

Apportioning Asbestos-Tobacco Liability in *Falise v. American Tobacco*

Kan M. Nawaday

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NOTE

APPORTIONING ASBESTOS-TOBACCO LIABILITY IN *FALISE V. AMERICAN TOBACCO*

Kan M. Nawaday†

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INTRODUCTION

In addition to sharing defendant status in the most recognizable mass-tort litigations in the United States, tobacco and asbestos companies have themselves been erstwhile adverse litigants. The fray between asbestos and tobacco companies arose from the former's industry's efforts to defray its ever burdensome liability load.¹ One can trace the first volleys between these two industries to asbestos defendants' attempts to attain apportionment of damages in actions involving smoker-plaintiffs who are claiming asbestos-related injuries. Although tobacco companies are not parties in these cases, asbestos defendants argue that plaintiffs' tobacco use triggers an offset of liability under the doctrine of comparative negligence.²

In 1997, riding the wave of third-party civil actions that health-care insurers brought against the tobacco industry under the Racketeer Influenced and Corrupt Organizations Act (RICO),³ certain asbestos defendants brought their own contribution claims against the tobacco industry. This Note discusses the import of one of these actions, *Falise v. American Tobacco Co.*, which was adjudicated before Judge Weinstein in the Eastern District of New York.⁴

¹ See discussion *infra* Part I.A.

² See discussion *infra* Part I.B.

³ Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C.A. §§ 1962-1968 (2002)).

⁴ *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316 (E.D.N.Y. 2000).

Many courts consider *Falise* to be a doctrinal outlier and criticize it for being at odds with precedent concerning proximate cause in RICO actions.⁵ Indeed, the ultimate outcome of *Falise*—a mistrial—and the subsequent withdrawal of similar suits in other jurisdictions⁶ suggest that it is not only a liminal case, but also moot. This Note argues, however, that in light of (1) the asbestos litigation crisis,⁷ (2) ample evidence concerning the synergistic effects between smoking and asbestos exposure,⁸ and (3) the ineffectiveness of traditional contribution and apportionment regimes as applied to asbestos defendants, Judge Weinstein's analysis is rightly-minded and, at the very least, illustrates the need for better contribution mechanisms to address asbestos defendants' liability dilemma.

Part I of this Note summarizes the state of the asbestos litigation and the asbestos defendants' attempts to relieve their overwhelming liability burden. Part II discusses the background of *Falise*, including its facts, the general claims alleged, and the outcome. Part III dissects the *Falise* court's analysis and distinguishes it from other RICO third-party actions. It also proffers (1) rationales for better contribution devices as well as (2) justifications of the *Falise* court's use of RICO. Part IV concludes that *Falise* is distinguishable from other RICO contribution claims against tobacco companies. Tort defendants who find themselves in a similar predicament as the asbestos defendants need relief mechanisms, and RICO provides an innovative solution to the apportionment and contribution issue.

⁵ See, e.g., *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 729 N.Y.S.2d 240, 248–49 (N.Y. App. Div. 2000) (refusing to follow Judge Weinstein's decisions in *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 74 F. Supp. 2d 221 (E.D.N.Y. 1999) and noting that one court has criticized the opinion as a “thinly disguised refusal to accept and follow the Second Circuit's holding” in *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000), in which the Second Circuit dismissed a health fund's third-party contribution claim against tobacco companies for remoteness (citing *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999)); see also *Asbestos Products Company Abandons Lawsuit Against Tobacco Companies; Similar Case Dismissed in Mississippi*, BUS. WIRE, July 27, 2001, WESTLAW, AllNewsPlus File [hereinafter *Asbestos Products*] (quoting Philip Morris Associate General Counsel William S. Ohlemeyer as stating that “[c]ourts across the country have consistently dismissed similar reimbursement cases because the connection between the conduct at issue and the damages being claimed is indirect, remote and speculative”).

⁶ See *Asbestos Products*, *supra* note 5.

⁷ See discussion *infra* Part I.A (discussing increasing number of bankruptcies among traditional and even non-traditional asbestos defendants).

⁸ See discussion *infra* Part I.B.

I

THE CURRENT STATE OF ASBESTOS LITIGATION

A. Asbestos Defendants' Search for Litigation Relief

The year 2001 brought with it two more companies, Federal-Mogul and USG Corp., filing for bankruptcy to shield themselves from asbestos lawsuits.⁹ These companies joined the approximately thirty companies¹⁰ that have filed for bankruptcy and reorganization in the form of a trust to settle asbestos claims since Johns-Manville filed the first Chapter 11 petition on August 26, 1982.¹¹

Over the years, as the impact and breadth of asbestos litigation in the United States has escalated at an expedited pace,¹² asbestos manufacturers and peripheral defendants have explored various avenues in addition to bankruptcy to reduce liability exposure.¹³ For example, to alleviate case management and administrative costs, asbestos manufacturers, in coordination with certain plaintiffs' attorneys, have attempted to attain class certification for asbestos plaintiffs and a subsequent class settlement.¹⁴ In addition, given the large number of claimants who were exposed to asbestos in naval shipyards, asbestos defendants have brought suit against the U.S. government for contribution.¹⁵ Most recently, some asbestos defendants have even filed a RICO conspiracy claim against certain asbestos plaintiffs' attorneys, alleging strong-arm settlement tactics and conspiracy to inundate defendants with meritless claims.¹⁶ Over the past twenty years, asbestos defendants have also lobbied extensively for legislative action to ad-

⁹ See Sandra Guy, *USG Files Bankruptcy*, CHI. SUN-TIMES, June 26, 2001, at 45; Rhoda Miel, *Lawsuits Push Federal-Mogul to Chapter 11*, PLASTICS NEWS, Oct. 8, 2001, at 22.

¹⁰ See Miel, *supra* note 9.

¹¹ See PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 3 (1985).

¹² When Johns-Manville petitioned for Chapter 11 protection in 1982, the company estimated that claimants would name it as a defendant "in at least 52,000 asbestos-disease lawsuits before the litigation ran its course." *Id.* Nineteen years later, however, at the date of its Chapter 11 filing, claimants have named USG in over 250,000 asbestos suits and its personal injury costs per year exceeded \$275,000,000. See Guy, *supra* note 9.

¹³ The asbestos litigation has also generated a substantial amount of peripheral insurance coverage litigation between asbestos manufacturers and their insurers, as well as between insurers and their reinsurers. See, e.g., *In re Liquidation of Midland Ins. Co.*, 269 A.D.2d 50 (N.Y. App. Div. 2000); *Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 20 Cal. Rptr. 2d 376 (Ct. App. 1993).

¹⁴ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597-601 (1997).

¹⁵ See *UNR Indus., Inc. v. United States*, 911 F.2d 654 (Fed. Cir. 1990); *Keene Corp. v. United States*, 17 Cl. Ct. 146 (1989); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1 (Cl. Ct. 1987).

¹⁶ In *G-I Holdings, Inc. v. Baron & Budd*, the plaintiff, G-I Holdings, Inc., brought a RICO suit against the asbestos plaintiffs bar (Baron & Budd, Weitz & Luxenberg, and Ness, Motley). The Southern District of New York, however, granted summary judgment as to the RICO claim. See 179 F. Supp. 2d 233, 270 (S.D.N.Y. 2001).

dress the asbestos litigation morass.¹⁷ These maneuvers to defray costs and liability and to preclude resort to bankruptcy protection have proven futile.¹⁸

Another tactic that asbestos defendants have recently explored to obtain relief from their daunting liability load is to seek a contribution from a sister mass-tort litigant—the tobacco industry.

B. Tobacco and Asbestos: Joint Tortfeasors and Adverse Litigants

The tobacco and asbestos industries have both figuratively and literally met on numerous occasions in the courtroom. Asbestos defendants raise the issue of a particular plaintiff's smoking habit in their defense strategies under two rubrics: (1) tobacco use by a claimant as a basis for apportionment of liability in the original action; and (2) contribution from the tobacco industry in a separate action claiming the tobacco industry as a nonparty tortfeasor. The latter rubric is the direct focus of this Note; however, it is useful to explicate the apportionment strategy, which is also a contribution strategy.

1. *Apportionment Claims in the Original Action*

Asbestos exposure is known to cause asbestosis, malignant mesothelioma, lung cancer, and pleural plaques.¹⁹ These are all progressive and incurable ailments.²⁰ Whereas one can attribute asbestosis, mesothelioma, and pleural plaques solely to asbestos exposure,²¹ doctors most commonly attribute lung cancer to smoking.²² A significant number of claims against asbestos defendants have involved smokers arguing that asbestos exposure caused their lung cancer.²³ Furthermore, since the 1980s, a growing consensus within the medical community is that there is a distinct relationship between tobacco use

¹⁷ Legislators have proposed no less than ten distinct reforms. See Guy, *supra* note 9.

¹⁸ See generally G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge"*, 84 IOWA L. REV. 753 (1999) (explaining why third-party non-debtor discharges have not succeeded with creditors or courts and arguing that bankruptcy courts should lack jurisdiction to negate such releases).

¹⁹ See *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 324 (E.D.N.Y. 2000); sources cited *infra* note 24.

²⁰ See sources cited *infra* notes 24–25.

²¹ See sources cited *infra* note 24.

²² See *Lungs and Bronchus: U.S. Racial / Ethnic Cancer Patterns*, at <http://www.cancer.gov/statistics/cancertype/lung-racial-ethnic> (last visited Apr. 7, 2003) (finding that "[c]igarette smoking accounts for nearly 90% of all lung cancers"); see generally U.S. DEP'T OF HEALTH AND HUMAN SERVS., *SMOKING AND HEALTH: A NATIONAL STATUS REPORT*, Pub. No. 87-8396 (1990), http://sgreports.nlm.nih.gov/nn/b/b/v/p/_/nnbvp.pdf.

²³ See, e.g., *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (Cal. 1997).

and asbestos exposure²⁴—*i.e.*, that “the risk of harm from exposure to both carcinogens is greater than the sum of the risk from exposure to the individual carcinogens.”²⁵ Applying this synergy concept, asbestos defendants have attempted to seek apportionment in cases involving smoker-plaintiffs.²⁶

In these synergy cases, asbestos defendants have pursued two strategies based on causation and apportionment theories. First, the defendants argue that asbestos exposure did not cause the claimant’s lung cancer.²⁷ Second, they opine alternatively that, even assuming that asbestos was a causal factor, the asbestos defendants are entitled to apportionment from tobacco companies of their liability as offset by the percentage of fault that a fact-finder attributes to the plaintiff’s tobacco use.²⁸

For two reasons, asbestos defendants have been, for the most part, unsuccessful with both of these strategies. First, despite the existence of research that validates the synergy between asbestos exposure and smoking, courts have been reluctant to allow juries to apportion liability because such apportionment would be too speculative.²⁹ Interestingly, one might assume that courts in states with comparative negligence regimes would at least entertain the apportionment argument, as the “underlying philosophy [of comparative negligence is that] each wrongdoer should pay for his or her own fault.”³⁰ Yet, in cases in which asbestos defendants have implicated tobacco as contributing to a plaintiff’s injury, such courts have precluded apportionment.³¹

The second barrier to the quest for apportionment is that some states have immunized the tobacco industry from direct liability for their products. For example, California has enacted such immunizing

²⁴ See Council on Scientific Affairs, *A Physician’s Guide to Asbestos-Related Diseases*, 252 JAMA 2593, 2593–96 (1984); Philip J. Landrigan, *The Recognition and Control of Occupational Disease*, 266 JAMA 676 (1991).

