs and finite judicial time, combined proceedings conducted in that fashion might be the only cost-effective way to adjudicate the case at all. Combined proceedings present the opportunity for litigation against the tobacco companies by an opponent whose resources and sophistication present something of an even match.

⁸⁰ I have argued elsewhere that state courts are the forum of choice for the development of underlying tort law in mass product exposures and similar dispersed injury cases. See Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL'Y REV. ____ (forthcoming 2002); Weber, *supra* note 1, at 1014-20; Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215 (1994).

A. *Relevant Elements of Claims and Defenses*

Getting past the long list of potential issues of fact in a tobacco case premised on product liability, negligence, and statutory or nonstatutory fraud and misrepresentation, the question is whether some of these issues may be amenable to legal approaches that facilitate their proof or disproof in an aggregate proceeding. Plainly, some matters, such as those that pertain to tobacco company conduct, are the same or nearly the same for all the underlying claims.⁸¹ Other questions of fact, such as reliance by smokers on misleading information, or a particular smoker's comparative fault with regard to negligence or product liability,⁸² would appear to be less so.

Although the elements of these underlying claims and defenses may need to be taken as a given in establishing subrogation liability, the decision of which party has the obligation to bring forward evidence on them or assume the risk of nonpersuasion is much more fluid. In many cases, from *Summers v. Tice*⁸³ to broad applications of *res ipsa loquitur*,⁸⁴ courts have shifted the burden of production or persuasion from a plaintiff with an apparently just cause but an evidentiary difficulty to a probable wrongdoer. At times, as with *Summers*, the court has shifted the burden when the defendant cannot establish its defense any more effectively

⁸¹ Some underlying claims of smokers with brand loyalties pertain only to particular defendants. Nevertheless, proof of civil conspiracy, *see Adcock v. Brakegate, Ltd.*, 645 N.E.2d 888 (Ill. 1994), which the insurers have alleged, or various market share liability approaches, *see Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1077-78, 73 N.Y.2d 487, 511-13 (1989), would make the proof of the conduct of every manufacturer relevant to each claim.

⁸² Most states now assimilate assumption of risk into comparative negligence in product liability cases. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 17 cmt. d (1998) (describing majority view).

⁸³ 199 P.2d 1 (Cal. 1948) (leading U.S. case on alternative causation involving two independent tortfeasors who were each held liable for the whole damage caused to the plaintiff, despite the fact that only one tortfeasor could have caused the harm).

⁸⁴ *See, e.g., Widmyer v. Southeast Skyways, Inc.*, 584 P.2d 1 (Alaska 1978) (permitting jury to find that operator of plane liable in airplane crash in absence of explanation of cause of crash); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1994) (permitting liability in case in which bottle exploded in plaintiff's hand); *Anderson v. Serv. Merch. Co.*, 485 N.W.2d 170 (Nev. 1992) (permitting finding of liability in case in which light fixture fell from ceiling).

than the plaintiff would have been able to establish the claim had the burden remained where it was.⁸⁵

With regard to comparative negligence, shifting the burden to the tobacco defendants is not a shift at all. Before the widespread adoption of comparative negligence, the vast majority of jurisdictions allocated the burdens of pleading, production, and persuasion on the topic of contributory negligence to the defendant. Those states that have dealt with the issue of burdens on comparative negligence have assigned them to the defendant, and scholarly opinion supports that view.⁸⁶ Therefore, if the trier of fact cannot make up its mind or must engage in estimation to determine how much the subrogation damages should be reduced for the comparative negligence of the smokers, it seems perfectly appropriate that the tobacco companies should bear that risk, if indeed they have marketed a defective product or engaged in negligent, reckless, or intentionally wrongful activity.⁸⁷ Even those states that would otherwise allocate the burden to the plaintiff would do well to shift it to the wrongdoer in a mass subrogation action of the kind being brought by the Blue Cross plans.