²⁵ *Altieri v. Fibreboard Corp.*, 617 A.2d 1302, 1305 (Pa. Super. Ct. 1992) (citing Arnold E. Reif, *Synergism in Carcinogenesis*, 73 J. NAT’L CANCER INST. 25 (1984)).

²⁶ See, e.g., *Taylor v. Celotex Corp.*, 574 A.2d 1084 (Pa. Super. Ct. 1990) (affirming trial court’s denial of apportionment instruction in case in which plaintiff-smoker exposed to asbestos suffered from asbestosis).

²⁷ See *Borman v. Raymark Indus., Inc.*, 960 F.2d 327, 331 (3d Cir. 1992) (noting defense expert’s testimony that asbestos exposure did not cause plaintiff’s lung cancer).

²⁸ See *id.*

²⁹ *Martin v. Owens-Corning Fiberglas Corp.*, 528 A.2d 947, 950 (Pa. 1987) (holding that a “[r]ough approximation” [in apportionment] is no substitute for justice” (citation omitted)).

³⁰ VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1.2 (3d ed. 1994).

³¹ See cases cited *supra* notes 26–29. But see *Brisboy v. Fibreboard Corp.*, 418 N.W.2d 650, 654–55 (Mich. 1988) (affirming a jury’s apportionment of 55% fault to the plaintiff for his own “negligence” from smoking).

legislation;³² thus, in cases in which asbestos defendants seek apportionment credit for a plaintiff's tobacco use under California's apportionment and comparative fault statute,³³ California courts refuse the request because the nonparty tobacco defendant is not a "tortfeasor." The courts reason that because legislation precludes liability against tobacco manufacturers on direct claims, courts may not hold the tobacco industry even nominally liable under the apportionment doctrine.³⁴

2. *Separate Contribution Claims*

Asbestos companies have also attempted to obtain contribution from the tobacco industry in separate contribution actions. As noted above, in comparative fault jurisdictions, a jury may take into account the conduct of nonparties to a litigation when apportioning liability in the original action or in a separate contribution action.³⁵ All jurisdictions, including those adopting a form of the Uniform Contribution Among Tortfeasors Act (UCATA),³⁶ impose time limits for contribution actions, usually one to two years following the underlying claim of personal injury liability.³⁷

Statutes of limitations, however, are not the precluding factor that prevents asbestos defendants from pursuing separate contribution actions. Simply put, asbestos defendants would not prevail on such actions for many of the same reasons that they do not succeed under the apportionment theory in the original actions.³⁸ First, in jurisdictions that have immunized the tobacco industry from direct liability, a contribution claim fails as a matter of law. Second, some comparative negligence states that do not follow the UCATA bar separate contribution actions against nonparties.³⁹ Third, tobacco compa-

³² CAL. CIV. CODE § 1714.45 (West 1998) (affording immunity to suppliers of certain unhealthy products, such as tobacco); see Stephen D. Sugarman, *Tobacco Tort Litigation in California: A Better Understanding of Civil Code Section 1714.45*, 38 SAN DIEGO L. REV. 1051 (2001).

³³ CAL. CIV. CODE §§ 1431-1431.5 (West Supp. 2003).

³⁴ See *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1225 (Cal. 1997); *Richards v. Owens-Illinois, Inc.*, 928 P.2d 1181, 1183 (Cal. 1997).

³⁵ AMERICAN LAW OF PRODUCTS LIABILITY § 52:27 (Timothy E. Travers et al. eds., 3d ed. 1987) WL ALPL § 52:27 ("a number of jurisdictions require the trier of fact to consider the fault of all persons who contributed to the alleged injury.")

³⁶ See *id.* § 57:31 (discussing the Uniform Contribution Among Tortfeasors Act).

³⁷ See *id.* § 52:87 (discussing limitations period in actions for contribution).

³⁸ See *supra* Part I.B.1.

³⁹ See, e.g., *St. Mary's Hosp. v. Health Personnel Options Corp.*, 72 N.E.2d 1213 (Ill. App. Ct. 1999) (holding that a separate contribution action against a nonparty was precluded for failure to join in original action); *Casa Ford, Inc. v. Ford Motor Co.*, 951 S.W.2d 865 (Tex. App. 1997) (upholding summary judgment against a defendant seeking a post-judgment contribution claim against a party that the plaintiff did not name in the original action); *Howell v. Luckey*, 518 S.E.2d 873 (W. Va. 1999) (holding that a defendant cannot bring a separate contribution claim against a nonparty to the original action and rejecting

nies are not liable under direct strict liability doctrine: no jurisdiction has imposed categorical liability for tobacco products.⁴⁰ Thus, plaintiffs seeking action against the tobacco industry must resort to failure-to-warn, misrepresentation, and conspiracy theories.⁴¹

The difficulty an asbestos company would confront in bringing a claim under any of these theories is clear. Even if (1) the asbestos defendant brings the separate contribution claim within the statute of limitations, (2) the venue of the action is in a jurisdiction in which plaintiffs may bring contribution actions against nonparties, and (3) the state has not immunized the tobacco industry, what would constitute the asbestos defendant's case? The case would require proof in support of an unworkable theory—either failure-to-warn or misrepresentation to the original plaintiff—that tobacco companies induced her to start and continue smoking. Such a claim would involve protracted litigation, not about the asbestos defendant's case, but rather about the original plaintiff's case. This obstacle is probably why asbestos defendants have neither attempted conventional separate contribution claims nor joined tobacco defendants in the original actions.⁴²

Apportionment in the original action and contribution in a separate action would appear to offer relief to asbestos defendants, because there is substantial evidence regarding the synergy between tobacco use and asbestos exposure.⁴³ These options, however, offer few prospects for relief in light of tobacco's special status in tort and the difficulties in proving causation.⁴⁴ Nonetheless, as discussed in the following subpart, in the late 1990s another avenue for relief—in addition to apportionment and contribution—arose for asbestos defendants to shift a portion of their liability to the tobacco industry: RICO.

C. RICO and the Funds Cases

Emboldened by the tobacco industries' multi-billion dollar settlements with the states,⁴⁵ plaintiffs' attorneys representing various

the UCATA approach). *But see* *Steve Spicer Motors, Inc. v. Gilliam*, 19 S.W.3d 153 (Mo. Ct. App. 2000) (holding that the original plaintiff need not name the alleged tortfeasor in the underlying action for that tortfeasor to be subject to contribution in a separate action).

⁴⁰ See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1317–18 (1991); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) § 2 cmt. d (“[C]ourts have not imposed liability for categories of products that are generally available, widely used and consumed, even if they pose substantial risks of harm.”).

⁴¹ See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

⁴² See *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316 (E.D.N.Y. 2000).

⁴³ See *supra* notes 24–25 and accompanying text.

⁴⁴ See *supra* notes 27, 40 and accompanying text.

⁴⁵ The landmark tobacco litigation brought by approximately forty states was provisionally settled in June 1997. See Frank J. Vandall, *The Legal Theory and the Visionaries that*

health care insurance provider funds,⁴⁶ occupational health trust funds,⁴⁷ and hospitals⁴⁸ began bringing third-party contribution claims against the tobacco industry.⁴⁹ The liability theory that the Funds employed approximated the theory used by the states; namely, they argue that the tobacco industry should pay a portion of the costs the Funds incurred in treating tobacco-related illnesses.⁵⁰

All of the Funds' actions invoked a mix of antitrust laws, RICO, or state fraud causes of action as the bases for their claims.⁵¹ The Funds' allegations fell into two categories: (1) indirect injury claims—that over a period of forty years the tobacco industry suppressed the dangers of tobacco use, thereby inducing the Funds' participants to smoke, which in turn forced the Funds to pay for their treatment; and (2) direct injury claims—that due to the tobacco industry's conspiracy to suppress the dangers of cigarette smoking, the Funds did not establish counseling programs to help their participants quit smoking.⁵² Almost all of the courts that addressed these claims disposed of them as a matter of law against the Funds plaintiffs.⁵³

A valid civil RICO claim can be distilled as follows: the defendant has (1) violated 18 U.S.C. § 1962 (setting forth the “[p]rohibited activ-

Led to the Proposed \$368.5 Billion Tobacco Settlement, 27 Sw. U. L. REV. 473, 478 (1998). The innovative theory of liability rested on the idea that “the states should be able to sue in order to recover the costs of treating disease . . . caused by cigarette smoking.” *Id.*

⁴⁶ See *Regence Blueshield v. Philip Morris, Inc.*, No. 99-35203, 2001 WL 205996 (9th Cir. Feb. 28, 2001); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162 (E.D.N.Y. 2001); *Ark. Blue Cross & Blue Shield v. Philip Morris, Inc.*, 47 F. Supp. 2d 936 (N.D. Ill. 1999).

⁴⁷ *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068 (D.C. Cir. 2001); *Lyons v. Philip Morris, Inc.*, 225 F.3d 909 (8th Cir. 2000); *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999); *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999); *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 729 N.Y.S.2d 240 (N.Y. Sup. Ct. 2000); *Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip Morris, Inc.*, No. W1999-01061-COA-R9-CV, 2000 WL 1390171 (Tenn. Ct. App. Sept. 26, 2000).

⁴⁸ See *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429 (3d Cir. 2000).

⁴⁹ This Note refers to these entities collectively as “Funds.”

⁵⁰ See *Vandall*, *supra* note 45.

⁵¹ See cases cited *supra* notes 46–47.

⁵² See *Allegheny Gen.*, 228 F.3d at 433–34.

⁵³ See *Serv. Employees*, 249 F.3d at 1068; *Regence Blueshield v. Philip Morris, Inc.*, No. 99-35203, 2001 WL 205996 (9th Cir. Feb. 28, 2001); *Lyons*, 225 F.3d at 909; *Laborers Local 17*, 191 F.3d at 229; *Steamfitters Local Union No. 420*, 171 F.3d at 912; *Ark. Blue Cross & Blue Shield v. Philip Morris, Inc.*, 47 F. Supp. 2d 936 (N.D. Ill. 1999); *Steamfitters Local Union No. 614*, 2000 WL 1390171; *E. States*, 729 N.Y.S.2d at 240. *But see* *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162 (E.D.N.Y. 2001) (rejecting a motion for summary judgment); *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70 (D.D.C. 1999), *rev'd*, *Serv. Employees*, 249 F.3d at 1068 (same).

ities” which trigger a civil RICO claim);⁵⁴ and (2) “by reason of” having violated § 1962, the defendant has caused the plaintiff to suffer an injury to her “business or property.”⁵⁵ The Supreme Court in *Holmes v. Securities Investor Protection Corp.* construed the “by reason of” language in § 1964 as requiring either cause-in-fact or but-for cause.⁵⁶ The *Holmes* Court stated that, although not explicit in the language of § 1964, a civil RICO plaintiff must also establish proximate cause in the common-law sense.⁵⁷ It is this proximate cause hurdle that has hampered the Funds’ RICO claims.

Courts that have passed on the Funds cases have uniformly relied on insufficient proof of proximate cause as the basis for dismissing the claims.⁵⁸ Invoking the proximate cause standard for RICO claimants, as set forth in *Holmes*, lower courts have held that the damages sought by the Funds as third parties against the tobacco industry are too remote and speculative.⁵⁹ Of the ten third-party contribution actions brought against the tobacco industry by the Funds, only two survived summary judgment at the trial level.⁶⁰ Consequently, it appeared that the tobacco industry had laid to rest this type of third-party contribution claim.⁶¹ Third-party contribution claims against the tobacco industry, however, were not all dead—at least not yet. On November 11, 1999, in *Falise v. American Tobacco Co.*, the Johns-Manville Trust filed a

⁵⁴ 18 U.S.C.A. § 1962(a)–(d) (2002). This section requires that the conduct, or rather the predicate acts, constitute a “pattern of racketeering activity.” *Id.* § 1962(a). A “‘pattern of racketeering activity’ requires at least two” predicate acts. *Id.* § 1961(5).

⁵⁵ *Id.* § 1964(c). For a general discussion of RICO elements and commentary, see ARTHUR F. MATHEWS ET AL., *CIVIL RICO LITIGATION* (2d ed. 1992); Roger T. Creager, A *Current Guide to Civil RICO in New York Federal Courts*, 66 N.Y. ST. B.J. 18 (1994).

⁵⁶ 503 U.S. 258 (1992).

⁵⁷ *See id.* at 268.

⁵⁸ *See, e.g., Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 443–46 (3d Cir. 2000).

⁵⁹ A RICO plaintiff’s claim fails “for being too remote and speculative” due to the following proximate cause policy considerations: (1) the injury is too indirect—“the more indirect the injury, ‘the more difficult it becomes to ascertain the amount of a plaintiff’s damages . . .’; (2) allowing recovery by indirectly injured parties would require complicated rules for apportioning damages; and (3) direct victims could generally be counted on to vindicate the policies underlying the relevant law.” *Steamfitters Local Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 932 (3d Cir. 1999) (citing *Holmes*, 503 U.S. at 269–70).

This Note further explicates the *Holmes* articulation of proximate cause under RICO in Part III. For a general discussion of RICO proximate cause, see Antonella M. Madonia, Comment, *Holmes v. Securities Investor Protection Corp.: Standing to Sue Under Section 1964(c) of RICO for the Securities Fraud Plaintiff*, 18 DEL. J. CORP. L. 923 (1993) and Stephen Scallan, *Proximate Cause Under RICO*, 20 S. ILL. U. L.J. 455 (1996).

⁶⁰ The two actions that survived summary judgment are *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162 (E.D.N.Y. 2001) and *Service Employees International Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70 (D.D.C. 1999), *rev’d*, 249 F.3d 1068 (D.C. Cir. 2001).

⁶¹ For a discussion criticizing the courts’ use of proximate cause to nullify third-party claims under RICO by fund-type entities, see Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 NOTRE DAME L. REV. 257 (2000).

third-party contribution claim under RICO against the American Tobacco Company and other cigarette manufacturers.⁶²

II

CASE DISCUSSION: *FALISE V. AMERICAN TOBACCO COMPANY*

A. The *Falise* Plaintiffs' Theories of Recovery

The plaintiffs in *Falise* were the trustees of the Johns-Manville Trust (the "Trust"), a trust which was created in 1988 to cover the outstanding asbestos liability of the bankrupt Johns-Manville Corporation.⁶³ The Trust brought a mixed civil RICO and state fraud action against various tobacco defendants ("Tobacco"), seeking monetary damages for their alleged contribution to the asbestos-related injuries suffered by the Trust's claimants.⁶⁴ In essence, the action claimed that the liabilities of the Trust were "substantially due to Tobacco's alleged misconduct in suppressing and concealing material information, and disseminating misinformation" concerning the risks posed to those who both smoked and were exposed to asbestos.⁶⁵

Judge Weinstein catalogued the plaintiffs' theories of recovery as follows: (1) a RICO settlement action claim alleging that Tobacco engaged in conduct directed at the Trust that fraudulently misinformed the Trust of the synergistic effects between smoking and asbestos exposure in order to minimize the damages that Tobacco would owe to smoker-asbestos claimants ("RICO Settlement Action"); (2) a RICO litigation action claim alleging that Tobacco devised a scheme to fraudulently misinform the Trust, causing the Trust to forego the option to implead Tobacco as a co-defendant in asbestos-related litigations ("RICO Litigation Action"); (3) a RICO direct payment action claim alleging that Tobacco engaged in conduct to fraudulently misinform asbestos workers to encourage them to continue to smoke and not to quit, thereby increasing the number of claimants to whom the Trust was liable ("RICO Direct Payment Action"); (4) a RICO investment action alleging that Tobacco invested RICO-derived income to fund a scheme to cause the Trust to bear greater payments than it otherwise would have ("RICO Investment Action"); and (5) a state fraud action alleging that Tobacco's fraudulent scheme caused more serious asbestos-related injuries due to the synergy between smoking and asbestos exposure, in violation of state common law ("State Fraud Action").⁶⁶

⁶² See *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 322 (E.D.N.Y. 2000).

⁶³ *Id.*

⁶⁴ See *id.*

⁶⁵ *Id.* at 326.

⁶⁶ See *id.* at 322-23.

B. Relevant Evidence of Fraudulent Misinformation and Synergy

The *Falise* opinion referenced a wide array of state-of-the-art medical literature illustrating the synergy between smoking and asbestos-related injury, as well as Tobacco's very own documentation showing the fraudulent concealment of such synergistic effects.⁶⁷ The Trust's medical evidence included articles and studies dating as far back as the early 1970s, detailing the increased health risks caused by the combination of tobacco use and asbestos exposure.⁶⁸ In addition, the Trust cited more recent studies, including a 1996 study which found the incidence of lung cancer to be fifty-three times greater for an asbestos-exposed smoker than for an unexposed non-smoker, and ten times greater than for a non-smoker occupationally exposed to asbestos.⁶⁹

The complaint also referenced seemingly damning documentary evidence of Tobacco's campaign of fraudulent misinformation concerning the synergistic effects between smoking and asbestos exposure.⁷⁰ Specifically, it noted internal memoranda demonstrating Tobacco's knowledge of the synergistic effects,⁷¹ as well as Tobacco's alleged cover-up of such knowledge.⁷²

Examples of evidence relating to Tobacco's knowledge of the synergy included a document that an attorney for American Tobacco drafted in 1978 acknowledging that "'the risk [of lung cancer in] a smoking asbestos worker is enormously inflated over that of a non-smoking asbestos worker,'"⁷³ and a 1968 Philip Morris memorandum suggesting that "asbestos workers . . . should be discouraged from indulging in the habit [of smoking]."⁷⁴ Moreover, the complaint referenced publications illustrating Tobacco's cover-up of its knowledge and dissemination of misinformation.⁷⁵ For example, a 1979 article published by the Tobacco Institute claimed that asbestos workers who do not smoke faced an increased risk of cancer,⁷⁶ and a 1997 R.J.

⁶⁷ See *id.* at 327-33.

⁶⁸ See *id.* at 327 (citing G. Berry et al., *Combined Effects of Asbestos Exposure and Smoking on Mortality from Lung Cancer in Factory Workers*, 2 LANCET 476, 478 (1972) (finding that the risk from combined tobacco use and asbestos exposure was fifty times greater than that in unexposed populations)).

⁶⁹ See *id.* (citing Piero Mustacchi, *Lung Cancer Latency and Asbestos Liability*, 17 J. LEGAL MED. 277, 280-97 (1996) (study of 17,800 insulators and asbestos workers over a twenty-year period)).

⁷⁰ See *id.* at 328.

⁷¹ See *id.* (referencing Plaintiff's Amended Complaint at ¶ 46-47, 49).

⁷² See *id.* at 328-29 (referencing Plaintiff's Amended Complaint at ¶ 48, 50, 52).

⁷³ *Id.* at 328 (reproducing Plaintiff's Amended Complaint at ¶ 46 (quoting Memorandum from Janet Brown, American Tobacco (Nov. 22, 1978))).

⁷⁴ See *id.* (reproducing Plaintiff's Amended Complaint at ¶ 46 (quoting Memorandum from H. Wakeham, Philip Morris (Aug. 7, 1968))).

⁷⁵ See *id.* at 328-29.

⁷⁶ See *id.*

Reynolds article claimed that one could interpret the data concerning the synergy between smoking and asbestos as smoking protecting the smoker from occupational exposure to asbestos.⁷⁷ The court's extensive explication of this documentation in its opinion emphasizes its importance to the ruling on Tobacco's motions for summary judgment as to all of the Trust's claims.

C. *Falise* Analysis and Adjudication of the Plaintiffs' Claims on Tobacco's Motion for Summary Judgment

The opening salvo in the *Falise* litigation was Tobacco's motion for summary judgment as to all of the Trust's claims. Judge Weinstein granted Tobacco's motions as to the Trust's RICO Settlement Action and RICO Litigation Action, but the court permitted the Trust's RICO Direct Payment Action to proceed to trial.⁷⁸

1. *Dismissal of RICO Settlement Action and RICO Litigation Action Claims*

Under its RICO Settlement Action and RICO Litigation Action theories, brought pursuant to 18 U.S.C. § 1962(c)'s mail and wire fraud prohibitions, the Trust alleged that it had relied to its detriment on Tobacco's misinformation.⁷⁹ In particular, the Trust pleaded that, in reliance on the misrepresentation directed at it by Tobacco, the Trust (1) forewent the opportunity to implead the tobacco defendants in the original asbestos suits; (2) assumed Tobacco's share of the injuries that the Trust's claimants suffered; and (3) settled claims that it would not otherwise have settled.⁸⁰

Because the Trust's action alleged mail and wire fraud as the predicate acts for RICO liability, the Trust was required to show justified reliance on Tobacco's fraud:⁸¹ "[J]ustified reliance on the [alleged] fraud is necessary to establish causation in fact."⁸² In cases in which, as here, the allegedly fraudulent scheme is directed at a large segment of the population, the requirement is met if the reliance is both detrimental and reasonable.⁸³ Unfortunately for the Trust, its depositions and responses to interrogatories supported the conclu-

⁷⁷ See *id.* at 329 (referencing Plaintiff's Counterstatement on Direct Injury at 12).

⁷⁸ *Falise v. Am. Tobacco Co.*, 91 F. Supp. 2d 525, 527 (E.D.N.Y. 2000); see *supra* text accompanying notes 61-62. The court also initially denied summary judgment with respect to the plaintiff's RICO Investment Action and State Fraud Action. See *Falise*, 94 F. Supp. 2d at 323. However, it subsequently granted the motion for the RICO Investment Action. See *id.*

⁷⁹ See *Falise*, 94 F. Supp. 2d at 322.

⁸⁰ *Id.*

⁸¹ *Id.* at 334.