The issue of reliance in fraud and misrepresentation claims (either common law or RICO) may also be amenable to judicial burden shifting. Courts have frequently accepted conclusive or rebuttable presumptions of reliance in consumer fraud cases.⁸⁸ In securities fraud class actions, the Supreme

⁸⁵ *Summers*, 199 P.2d at 4 (acknowledging effect of shifting burden of proof).

⁸⁶ VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 17-2, at 356 nn.17-20 (3d ed. 1994).

⁸⁷ This description does not fully capture the problem in a modified comparative negligence state, for if the responsibility assigned to the victim equals (or in other states is greater than) 50%, the reduction is 100%. Nevertheless, establishing the percentages that pertain to the smokers and applying the appropriate rule is no easier for the plaintiff than for the defendant. Moreover, the temptation to assign the smoker a percentage of fault equal or greater than 50% diminishes if the trier of fact considers the reality that most smokers become addicted at about age fourteen and that nicotine is an extremely difficult drug to quit. See Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 485, 499-506 (1998) (providing information about nicotine addiction and discussing its impact on assignment of fault to smokers). As indicated below, expert opinion and statistical support would be the most sensible way to approach the issue whether the burdens fall on the plaintiff or the defendant.

⁸⁸ See, e.g., *Cope v. Metro. Life Ins. Co.*, 696 N.E.2d 1001, 1008 (Ohio 1998) (allowing inference of reliance by entire class regarding marketing of insurance policies); *Stellema v. Vantage Press, Inc.*, 109 A.D.2d 423, 425-26, 492 N.Y.S.2d 390,

Court has permitted the use of a "fraud-on-the-market" theory that dispenses with the need for individual proof of reliance on the assumption that false information affects the prices of the security whether the individual investor relies on it or not.⁸⁹ The analogy between smoking and the consumer class actions is closer than that for the securities law, but even the securities situation demonstrates the flexibility of the assignment of burdens, the need to respond to the fact of what realistically can be proved, and the urgency of vindicating social policies against fraud and deceit.⁹⁰

B. *Use of Statistical Evidence*

At the outset, the *Empire* plaintiffs announced their intention to rely on statistical evidence and expert opinion in proving their direct injury and subrogation claims, and Judge Weinstein commented at length on his belief that use of that approach satisfies due process and jury trial entitlements.⁹¹ I have discussed elsewhere the due process and related issues in the conduct of mass tort trials,⁹² and would merely emphasize here that a subrogation action of the Blue Cross type is a far more appropriate candidate for mass trial techniques, such as statistical inference, than is a class action product liability case. The participation concerns of the individual claimants

393 (1st Dep't 1985) (noting that reliance could be presumed in class action regarding publication contracts). Reliance is not necessarily an element in state consumer fraud statutory actions, see *Group Health Plan*, 621 N.W.2d at 13; *Stutman v. Chemical Bank*, 731 N.E.2d 608, 612 (N.Y. 2000), though something akin to it may need to be shown to establish causation, see *Group Health Plan, Inc.*, 621 N.W.2d at 13-14.

⁸⁹ *Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988).

⁹⁰ See generally Hal S. Scott, Comment, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 348-71 (1971) (discussing relationship between nature and use of class action device and development of fraud-on-the-market reasoning in lower courts).

⁹¹ *Blue Cross & Blue Shield of N.J. v. Philip Morris*, 113 F. Supp. 2d at 372-76. The court extended the analysis to state law objections to proof of the state law claims by the same means. *Id.* at 379-80. The *Empire* opinion makes the same points about due process and jury trial, though it focuses on state law consumer fraud claims supporting the \$17 million verdict. *Empire*, 2001 WL 1304370, at *46-*52.