⁸² *Id.*

⁸³ *Id.* at 334, 337.

sion that the reason the Trust did not implead Tobacco in the original personal injury actions was, in fact, that the Trust did not believe it could ultimately prevail against Tobacco at trial.⁸⁴ The Trust also conceded that it had knowledge of the synergistic effects of asbestos exposure and tobacco use as early as 1988.⁸⁵ Such evidence, according to the court, indicated that Tobacco did not mislead the Trust at all.⁸⁶ Therefore, the Trust could not have detrimentally relied on Tobacco's misinformation and misrepresentation.⁸⁷ Due to the Trust's lack of detrimental reliance on Tobacco's misrepresentations, the court dismissed both the RICO Settlement and RICO Litigation claims.⁸⁸

2. *The RICO Direct Payment Action Survives Summary Judgment and Proceeds to Trial*

With respect to the RICO Direct Payment Action,⁸⁹ the court held that there was a "sufficient showing of detrimental reliance" to satisfy RICO's but-for cause requirement.⁹⁰ More importantly, unlike other Funds cases, which failed to surmount the proximate cause obstacle due to the indirect nature of the harm,⁹¹ the Trust in *Falise* succeeded in satisfying the proximate cause requirement as well.⁹² Judge Weinstein held that, although the Trust based its claim upon an indirect injury, the Trust satisfied proximate cause.⁹³

In order to reach this decision, the *Falise* court distinguished the case at bar from the Second Circuit case most directly on point, *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*,⁹⁴ and applied *Holmes's*⁹⁵ tripartite proximate cause policy factors.⁹⁶ *Holmes* explicated the following three policy considerations for courts to weigh in determining whether proximate cause limits an indirect, harm-based

⁸⁴ *Id.* at 336.

⁸⁵ *See id.* Indeed, the Trust admitted that "perhaps" by 1988 it had been aware of a 1985 Surgeon General report "indicat[ing] that the risk of lung cancer among asbestos workers was five times higher than that for workers in other industries, [and] that said risk is 50 times higher if the asbestos worker smokes." *Id.*

⁸⁶ *See id.* at 337.

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ *See supra* text accompanying note 66.

⁹⁰ *Falise*, 94 F. Supp. 2d at 337.

⁹¹ *See supra* note 53 and accompanying text.

⁹² *See Falise*, 94 F. Supp. 2d at 347. "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 271-72 (1992) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983) (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918))).

⁹³ *Falise*, 94 F. Supp. 2d at 347.

⁹⁴ 191 F.3d 229 (2d Cir. 1999).

⁹⁵ 503 U.S. 258 (1992).

⁹⁶ *See Falise*, 94 F. Supp. 2d at 340-47; *infra* Part III.A.3.

RICO claim: (1) the difficulty in assessing damages if a jury attributes a plaintiff's harm to independent factors; (2) the difficulty of apportioning damages among different plaintiffs in order to "obviate the risk of multiple recoveries"; and (3) the possibility of more directly injured victims who could be "counted on to vindicate the law as private attorneys general."⁹⁷ Applying these criteria to *Falise's* facts, Judge Weinstein held that intervening causes were minimal,⁹⁸ that there was no threat of difficulty in apportioning damages,⁹⁹ and that there were no other more direct victims who could more appropriately bring a civil RICO action.¹⁰⁰ Consequently, Judge Weinstein permitted the Trust to continue its RICO Direct Payment Action.¹⁰¹

The *Falise* court's finding of sufficient proximate cause presents the most controversial aspect of the decision.¹⁰² Part III parses in further detail the proximate cause analysis in *Falise* in relation to *Holmes* and *Laborers Local 17*.

D. Resolution of the Case

In January 2001, the *Falise* saga came to an abrupt, albeit bizarre, end when the judge declared a mistrial.¹⁰³ Subsequently, asbestos manufacturers either withdrew similar cases brought in other jurisdictions, or judges dismissed those complaints.¹⁰⁴

III ANALYSIS

This Part argues that the *Falise* court's causation finding with regard to the RICO Direct Payment claim is consistent with a broad reading of the Supreme Court's *Holmes* causation test, even if the decision seems on its face to be inconsistent with existing Second Circuit doctrine. It argues also that the court's decision to allow the contribution claim to proceed was correct for three reasons. First, one can distinguish the *Falise* plaintiffs and facts from other fund-type contribution actions. Second, countervailing policy considerations, such as the fact that current contribution and apportionment systems and

⁹⁷ See *Holmes*, 503 U.S. at 269–70.

⁹⁸ See *Falise*, 94 F. Supp. 2d at 342–44.

⁹⁹ See *id.* at 344–45.

¹⁰⁰ See *id.* at 345–46.

¹⁰¹ See *id.* at 347. The court also allowed the Trust to proceed on its State Fraud Action. See *id.* at 357.

¹⁰² See *supra* note 5 and accompanying text.

¹⁰³ Tom Hays, *Tobacco-Asbestos Mistrial Declared*, AP, Jan. 25, 2001 (noting that a juror sent Judge Weinstein a hand-written note on the fifth day of deliberations reading "Juror has made threat against other juror to kill if required to be here 'much longer'" and also that the jury was deadlocked for the tobacco industry and that tensions were mounting against the holdouts).

¹⁰⁴ See *Asbestos Products*, *supra* note 5.

mechanisms provide few remedies for mass toxic tort defendants, tip the balance of proximate cause in favor of letting the claim proceed. Third, given the unique and intertwined nature of the tobacco and asbestos litigations, courts should establish contribution and apportionment mechanisms for illnesses that juries can attribute to both tobacco and asbestos. Allowing contribution through a RICO action provides an innovative opportunity for courts to establish such mechanisms.

A. The *Falise* Court Properly Found Sufficient But-For and Proximate Causation

The *Falise* court's conclusion that the plaintiffs' RICO Direct Payment claim satisfies proximate cause appears to contradict both generally prevailing law,¹⁰⁵ as well as the law of the Second Circuit.¹⁰⁶ Not surprisingly, some have accused Judge Weinstein of performing analytical acrobatics in order to sidestep the Second Circuit's holding in *Laborers Local 17* to arrive at a finding of sufficient proof of causation.¹⁰⁷ Regardless, the *Falise* court's analysis is sound. The following subparts argue that the Second Circuit's re-articulation of *Holmes* overly ossifies the *Holmes* conceptualization of proximate cause. Although *Falise* may appear contrary to *Laborers Local 17*, the decision squares with the Supreme Court's articulation of RICO causation in *Holmes*.

It bears noting that the *Falise* court found sufficient proof of the first prong of the causation analysis—but-for causation. To do so, the court referred to the Harris Model, a statistical model prepared by the Trust's expert that compared the quit rates of asbestos worker smokers who had information concerning the synergistic effects of smoking and asbestos exposure to those workers who lacked such information.¹⁰⁸ The court held that the study provided a sufficient basis, for summary judgment purposes, to find that the asbestos worker smokers detrimentally relied on Tobacco's misrepresentations and omissions so as to establish but-for causation.¹⁰⁹ As the core civil RICO cases involving third-party contribution are disposed under the second

¹⁰⁵ See *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 443–45 (3d Cir. 2000); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 823–26 (7th Cir. 1999).

¹⁰⁶ See *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999).

¹⁰⁷ See *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 729 N.Y.S. 2d 240, 248–49 (N.Y. Sup. Ct. 2000).

¹⁰⁸ See *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 337–38 (E.D.N.Y. 2000).

¹⁰⁹ See *id.* at 338.

prong, proximate cause,¹¹⁰ the subsequent analysis of *Falise* focuses only on the proximate cause issue under RICO.

1. *Causation in Civil RICO Under Holmes*

The Supreme Court spoke for the first time on the issue of causation under civil RICO in *Holmes v. Securities Investor Protection Corp.*¹¹¹ First, *Holmes* validated the requirement of but-for causation under 18 U.S.C. § 1964(c), stating that one could read the language in the statute “to mean that a plaintiff is injured ‘by reason of’ a RICO violation . . . on showing that . . . the defendant’s violation was a ‘but for’ cause of plaintiff’s injury.”¹¹² Second, in addition to but-for cause, *Holmes* further imposed a proximate cause requirement. Although § 1964(c) does not explicitly articulate such a requirement,¹¹³ the Court, by analogizing civil RICO to antitrust statutes and the Clayton Act, held that § 1964(c) also requires proof of proximate cause.¹¹⁴

Initially, the *Holmes* Court articulated the proximate cause requirement as one grounded in common-law traditions. The Court opined that “we use ‘proximate cause’ to label generically the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts. At bottom, the notion of proximate cause reflects ‘ideas of what justice demands, or of what is administratively possible and convenient.’”¹¹⁵ Then, the Court focused its articulation of proximate cause in terms of directness, to wit: “[A]mong the many shapes [that proximate cause] took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged.”¹¹⁶ Finally, the Court presented the three policy considerations already analyzed in connection with the “directness” of the relationship between the injury and the violation.¹¹⁷

¹¹⁰ See *supra* note 5 and accompanying text.

¹¹¹ 503 U.S. 258 (1992). For a summary of the facts of *Holmes*, see Madonia, *supra* note 59, at 938–41.

¹¹² *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265–66 (1992) (citation omitted).

¹¹³ Edward Brodsky, *RICO and ‘Indirect Injuries’*, N.Y. L.J., Mar. 8, 1995, at 3, 3 (“Justice Souter, writing for the majority, imported the proximate cause requirement of § 4 of the Clayton Act into RICO’s § 1964—even though the statute contains no such stated criteria.”).

¹¹⁴ See *Holmes*, 503 U.S. at 268. Analogizing § 1964(c) to the Clayton Act, Justice Souter, writing for the majority, explained: “Thus, we held that a plaintiff’s right to sue . . . required a showing that the defendant’s violation not only was a ‘but for’ cause of his injury, but was the proximate cause as well. The reasoning applies just as readily to § 1964(c).” *Id.*

¹¹⁵ *Id.* at 268 (quoting PROSSER AND KEETON ON LAW OF TORTS § 41 (W. Page Keeton et al. eds., 5th ed. 1984)).

¹¹⁶ *Id.* (citation omitted).

¹¹⁷ See *supra* Part II.C.2.

Two observations are relevant here. First, the Court prefaced the policy considerations relating to “directness” with the statement that although it is a central element, “such directness of relationship is not the sole requirement of . . . causation.”¹¹⁸ Second, as noted above, the Court began its proximate cause discussion by referencing the common-law traditions and roots of proximate cause.¹¹⁹ Bearing in mind these observations, one can express the *Holmes* causation analysis for civil RICO as a two-prong inquiry of but-for cause and proximate cause. The latter prong of proximate cause considers traditional notions of fairness as well as the above three policy considerations concerning “directness.”

2. *Proximate Cause in Civil RICO Under Laborers Local 17: A Narrow Reading of Directness*

Seven years after *Holmes*, the Second Circuit addressed the issue of proximate cause in the RICO third-party contribution case *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*¹²⁰ The plaintiffs in *Laborers Local 17* alleged that Tobacco conspired to deceive union health funds as to the dangers of smoking in order to shift the health-related costs of smoking to the plaintiffs.¹²¹

The *Laborers Local 17* court first distinguished between direct injuries and indirect injuries by discussing the direct injury test—“whether the damages a plaintiff sustains are derivative of an injury to a third party.”¹²² If there is such a derivative injury, “then the injury is indirect; if not, it is direct.”¹²³ The court, citing *Holmes*, justified its focus on the import of “directness.”¹²⁴ Specifically, the *Laborers Local 17* court commenced its analysis by stating that “*Holmes* emphasized that although the direct injury test ‘is not the sole requirement of [proximate] causation, it has been one of its central elements’”; therefore, “plead[ing] a direct injury is a key element for establishing proximate causation”¹²⁵ The court further illustrated its focus on the concept of “directness” of injury by referring to the settled tort law concept that plaintiffs who are obligated to pay the medical expenses of another may not recover against the tortfeasor who caused the dam-

¹¹⁸ *Holmes*, 503 U.S. at 269.

¹¹⁹ *Id.* at 268.

¹²⁰ 191 F.3d 229 (2d Cir. 1999).

¹²¹ *See id.* at 232–33.

¹²² *Id.* at 238–39.

¹²³ *Id.* at 239.

¹²⁴ *Id.* at 235.

¹²⁵ *Id.* (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992) and citing *Associated Gen. Contractors, Inc. v. Carpenters*, 459 U.S. 519, 540 (1983)).

age, because “their injuries are . . . derive[d] wholly from the injuries sustained by [a] third party,” and thus are indirect.¹²⁶

The Second Circuit’s logic implicitly narrows *Holmes* by underscoring “directness” as a dispositive measure. Pursuant to the *Laborers Local 17* approach, once a court determines the injury to be “derivative” or “indirect,” there is no proximate cause.¹²⁷ In applying the direct injury test, the court concluded that the Plaintiffs’ injuries

are entirely derivative of the harm suffered by plan participants as a result of using tobacco products. . . . Being purely contingent on harm to third parties, these injuries are indirect. Consequently, because defendants’ alleged misconduct did not proximately cause the injuries alleged, plaintiffs lack standing to bring RICO claims against defendants.¹²⁸

After concluding that a “derivative” or “indirect” injury forecloses proximate cause, the court then determined whether this was consistent with *Holmes*’s tripartite policy considerations.¹²⁹ Not surprisingly, the *Laborers Local 17* court’s application of the *Holmes* policy considerations corresponded with its finding of no proximate cause.¹³⁰ The *Holmes* considerations, as parsed by the Second Circuit, essentially served as an after-the-fact formality. It bears noting, however, that the Second Circuit did qualify its narrow application of directness by stating:

[W]e follow the lead of the *Holmes* Court in making clear that, to the extent our description of “indirect” or “derivative” injury might seem to encompass cases where recovery by the plaintiff would not run afoul of the policy concerns set forth [by the *Holmes* court], the outer limits of the direct injury test are described more by those concerns than by any bright-line, verbal definition.¹³¹

Although this language is consistent with the *Holmes* court’s flexible articulation of proximate cause, the Second Circuit ostensibly applied “directness” as a bright-line rule.¹³² That is, under *Laborers Local 17*, determining that the harm pleaded is indirect or derivative appears to be fatal in fact.

¹²⁶ *Id.* at 237.

¹²⁷ *See id.* at 239.

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *See id.* at 239–41.

¹³¹ *Id.* at 239 n.4.

¹³² *See supra* notes 123–27 and accompanying text.

3. *The Falise Court's Proximate Cause Analysis: Applying Holmes and Laborers Local 17*

In contrast to *Laborers Local 17*, but in accordance with a flexible reading of *Holmes*, the *Falise* court did not treat “directness” as dispositive. It conceded the indirect or derivative nature of the harm alleged—that Tobacco’s misrepresentations led asbestos-exposed smokers to continue smoking, thereby increasing the Trust’s liability.¹³³ However, by focusing his analysis on the *Holmes* policy considerations, Judge Weinstein concluded that the considerations favored a finding of proximate cause. In other words, the *Falise* court concluded that this particular case *was* just one of those cases that the *Laborers Local 17* court had alluded to, in which there is an indirect harm that does “not run afoul of the policy concerns” set forth by *Holmes*.¹³⁴

a. *Holmes Policy Concern No. 1: Difficulty of Assessing Damages Due to Intervening Causal Factors*

With respect to the first *Holmes* policy concern—the difficulty of assessing damages in cases in which there are independent causal factors—Judge Weinstein distinguished *Falise* based on several factors that diminished the speculativeness of assessing damages, notwithstanding intervening causal elements.¹³⁵ The *Laborers Local 17* court cited three possible intervening causes—that is, other reasons why the third-party plaintiffs incurred harm—as further evidence of the difficulty of assessing damages:¹³⁶

- (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries;
- (2) the countereffect that . . . [Tobacco’s] . . . direct fraud would have had on the smokers . . . ; and
- (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers¹³⁷

Addressing the intervening factor of individual smoker agency, Judge Weinstein distinguished *Falise* on the evidence pled. The court

¹³³ See *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 334 (E.D.N.Y. 2000) (“[A] plaintiff may allege that ‘his injuries were indirectly but proximately caused by a fraudulent scheme directed at third parties’” (citation omitted)).

¹³⁴ *Id.* at 341 (emphasis in original) (quoting *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 239 n.4 (2d Cir. 1999)).

¹³⁵ See *id.* at 342–43.

¹³⁶ The *Laborers Local 17* court referenced the first *Holmes* policy consideration, which concerned the difficulty of determining damages due to potential intervening causes: “First, the less direct an injury . . . the more difficult it becomes to ascertain the amount of a plaintiff’s damages attributable to the violation, as distinct from other, independent, factors.” *Laborers Local 17*, 191 F.3d at 239 (quoting *Holmes v. Sec. Investor Corp.*, 503 U.S. 258, 269 (1992)).

¹³⁷ *Falise*, 94 F. Supp. 2d at 343 (quoting *Laborers Local 17*, 191 F.3d at 239–40).

posited that elements absent from the other Funds cases diminished the speculativeness of the damage assessment caused by the intervening agency of individual smokers who decide whether and how frequently to smoke.¹³⁸ In this regard, Judge Weinstein referred to the statistical evidence of increased risks of harm to asbestos-workers who smoke:

Asbestos-workers faced a relative risk of developing lung cancer which was some 500% greater than that faced by the smokers in the general population who were not occupationally exposed to asbestos. Presented with these figures, it is difficult . . . to find that the "other reasons" suggested in *Laborers Local 17* would, in any meaningful sense, lead asbestos-workers to continue smoking.¹³⁹

Hence, had this information concerning the heightened risk of harm attendant to smokers occupationally exposed to asbestos been available, it would be reasonable to assume such persons would have ceased to smoke.

More importantly, the *Falise* court pointed to another statistical study the Trust presented in this case—the Harris Model.¹⁴⁰ This study, which an expert for the Trust prepared, proffers a comparative analysis of quit rates for asbestos-workers who "unlike the Trust's claimants, were informed . . . of the smoking-asbestos synergy and its effects on human health."¹⁴¹ Accordingly, the court concluded that such a study would afford "the jury . . . a real world guide to measure the effect of Tobacco's alleged misrepresentations and omissions."¹⁴² The *Falise* court cited the Harris Model as diminishing both the speculativeness of the first *Laborers Local 17* intervening factor (assessing the effect on the Trust's claimants had the Trust and its claimants been privy to the synergistic effects) as well as the third factor of intervening smoker agency.¹⁴³

Arguably, it is improbable that asbestos workers would have quit smoking had this data been made available to them; however, it is nonetheless plausible that some may have sought different employment. Recall that the *Holmes* analysis requires a court only to determine the level of difficulty in assessing damages.¹⁴⁴ Indeed, under the *Holmes* policy consideration analysis, a court assesses the difficulty of apportioning damages in cases in which (1) the harm may be attributable to independent factors, and (2) there is a risk of multiple recov-

¹³⁸ See *id.* at 342–44.

¹³⁹ *Id.* at 344 (emphasis omitted).

¹⁴⁰ See *id.* at 343–44.

¹⁴¹ *Id.* at 344.

¹⁴² *Id.*

¹⁴³ *Id.* at 343–44.

¹⁴⁴ See *supra* Part II.C.2.

eries.¹⁴⁵ As the *Falise* court stated, this difficulty is tempered by the availability of a benchmark—the statistical model itself, and the comparative statistical evidence of quit rates.¹⁴⁶ Furthermore, recall the procedural posture of the case: it was on summary judgment.¹⁴⁷ In light of the procedural posture, the court rightly credited the statistical model in favor of the Trust. Not only did the Harris Model present a touchstone for the jury to assess the damages (thereby diminishing the speculative nature of such damages), it also created a question of fact as to the validity of the study. This is not a question a judge should determine on a motion for summary judgment; rather, it should be decided by a jury.¹⁴⁸

As the *Falise* court correctly noted, the second intervening cause the *Laborers Local 17* court cited—the countereffect of Tobacco’s fraud despite the best efforts of the Funds—was irrelevant in that the Trust in *Falise* did not claim that, but for Tobacco’s misrepresentations, it would have created cessation programs.¹⁴⁹ As an admitted joint tortfeasor, the Trust merely alleged that Tobacco’s direct fraud increased the number of claimants seeking tort recovery from the Trust. Therefore, the direct fraud countereffect concern did not apply.

At bottom, the salient intervening factor that troubled the Second Circuit in *Laborers Local 17* was the individual agency of the smokers. As this subsection has argued, the Harris Model sufficiently tempered the speculative nature of assessing damages due to this intervening causal element.¹⁵⁰

¹⁴⁵ See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

¹⁴⁶ See *Falise*, 94 F. Supp. 2d at 343–44.

¹⁴⁷ See *supra* Part II.C.

¹⁴⁸ Under the summary judgment standard, the movant prevails by showing that “there is no genuine issue as to any material fact.” *Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir. 2001) (quoting FED. R. Civ. P. 56(c)). Moreover, “[i]n applying this standard . . . [a court] ‘resolve[s] all ambiguities, and credit[s] all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment.’” *Id.* (emphasis added) (quoting *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 216 (2d Cir. 2001)); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”).

Of course, the tobacco defendants may have attacked the methodology and reliability of the Harris Model under Rule 702 of the Federal Rules of Evidence, triggering a *Daubert* question for the court. See *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 265–68 (2d Cir. 2002) (outlining the nature of a court’s *Daubert* inquiry in determining the reliability of expert witness testimony and evidence). However, given that the case proceeded with the Trust’s statistical evidence intact, it would appear that the Harris Model and testimony survived any such *Daubert* scrutiny.

¹⁴⁹ *Falise*, 94 F. Supp. 2d at 343.

¹⁵⁰ See *supra* notes 140–48 and accompanying text.

b. *Holmes Policy Concern No. 2: The Difficulty of Apportioning Damages Among Different Plaintiffs to Prevent Double Recovery*

Addressing the second *Holmes* policy consideration—the problem of double recovery—the *Falise* court found that the identity of the parties significantly diminished this concern. As the *Falise* court correctly reasoned, the identity of the parties distinguished *Falise* from the Fund cases because Tobacco and the asbestos companies (“Asbestos”) were joint tortfeasors, as the Trust “[stood] in this litigation as an ‘admitted tortfeasor.’”¹⁵¹ This is an important fundamental characteristic distinguishing *Falise* from other health and fund third-party contribution RICO actions. Recall that the plaintiffs in the other RICO third-party contribution suits against Tobacco were insurance and health-fund entities who were never subject to tort liability arising from the third-party claimants’ injuries.¹⁵² Thus, there was no danger of double recovery in those cases.