⁹² See Weber, *supra* note 1, at 1011-14; Mark C. Weber, *Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues*, 48 DEPAUL L. REV. 463, 473 (1998); cf. Mark C. Weber, *Managing Complex Litigation in the Illinois Courts*, 27 LOY. U. CHI. L.J. 959, 973-74 (1996) (discussing procedural mechanisms used in Illinois).

either are nonexistent, may be deemed satisfied by the contractual subrogation provision, or may be met by limited intervention in the trial proceedings.⁹³ The concern of defendants for an accurate determination is more clearly met in a mass determination made with sophisticated statistical tools than even in individual litigation.⁹⁴ Discussing the tobacco companies' proportional responsibility for the cost of treating conditions such as lung cancer, heart disease, and other maladies, the Seventh Circuit Court of Appeals commented that "[s]tatistical methods could provide a decent answer—likely a more accurate answer than is possible when addressing the equivalent causation question in a single person's suit."⁹⁵

C. *Economies of Scale and Magnitude of Recovery*

A power imbalance affects smokers' actions against the tobacco companies because the tobacco defendants can mass resources against individual plaintiffs. Of course, the tobacco industry has a legal right to defend itself as vigorously as it can afford to do, which is very vigorously indeed. But a party that takes advantage of its litigation power can hardly complain when a new opponent adopts its own tactics. That is what the insurers have done. The Blue Cross plans are large enterprises with the ability to finance protracted litigation, even if their resources still do not quite match those of the tobacco defendants. The Blue Cross plans have combined their purses and taken advantage of economies of scale in litigating

⁹³ See generally Roger H. Transgrud, *Mass Trials in Mass Tort Cases A Dissent*, 1989 U. ILL. L. REV. 69, 74-76, 82-86 (explaining participation concerns of claimants in mass tort proceedings).

⁹⁴ See Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 825-26 (1992) (discussing benefits of use of statistical inference in mass tort cases); cf. *Hilao v. Estate of Marcos*, 103 F.3d 767, 787 (9th Cir. 1996) (approving use of statistical methods of proof in class action over human rights violations).

⁹⁵ *Int'l Bd. of Teamsters*, 196 F.3d at 823. A subrogation action, which relies on this measure of damages, is thus a much easier action to sustain than the direct injury action that the court rejected on the ground that the ultimate gain or loss to the insurer itself is nonexistent or impossible to measure. Cf. *id.* at 824-27 (asserting that gain or loss from smoking diseases to medical intermediaries is indeterminate or does not occur).

the cases. Empire's success on its subrogation claim shows what sophisticated legal advocacy can accomplish. If the *Empire* subrogation verdict withstands appeal (even if the direct injury claim fails) and other Blue Cross companies succeed, perhaps with still larger awards, the aggregated recoveries may even threaten the profitability of Big Tobacco.⁹⁶

The tobacco companies' reaction to the rare victories of individual smokers is revealing. After the award of \$3 billion in an individual smoker's suit this June,⁹⁷ a stock analyst downplayed the significance of the verdict, predicting it would be overturned on appeal.⁹⁸ The analyst noted, however, that the industry is worried about aggregate cases, such as those filed as class actions or by third parties. "Tobacco companies won seven cases in a row before this one," the *New York Times* quoted the analyst. "The real challenge, in our opinion, are the aggregate suits."⁹⁹ Aggregated subrogation actions provide the opportunity for a fair fight between a powerful representative of those injured by tobacco and powerful companies that claim that the responsibility is not theirs.

CONCLUSION

Subrogation claims by health care insurers against Big Tobacco deserve the serious attention of the litigants, the courts, and those of us who comment from the sidelines. The claims are the logical outgrowth of the effort to recover for the losses inflicted by tobacco, and may be squared, though not without some challenges, with RICO and state law principles. If they prove successful, subrogation claims will present still more questions for courts and scholars about the measure of recovery and allocation of proceeds.

⁹⁶ See Weber, *supra* note 1, at 1009-14 (describing effect of aggregate tobacco litigation in balancing plaintiff and defendant resources and bringing all claims to the head of the trial queue).

⁹⁷ See Sterngold, *supra* note 67, at A14; see also <http://www.foxnews.com/story/0,2933,26611,00.html>; <http://www.usatoday.com/news/nation/june01,2001-06-06-smoke.htm>.

⁹⁸ See Sterngold, *supra* note 67.

⁹⁹ *Id.*