Consider a hypothetical asbestos worker who smokes and develops lung cancer. If this worker were to bring a suit against the Trust to recover for her injury, then courts would preclude her from subsequently bringing suit for the same harm against Tobacco. It follows that the defendant in this case, Tobacco, is not in danger of being subjected to double recovery. As the *Falise* court rightly noted: “A victim of a tort caused by multiple tortfeasors does not obtain overlapping recoveries.”¹⁵³ On the other hand, the danger of double recovery was present in the Funds cases. The Funds’ payment of medical expenses to our hypothetical plaintiff would not preclude her claim against Tobacco, thereby subjecting Tobacco to double recovery. Given the nature of the relationship between the plaintiff and the defendant in this case, the *Falise* court properly disposed of the second *Holmes* policy consideration in favor of proximate cause.

c. *Holmes Policy Concern No. 3: Existence of More Direct Victims to Remedy the Violation*

The *Falise* court’s application of the third *Holmes* policy consideration—the existence of more “directly injured victims” who could be relied upon to “vindicate the law as private attorneys general”¹⁵⁴—is the most tenuous part of the opinion. The *Holmes* court implied that

¹⁵¹ *Id.* at 344.

¹⁵² *See, e.g.,* *Serv. Employees Int’l Union Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068 (D.C. Cir. 2001); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999).

¹⁵³ *Falise*, 94 F. Supp. 2d at 344.

¹⁵⁴ *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269–70 (1992).

“since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely,”¹⁵⁵ courts disfavor indirect plaintiffs. In *Falise*, the directly harmed parties were the asbestos-smoker plaintiffs who claimed that Tobacco’s misrepresentations caused their injuries.¹⁵⁶ It is clear that these plaintiffs would be able to recover damages for their harms by bringing a direct tort action against Tobacco.¹⁵⁷ Moreover, such recovery was possible without the attendant difficulties intimated by the first and second *Holmes* considerations. Facially, it would appear that this final *Holmes* consideration cuts against a finding of proximate cause.

To address this issue, the *Falise* court first argued that because the other policy considerations weighed in favor of a finding of proximate cause, the court should discount the fact that more direct plaintiffs existed.¹⁵⁸ Secondly, the court emphasized the outcome-efficiency of allowing the Trust to litigate the matter: because eighty to ninety percent of the Trust’s claimants were smokers, recovery would immediately vindicate the directly injured parties.¹⁵⁹

In *Holmes*, the Supreme Court did not articulate a per se standard on how lower courts should assess the tripartite policy considerations. In light of the *Holmes* Court’s silence on the matter, it was reasonable for the *Falise* court to discount one consideration because the other two suggest a finding of proximate cause. Furthermore, this balancing approach conforms to the flexible notions associated with proximate cause.¹⁶⁰ Recall that the *Holmes* Court grounded its analysis upon a framework of common-law proximate cause, a concept whose

¹⁵⁵ *Id.*

¹⁵⁶ See *Falise*, 94 F. Supp. 2d at 343–45. The court noted that the third *Holmes* factor “turns in substantial part upon whether Trust Claimants who smoked would be better suited to remedy existing injuries caused by Tobacco’s conduct.” *Id.* at 345.

¹⁵⁷ See discussion *infra* Part III.B.1.

¹⁵⁸ See *Falise*, 94 F. Supp. 2d at 345.

¹⁵⁹ See *id.* at 345–46.

¹⁶⁰ The two modern conceptualizations of proximate cause, the Harper and James unreasonable foreseeable risk of harm articulation and the competing theory of Prosser and Keeton (which couches proximate cause as a question of legal policy) inherently recognize the flexibility of the doctrine. See Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 52 (1991) (“Harper and James recognize that ‘foreseeability’ is an elastic concept. . . . Prosser and Keeton . . . understand proximate cause as ‘the term . . . applied by courts to those *more or less undefined considerations* which limit liability even where the fact of causation is clearly established.’” (citations omitted) (emphasis added)). Ultimately, Kelley notes that although “[m]odern tort theorists have lavished seemingly boundless attention on the problem of explaining proximate cause . . . the consensus of law students and others is that [it] remains a hopeless riddle.” *Id.* at 49–50; see also *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (noting that “proximate cause . . . depend[s] in each case upon many considerations”).

limits are defined by “‘what justice demands.’”¹⁶¹ Thus, no single consideration should be dispositive in proximate cause analysis.¹⁶²

Another line of reasoning that supports the *Falise* court’s determination—that it should discount the existence of more direct parties—flows from the nature of this type of civil RICO action. It is clear that the “more directly injured” parties in *Falise*, the smoker-plaintiffs exposed to asbestos, did not have any legal right to bring individual claims under RICO “because under the statute, personal injuries are not recoverable.”¹⁶³ Therefore, the argument that Asbestos lacked standing or was too remote a party to vindicate the RICO claim against Tobacco falls apart; even the more direct parties (the directly injured smokers and Trust claimants) are precluded from bringing such a claim.¹⁶⁴

Indeed, it is only logical that whenever a plaintiff pleads an indirect harm, there will be a more direct plaintiff. The inquiry should not end, as it does under *Laborers Local 17*, upon a showing that more directly injured parties exist; a third-party contribution action, by definition, presumes that more directly harmed persons exist. Rather, the third policy consideration in *Holmes* compels courts to inquire into whether the directly injured plaintiff is better suited to litigate the claim. As the *Falise* court explicated, and as argued above, the Trust was not only the more appropriate plaintiff, but also the only plaintiff to vindicate the harm. Moreover, even though the directly injured plaintiffs could theoretically bring individual actions against Tobacco, in practice they do not.¹⁶⁵ Strategically, a smoker exposed to asbestos is more likely to seek reparations solely from Asbestos,¹⁶⁶ thereby forever absolving Tobacco of liability.

Lastly, the fact that the adjudication of the civil RICO claim would also address the injuries of future claimants further buttresses the rationale that the Trust is the better situated plaintiff. That is, the damages that the Trust obtains from Tobacco would also be available to plaintiffs whose harms have yet to materialize. Although the Trust’s current claimants may have common-law tort claims against Tobacco, the future claimants do not.

4. *Falise Proximate Cause Analysis Summary*

As this Part has shown thus far, the *Falise* proximate cause analysis fits soundly within the *Holmes* framework. There was both sufficient

¹⁶¹ *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (citation omitted).

¹⁶² See *Palsgraf*, 162 N.E. at 103.

¹⁶³ Mosesso, *supra* note 61, at 338 (citing 18 U.S.C. § 1964 (1994 & Supp. IV 1998)).

¹⁶⁴ *Id.*

¹⁶⁵ See discussion *infra* Part III.B.1.

¹⁶⁶ See discussion *infra* Part III.B.1.

but-for and proximate causation. On its facts, *Falise* presented elements which overcame the three *Holmes* policy considerations. Yet, in light of the dispositions of other circuit and district courts that have addressed third-party contribution claims under civil RICO, and in particular the Second Circuit's narrow application of the direct injury test, it would be naive to propose that the Trust's Direct Payment Action could have survived an appeal. As expressed above, the vast majority of third-party claims involving hospitals, insurers, and health funds seeking contribution from Tobacco illustrates that a majority of courts are reluctant to hold that such plaintiffs have sufficient standing under the *Holmes* standard.¹⁶⁷ Had Tobacco appealed the *Falise* court's recognition of standing, it is probable that the appellate court would have overturned it as a misapplication of the *Laborers Local 17* and *Holmes* RICO proximate cause analyses.

That said, the inquiry does not end here. The following subpart argues that for policy reasons, the outcome of *Falise*—namely, the fact that the court allowed the claim to proceed—was correct. This is so because (1) *Falise* differs fundamentally from other RICO third-party contribution actions; (2) policy considerations, such as the failure of existing contribution mechanisms, favor a finding of proximate cause; (3) the special relationship and problems that both the tobacco and asbestos mass tort litigations pose warrant the creation of some system of contribution between the two for harms attributable to both toxins; and (4) the use of a RICO action in this regard would be an innovative alternative contribution vehicle.

B. Public Policy and Equity Considerations Militate in Favor of Allowing the Contribution Claim to Proceed

The fundamental element that distinguishes *Falise* from other health and fund third-party contribution RICO actions is the identity of the third-party plaintiffs. In *Falise*, the plaintiffs were admitted tortfeasors who in turn sought recovery from Tobacco entities as joint

¹⁶⁷ See *Regence Blueshield v. Philip Morris, Inc.*, No. 99-35203, 2001 WL 205996 (9th Cir. Feb. 28, 2001); *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068 (D.C. Cir. 2001); *Lyons v. Philip Morris, Inc.*, 225 F.3d 909 (8th Cir. 2000); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999); *E. States Health & Welfare Fund v. Philip Morris, Inc.*, 729 N.Y.S.2d 240 (N.Y. Sup. Ct. 2000); *Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip Morris, Inc.*, No. W1999-0161-COA-R9-CV, 2000 WL 1390171 (Tenn. Ct. App. Sept. 26, 2000). *But see* *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70 (D.D.C. 1999) (allowing a labor union health trust fund's RICO contribution claim against Tobacco to survive defendant's motion to dismiss), *rev'd*, 249 F.3d 1068 (D.C. Cir. 2001).

tortfeasors.¹⁶⁸ In contrast, the plaintiffs who brought the other RICO third-party contribution suits against Tobacco were insurance and health-fund entities that never faced liability for the underlying tort giving rise to their alleged third-party harm.¹⁶⁹

Viewing the Trust and Tobacco as joint tortfeasors sheds light on a policy consideration that may have fueled Judge Weinstein's analysis. The *Falise* court's willingness to find sufficient proximate cause may be due to the need for a system to apportion damages between Tobacco and Asbestos. Judge Weinstein was keenly aware of the opportunity *Falise* presented to resolve the problem of liability apportionment for harms attributable to both asbestos and tobacco. Indeed, he stated that "[a]llowing recovery in this action by the Trust would substantially clarify in a single action both Tobacco's share and the Trust's share of liability for Claimants' injuries. . . ."¹⁷⁰

This statement raises a broader question: is Judge Weinstein's approach desirable or does it approach the problem widdershins? More specifically, should the fact that a party bringing a contribution claim is a joint tortfeasor seeking recovery from another alleged joint tortfeasor shift policy toward allowing such a claim to proceed under RICO notwithstanding the "remoteness," "derivative," or "indirect"¹⁷¹ nature of the injury? Or should the fact that Asbestos and Tobacco are two of the largest and most notorious toxic tort litigants play a role in a court's analysis? What special consideration should there be for two large mass tort litigants whose products arguably cause identical harms? Moreover, what are the implications of allowing such a contribution claim to go forward? Lastly, to address these questions, we must analyze the shortcomings of traditional contribution mechanisms between joint tortfeasors as applied to the asbestos-tobacco relationship involving a harm attributable to both toxins.

1. *Asbestos Defendants Assume Additional Liability for Lung Cancer Attributable to Tobacco*

Take the following hypothetical: an individual who was exposed to asbestos began smoking before Congress mandated warnings for tobacco products; subsequently, she developed lung cancer.¹⁷² In the-

¹⁶⁸ In rejecting the Tobacco defendants' double recovery argument, Judge Weinstein noted that such an "argument fails because it neglects the relationship of the Tobacco entities to the Trust: they are joint-tortfeasors." *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 344 (E.D.N.Y. 2000).

¹⁶⁹ See, e.g., *Serv. Employees*, 249 F.3d at 1068; *Laborers Local 17*, 191 F.3d at 229; *Steamfitters Local Union No. 420*, 171 F.3d at 912.

¹⁷⁰ *Falise*, 94 F. Supp. 2d at 345.

¹⁷¹ See *supra* notes 56-59 and accompanying text.

¹⁷² Congress enacted the Federal Cigarette Labeling and Advertising Act in 1965. See Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1340 (2000)). Five years later, Congress amended the Public Health Cigarette Smoking Act of

ory, this individual could do any one of the following: (1) bring misrepresentation or failure-to-warn claims against Tobacco or Asbestos, (2) bring these claims against both Tobacco and Asbestos, or (3) bring only a defect claim sounding in strict products liability against Asbestos.

In all likelihood, however, she will sue only the potential asbestos defendants because litigating an asbestos claim is her most assured option.¹⁷³ First, the causation hurdle is lower in asbestos litigation because generally the only issue therein is product identification—that is, whether the plaintiff had been exposed to a particular asbestos product.¹⁷⁴ Furthermore, proof of liability is more straightforward because an asbestos plaintiff also has the luxury of being able to sue in strict liability on a product defect claim, as courts consider asbestos a defective product. Under a strict liability regime, once a plaintiff proves specific causation (that the plaintiff was exposed to a particular defendant's product), the plaintiff recovers at least compensatory damages.¹⁷⁵

On the other hand, courts do not consider tobacco a defective product¹⁷⁶—such a conclusion would amount to categorical liability for tobacco manufacturers. Therefore, in a tobacco action, plaintiffs must resort to theories of conspiracy and misrepresentation on the part of the tobacco industry to recover any damages. Unlike an asbestos action, simply proving that the plaintiff was exposed to tobacco is insufficient for recovery.

1969, which barred radio and television advertising by tobacco companies. See Pub. L. No. 91-222, § 2, 84 Stat. 87, 87 (1970) (codified as amended at 15 U.S.C. § 1335 (2000)).

¹⁷³ Plaintiffs' large-scale success in suing the asbestos industry since the 1970s has yet to be replicated in tobacco litigation. For example, although plaintiffs in individual tobacco failure-to-warn cases have achieved a 33% success rate at trial, see *Florida Man Wins \$165,000 Verdict Against R.J. Reynolds*, ANDREWS ASBESTOS LITIG. REP., Jan. 3, 2002, at 7, 7 [hereinafter *Florida Verdict Against RJR*], this pales in comparison to the success rate in asbestos litigation.

¹⁷⁴ It is well settled that asbestos causes ailments such as certain cancers, mesothelioma and asbestosis. See THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 9–10 (1987). Richard Nagareda has noted that “[t]he existence of a link between asbestos and a host of diseases is, by now, virtually indisputable as a general matter. . . .” Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 924 (1996).

This is not to say, however, that a defendant may not raise a state-of-the-art defense. See PAUL D. RHEINGOLD, MASS TORT LITIGATION § 10:6 (1996). However, with respect to asbestos manufacturer defendants, overwhelming proof of industry knowledge of the dangers and suppression of such knowledge is now well settled. Cf. WILLGING, *supra*, at 7 (noting that “industry knowledge . . . of the health dangers associated with exposure to asbestos fibers illustrate some of the causes of the asbestos litigation explosion”).

¹⁷⁵ See WILLGING, *supra* note 174, at 9 (noting that since the decision in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), “there has been little or no dispute . . . that asbestos is an unreasonably dangerous product”).

¹⁷⁶ See Henderson & Twerksi, *supra* note 40.

Secondly, asbestos litigation has matured much more than tobacco litigation.¹⁷⁷ Notably, it was not until the early 1990s that plaintiffs prevailed at trial against Tobacco on individual personal injury claims. In stark contrast, even during the nascent years of asbestos litigation, one study demonstrated a plaintiff success rate at trial of fifty-three percent between 1980 and 1982.¹⁷⁸ Tobacco plaintiffs have only recently reached a thirty-three percent success rate at trial.¹⁷⁹

Arguably, the transaction costs of actually litigating asbestos claims are also less, making that option even more appealing to plaintiffs. Additionally, many jurisdictions and judges have special dockets and longstanding case management orders streamlining the litigation of asbestos actions and problems of proof.¹⁸⁰ Conversely, the breadth of individual tobacco cases has yet to reach a level at which courts have developed an expertise in efficiency measures.

All these reasons suggest that a plaintiff would not likely bring action simultaneously against Asbestos and Tobacco. A plaintiff would be ill-advised to complicate her prima facie case against Asbestos by introducing claims against Tobacco if the possibility of recovering against Asbestos alone is more assured and would nevertheless result in the same damages as if she had sued both. Indeed, bringing the lone asbestos claim rather than the tobacco claim at all appears to be a more prudent maneuver.

Given this obvious strategic choice, what are Asbestos's options if a smoker stricken with lung cancer claims that asbestos exposure is the cause of her illness? In theory, Asbestos may utilize numerous procedural methods to apportion liability, such as impleading Tobacco, bringing a separate contribution action against Tobacco, or defending on the basis of plaintiff fault, arguing that the plaintiff's tobacco use "caused" the harm. However, because of Tobacco's special status and the nature of mass tort litigation, the first two options—the contribution actions—are not viable means of relief for Asbestos.¹⁸¹ Indeed, one can argue that Tobacco is an "immune nonparty" in the context of asbestos personal-injury cases involving smokers. According to this line of reasoning, Tobacco is at least immune from

¹⁷⁷ "The term 'mature' mass tort was coined by Francis McGovern to characterize repeat-injury litigation in which the sheer number of cases that had gone to trial established the likely valuation of all subsequent claims." Samuel Issacharoff, "Shocked": *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1927 n.13 (2002) (citing Francis McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989)).

¹⁷⁸ See JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 18-19 (1984).

¹⁷⁹ See *Florida Verdict Against RJR*, *supra* note 173, at 7.

¹⁸⁰ See JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 23-26 (1995).

¹⁸¹ See *supra* Parts I.B.1-I.B.2.

contribution claims brought by a tortfeasor whose product has also been linked to lung cancer.

Moreover, traditional contribution mechanisms are economically unfeasible for the mass toxic-tort defendant. Given the large number of claims pending in every jurisdiction,¹⁸² Asbestos's incentive to settle outweighs its incentive to take a claim to trial. In fact, trial is a rare occurrence with asbestos claims. One empirical study of the disposition of asbestos cases in ten federal districts revealed that only five percent of all asbestos cases went to trial, or that they were disposed of on pretrial motions.¹⁸³ In turn, settlement essentially nullifies any potential contribution claim an asbestos defendant might have had against an alleged joint tortfeasor.¹⁸⁴

Even the last option—that of arguing a plaintiff's contributory fault for smoking—proves troublesome for Asbestos. In the majority of jurisdictions, only a showing that asbestos “substantially caused” the harm is necessary.¹⁸⁵ Therefore, once a plaintiff proves above a fifty percent likelihood that asbestos was the cause of his or her lung cancer, the asbestos defendants become fully liable regardless of any “enhanced” injury that tobacco use might have caused.¹⁸⁶ Thus, the asbestos defendant is left with only one method of recourse: seeking contribution in a separate action. For the aforementioned reasons, even this option is hardly viable.¹⁸⁷

Although lawmakers founded contribution actions and apportionment on theories of equity,¹⁸⁸ asbestos defendants find that they cannot avail themselves of the equities these mechanisms purportedly afford. Surprisingly, this is so even in cases in which the asbestos de-

¹⁸² STEPHEN J. CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 51 (2002) (finding that “through the year 2000 over 600,000 claimants had filed against about 6,000 defendants”).

¹⁸³ See WILLING, *supra* note 174, at 26.

¹⁸⁴ Under UCATA and most state contribution statutes, a settling party may not recover from a non-settling party for any amount paid above its portion of liability. See *supra* notes 36–39 and accompanying text.

¹⁸⁵ See WEINSTEIN, *supra* note 180, at 151.

¹⁸⁶ See *id.*; see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 (1998) (discussing “enhanced injury” liability).

¹⁸⁷ See *supra* Part I.B.2.

¹⁸⁸ See Jean Macchiaroli Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 TEX. L. REV. 1701, 1704 (1995) (noting that “[t]he right of contribution evolved in equity” and the revisions of joint and several liability “demonstrate a trend toward assuring that a defendant will be responsible for damages in an amount that most closely approximates its proportionate equitable share of liability” (emphasis added)); see also Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103, 1119 (2002) (“Comparative fault and comparative contribution recognize the reality that many tortious acts may concur to cause the same harm. While recognizing that reality, comparative methodology also provides a mechanism for apportioning liability for the harm among all of the tortfeasors in some rough approximation to the culpability of each.”).

fendants are armed with evidence demonstrating the "synergy" between tobacco and asbestos. Because of the strategic preference of smoker-asbestos workers to sue Asbestos rather than Tobacco and the lack of mechanisms available to a mass toxic-tort litigant such as Asbestos to recover contribution, the Trust in *Falise* is correct in opining that it has been unfairly bearing a portion of Tobacco's liability for quite some time.¹⁸⁹

2. *Why a Contribution Mechanism Is Necessary*

As expressed above, because plaintiffs affirmatively choose to sue Asbestos rather than Tobacco for a harm that is arguably attributable to both toxins, and because courts are reluctant to allow juries to apportion harm between the two, Asbestos bears a disproportionate share of liability. This results in inequities that are contrary to the progressive principles of fairness inherent in modern comparative negligence and contribution statutes.¹⁹⁰ However, beyond the inequity problems, there are policy issues to consider. The disparate treatment of Asbestos leads to troubling extra-legal effects, such as the current flood of bankruptcies among asbestos defendants,¹⁹¹ the increased transaction costs, and the siphoning of available funds for future plaintiffs.

The alarming increase of bankruptcies, including bankruptcies of seemingly peripheral asbestos defendants,¹⁹² correlates directly to increased transaction costs. In fact, if mechanisms were available to properly apportion the liability between Asbestos and Tobacco, the former would not bear the disproportionate liability and thus could avoid the need for bankruptcy protection. Bankrupt asbestos defendants increase transaction costs by creating secondary litigation in the bankruptcy courts.

Increased transaction costs due to the lack of contribution mechanisms are apparent in other ways. For instance, consider once again the hypothetical smoker-asbestos plaintiff whose injury is lung cancer. Suppose that such a plaintiff, because of product identification difficulties, brings action against Tobacco rather than suing Asbestos. Although it has already been shown that Asbestos may utilize a contributory negligence defense based on the plaintiff's tobacco use as the cause of injury,¹⁹³ Tobacco's defense in the tobacco action will

¹⁸⁹ See *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 326 (E.D.N.Y. 2000).

¹⁹⁰ See Part II.B.1.

¹⁹¹ See *supra* notes 9–13 and accompanying text.

¹⁹² See CARROLL, *supra* note 182; Miel, *supra* note 9 (discussing the bankruptcy of Federal-Mogul, an automotive parts supplier that did not handle asbestos directly but, through the acquisition of a subsidiary, became implicated in asbestos litigation).

¹⁹³ See cases cited *supra* notes 23, 25–27, 29, 31.

be to blame asbestos exposure as the cause of the injury.¹⁹⁴ Thus, as a practical matter, the issue of liability as between Asbestos and Tobacco is repeatedly litigated at the trial level. Such redundant litigation undoubtedly slows down the trial process, thereby increasing transaction costs. Indeed, Judge Weinstein's suggestion in *Falise* that the Trust's RICO action would "substantially clarify in a single action both Tobacco's share and the Trust's share of liability"¹⁹⁵ does have merit. Establishing the relative liability as between Asbestos and Tobacco in one action under the synergy theory would undoubtedly diminish transaction costs resulting from repeatedly litigating this issue separately.

Probably the most troubling extra-legal effect stemming from the lack of viable contribution mechanisms available to Asbestos is the reality of rapidly disappearing funds available to future plaintiffs. Judge Weinstein noted this disturbing trend of bankruptcies among asbestos-related companies in his book, *Individual Justice in Mass Tort Litigation*.¹⁹⁶ In a passage discussing the pitfalls of adjudicating mass toxic-tort claims one by one, he argued:

If we persist in trying cases on an individual or even small-scale jurisdiction-by-jurisdiction basis, many plaintiffs will die before they are compensated, a great many will wait years, and some may receive nothing as the available monies are dribbled away by earlier awards and transaction costs.¹⁹⁷

Although in this passage Judge Weinstein is specifically advocating the consolidation of mass toxic-tort actions, the underlying theme is that inefficiencies result in insufficient funds to resolve all claims. Moreover, as the increasing number of bankruptcies illustrates, and the above quote intimates, funds are actually dwindling at an expedited rate.¹⁹⁸ Ironically, the very fact that Asbestos brought a claim such as the one in *Falise* not only indicates the dire situation, but the suit itself also raises transactional costs and provides another example of a cost-increasing, peripheral action.

Taken together, the combined effects of the lack of adequate contribution devices available to Asbestos—the disproportionate assumption of liability and the inequities flowing therefrom, increased transaction costs, and dwindling funds—necessitate pro-activity to find

¹⁹⁴ See *San Francisco Jury Sparing Asbestos Defendant in Big Tobacco Case*, ANDREWS ASBESTOS LITIG. REP., Apr. 14, 2000, at 6, 6 (highlighting the case in which Tobacco defended on grounds that asbestos exposure caused the plaintiff's lung cancer).

¹⁹⁵ *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 345 (E.D.N.Y. 2000).

¹⁹⁶ WEINSTEIN, *supra* note 180, at 136–37.

¹⁹⁷ *Id.* at 141.

¹⁹⁸ See CARROLL, *supra* note 182; Miel, *supra* note 9 (citing Credit Suisse First Boston's estimate that liability claims from asbestos exposure could reach as high as \$50 billion total for a group of 120 defendants).

a solution. This is especially true because asbestos defendants are armed with substantial evidence demonstrating the synergistic relationship between tobacco use and asbestos exposure.¹⁹⁹ Furthermore, although this Note has focused on the narrow situation concerning Asbestos and Tobacco, the development of remedies to address adequate contribution devices for Asbestos would prove relevant to other mass-tort litigants.²⁰⁰ One can imagine other future mass toxic-tort defendants in a similar predicament; namely, a situation in which, due to a lag in scientific knowledge, the defendant learns either post-settlement or post-litigation that another toxin may have caused the harm for which the litigant was found liable.

The next section concludes that the RICO solution illustrated in *Falise* is a viable and innovative response to the mass toxic-tort litigant's contribution predicament.

3. *The Use of Civil RICO as an Innovative Alternative in Falise*

In light of the considerations discussed above,²⁰¹ other courts should follow *Falise's* lead and reinvigorate the traditional common-law notions of proximate cause to allow such claims to proceed. A RICO action affords a viable vehicle to resolve the apportionment of liability between Asbestos and Tobacco because: (1) notwithstanding the seemingly narrow articulation of proximate cause under RICO, proximate cause is a malleable principle subject to judicial discretion; (2) even under RICO's conceptualization of proximate cause, Asbestos represents an appropriate party to vindicate the RICO claim; (3) because of the singular nature of a RICO suit, the parties can litigate liability between Tobacco and Asbestos in one action, thereby reducing transaction costs; and (4) the RICO action affords the only contribution relief currently available to Asbestos.

First, the Asbestos-Tobacco complexity justifies doing "what justice demands" and returning to traditional articulations of proximate cause. That notion asserts that proximate legal cause is a discretionary doctrine. Even the court in *Laborers Local 17* noted that proximate cause is "an elusive concept, one 'always to be determined on the facts of each case upon mixed considerations of logic, common sense, jus-

¹⁹⁹ See *supra* Part II.B.

²⁰⁰ Other possible mass toxic-tort litigants include Lead Paint, Albuterol, and Bendectin. See generally RHEINGOLD, *supra* note 174, § 3:13-3:43 (discussing class action case histories).

²⁰¹ See *supra* Part III.A.4-B.2 (observing the inequities of not allowing apportionment between two tortfeasors, despite substantial evidence that warrants apportionment, and the resulting increase in transactional costs and detrimental extra-legal effects of disproportionate liability).

tice, policy and precedent.’”²⁰² Furthermore, “[a]t bottom . . . proximate cause reflects ‘ideas of what justice demands’”²⁰³ These articulations imply the inherently flexible nature of proximate cause, under which principles of justice and policy factor into a court’s calculus of whether a claimant’s injuries, are too remote. Whether one follows the Harper and James articulation of proximate cause (the unforeseeable risk of harm conceptualization)²⁰⁴ or that of Prosser and Keeton (that proximate cause is a question of policy),²⁰⁵ both articulations indicate the discretionary nature of a doctrine underpinned by notions of public policy.²⁰⁶ Indeed, proximate cause analysis considers “whether . . . the law will extend . . . responsibility to the consequences which have in fact occurred.”²⁰⁷ To make such a determination, courts invariably weigh a number of factors.²⁰⁸ In short, the unique facts of *Falise*, and the overwhelming policy considerations to which it gives rise,²⁰⁹ will compel courts to invoke their equitable discretionary powers and find adequate proximate cause.

Second, contrary to the holdings in RICO actions that involved the Funds,²¹⁰ the *Falise* plaintiffs represent an appropriate party to vindicate the claims of the more directly injured parties. A risk that the *Holmes*-RICO-proximate-cause-limitation attempts to address is the existence of more “directly injured parties who can remedy the [alleged] harm.”²¹¹ Yet, it is clear that the more “directly injured parties” in *Falise*—the smoker-plaintiffs exposed to asbestos—do not have any legal right to bring individual claims under RICO “because under the statute, personal injuries are not recoverable.”²¹² Therefore, the argument that Asbestos lacks standing, or is too remote a party to vindicate the RICO claim against Tobacco, falls apart because the directly injured smokers and Trust claimants are themselves precluded from bringing such a claim.

²⁰² Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 235 (2d Cir. 1999) (emphasis added) (quoting PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 115, at 279).

²⁰³ Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992) (quoting PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 115, at 264).

²⁰⁴ FOWLER V. HARPER ET AL., THE LAW OF TORTS 167–69 (2d ed. 1986).

²⁰⁵ PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 115, at 273.

²⁰⁶ See *supra* Part IV.A.1, A.3.

²⁰⁷ PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 115, at 273.

²⁰⁸ See *supra* Part III.A.1.

²⁰⁹ See *supra* Part III.B.2 (discussing the consequences of the lack of contribution devices available to asbestos defendants).

²¹⁰ See, e.g., Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 229 (2d Cir. 1999).

²¹¹ *Id.* at 237; see also *supra* note 59 (summarizing the *Holmes* proximate cause standard).

²¹² Mosesso, *supra* note 61, at 338 (citing 18 U.S.C. § 1964 (1994 & Supp. IV 1998)).

Third, the use of a RICO action provides an efficient means of settling apportionment issues. Both an extension of the statute of limitations on a contribution claim²¹³ for mass toxic-tort litigants, as well as a legislative amendment to Tobacco's legal immunity,²¹⁴ appear to resolve the inequity of disproportionate liability Asbestos has suffered. The retooling of conventional contribution mechanisms would provide Asbestos adequate relief to vindicate its contribution claim under the synergy theory of liability.²¹⁵ Such solutions, however, fail to address the underlying dilemma of overburdensome transactional costs because the issue of apportionment between Tobacco and Asbestos would still be relitigated on a case-by-case basis. Conversely, as Judge Weinstein suggested, a RICO action could be used to settle the apportionment issue in a single suit, thereby cutting transaction costs and ultimately "providing greater relief to *more* victims . . . [than would] ad hoc litigation" in which "[e]normous sums would be consumed in litigation costs that would otherwise be available for recovery" by the injured smoker-asbestos plaintiffs.²¹⁶

The argument against the use of RICO as a belated contribution claim is that it allows Asbestos to sidestep the conventional limitations of contribution actions²¹⁷ and legislatively enacted immunity statutes.²¹⁸ That such sidestepping is necessary rebuts this counterargument. The troubling state of asbestos litigation, and more generally, the unique characteristics of the mass toxic-tort litigant, warrant a fresh and innovative use of existing causes of action, such as civil RICO, to reach equity-driven results. To quote Judge Weinstein:

Monstrous mega-mass tort litigations can be tamed. They must be examined with a realistic eye, rather than romantic notions of how the law and lawyers once operated when a tort involved only a private matter of two parties . . . and a passive court. Ethical and legal

²¹³ In general, the statute of limitations to bring a contribution claim is one to two years in most jurisdictions. See AMERICAN LAW OF PRODUCTS LIABILITY, *supra* note 35, § 52:137, WL ALPL 52:137 (last updated Feb. 2003). Extending the statute of limitations would be especially helpful to the mass toxic-tort litigant in light of the slow progress of scientific knowledge, as the *Falise* facts illustrate. Indeed, knowledge of synergy between toxins, as the asbestos defendants showed in *Falise*, did not develop until long after the statute of limitations had tolled, thereby precluding contribution recovery.

²¹⁴ See *supra* notes 32–34 and accompanying text (detailing the California immunity statute for tobacco defendants).

²¹⁵ See *supra* Part I.B.1–B.2 (addressing the barriers to conventional contribution devices that limit Asbestos's chances of contribution relief).

²¹⁶ *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 346 (E.D.N.Y. 2000).

²¹⁷ See *supra* Part I.B.1–B.2 (discussing conventional contribution action requirements).

²¹⁸ See *supra* notes 32–34 (detailing the California immunity statute for tobacco defendants); see generally Vandall, *supra* note 45 (explaining the proposed settlement between Tobacco and the states that offered exemption from future class action suits as a part of settlement).

norms out of touch with real life lead not to morality, but to hypocrisy, abuse, and waste.²¹⁹

As the above quotation intimates, passivity with regard to the reality of the mass-tort situation leads to detrimental inefficiencies and waste. The use of RICO as a contribution mechanism avoids such waste and reduces the viscosity inherent in current conventional responses to apportionment issues in an increasingly mass-tort world.

CONCLUSION

Without a resolution of the Asbestos-Tobacco apportionment problem concerning injuries resulting from exposures to both toxins, the problems of increased transaction costs and the resulting extra-legal effects of bankruptcy and insufficient funds to pay claimants will persist. Likewise, a party bearing a greater or lesser portion of its liability to the benefit or detriment of another party undermines the fundamental premise of modern day comparative negligence and contribution theories. Although unorthodox by strict civil RICO standards, the *Falise* rationale is an example of warranted judicial activism and the appropriate use of a court's equitable powers to address a complex legal quagmire.

²¹⁹ WEINSTEIN, *supra* note 180, at 171.