From Tobacco to Health Care and beyond—A Critique of Lawsuits Targeting Unpopular Industries

Bryce A. Jensen

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NOTE

FROM TOBACCO TO HEALTH CARE AND BEYOND—A CRITIQUE OF LAWSUITS TARGETING UNPOPULAR INDUSTRIES

Bryce A. Jensen†

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The 1998 settlement between state Medicaid agencies and the five major tobacco companies heralded a new form of litigation in which individual or government plaintiffs allied with private class action attorneys use economic, political, and moral leverage to extract huge settlements from entire industries. Beginning with several class action suits filed in late 1999 against managed care companies by aggrieved HMO enrollees, and continuing with government suits against the paint and handgun industries, this new form of litigation has become a powerful vehicle for plaintiffs to punish unpopular—but entirely legal—industries.

In this Note, the author demonstrates that the popular appeal of these suits conceals legal theories of recovery that probably could not survive courtroom scrutiny. The author argues that the thin legal merits of these class action claims are often tolerated by courts, who urge settlement in order to clear their dockets, and by the industries, who regard settlement merely as a cost of doing business. The author concludes that the tobacco litigation and its progeny encourage citizens and the executive branches of government to seek restitution and fundamental social change in the courts after losing in the legislative arena, thus forcing the judiciary branches into the unwise and improper role of policymaker.

INTRODUCTION

In the fall of 1998, the attorneys general of forty-six states and their allies in the plaintiffs' bar negotiated a settlement agreement with the five major cigarette manufacturers. The deal, worth a staggering $206 billion over twenty-five years, will reimburse states for the expenditures that their Medicaid programs made for treating tobacco-related illnesses. The attorneys general praised the settlement as a victory in the decades-long battle against one of the public health's primary enemies. During a press conference following the settlement President Clinton proclaimed, "Today is a milestone in the long struggle to protect our children from tobacco. This settlement . . . is clearly an important step in the right direction for our country."
In the fall of 1999, less than one year after defeating the tobacco companies, these attorneys filed several class action lawsuits against health maintenance organizations (HMOs) on behalf of the HMOs’ members. The lawsuits allege that the defendant HMOs breached a duty by failing to disclose to their members that the HMOs render health care decisions based not only on medical need but also on treatment cost. These plaintiffs seek nothing less than fundamental change: According to one plaintiffs’ attorney, “‘our lawsuit is the last line of defense for millions of men, women, and children who were sold a bill of goods at the expense of their health. They have asked us to change this unconscionable system through the courts, and that is what we will do.’”

Litigation involving the tobacco and managed care industries is troubling because it may punish defendants for marketing entirely legal products and services. Regardless of one’s opinion on smoking, cigarettes are a lawful product enjoyed by more than a quarter of all Americans, most of whom are well aware of the risks. Despite the widespread awareness of these risks, ambitious legal strategies compelled tobacco companies to pay a record settlement. Similarly, HMOs may be under the gun for simply doing what their charters entail. During the 1980s, HMOs evolved as a market response to control the skyrocketing costs of health care. HMOs reigned in these expenses by balancing a patient’s medical needs with the cost of providing treatment. If the plaintiffs succeed in their lawsuits, however, the likely result will be a dismantling of the cost-containment systems that HMOs employ. A plaintiff victory would thus be truly ironic

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5 See Steven Syre & Charles Stein, Tobacco Lawsuit Spinoff May Cause Waves in Market, ARIZ. REPUBLIC, Oct. 24, 1999, at D5, available at 1999 WL 4204335. Among the HMOs named in the lawsuits are PacifiCare Health Systems Inc., Foundation Health Systems Inc., Cigna Healthcare, Prudential Health Care, and Humana Inc. See Rubin & Weinstein, supra note 4. These lawsuits were subsequently transferred to and consolidated in the Southern District of Florida. The district court recently dismissed the plaintiffs’ claims without prejudice. See infra note 139.
6 See, e.g., Class Action Complaint ¶¶ 7, 9, 10, Pickney v. Cigna Corp., No. 2:99 CV 327 (S.D. Miss. filed Nov. 22, 1999) (on file with author) [hereinafter Cigna Class Action Complaint].
7 Joseph Nocera, First: Who’s Running This Country, Anyway? We, the Lawyers, FORTUNE, Nov. 8, 1999, at 38, 38-39 (quoting Richard Scruggs, the Mississippi plaintiffs’ attorney who successfully attacked the tobacco industry), available at 1999 WL 27632997.
9 See Tobacco Settlement, supra note 1, at 1.
10 See GEORGE ANDERS, HEALTH AGAINST WEALTH: HMOs AND THE BREAKDOWN OF MEDICAL TRUST 22-26 (1996); infra Part II.B.
11 See ANDERS, supra note 10, at 25-26; infra Part II.B.
12 See Jack Mabley, Editorial, Who Are the Winners, Losers in This Picture?, DAILY HERALD (Chicago), Oct. 8, 1999, at 18 (arguing that dismantling HMOs will revive the trend in American health care of twenty years ago when premiums increased 20% annually), availa-
because the removal of incentives that keep doctors from overtreating their patients will return Americans to the system of health care that they rejected just twenty years ago.\textsuperscript{13}

A plaintiff victory against HMOs would be not only short-sighted, but also a disturbing first step down the proverbial slippery slope. Already, suits against other unpopular industries—gun manufacturers and the former makers of lead paint—are in progress.\textsuperscript{14} Suits against these industries, however, are difficult to justify. In contrast to the tobacco industry, for example, the paint industry did not engage in a systematic deception of the American public.\textsuperscript{15} Indeed, in the case of paint companies, a culpable party is especially difficult to find because the alleged wrongdoing occurred more than a generation ago.\textsuperscript{16} Similarly, suits against gun makers are problematic because the industry at best only indirectly causes the injuries suffered by victims of gun violence.\textsuperscript{17} The party most responsible for the harm is the person who pulled the trigger.\textsuperscript{18} Nevertheless, gun makers and the paint industry, along with HMOs, are learning what tobacco companies already know: when enough financial and political pressure is brought to bear against an unpopular corporate defendant, it becomes irrelevant that the corporation’s business is legal and the plaintiffs’ legal grounds for recovery are weak.

This Note demonstrates that the tobacco settlement is indeed portentous litigation. Not only did the settlement christen a new form of class action in which the lawfulness of a defendant’s business is insufficient to shield it from liability, but the tobacco litigation and its progeny encourage citizens who lost in the legislative arena to co-opt the courts, forcing the judiciary into the unnatural and perhaps improper role of social policymaker.

\textsuperscript{13} See Mabley, supra note 12; infra Parts II.B, III.E. See generally Editorial, Don’t Let Lawyers Settle HMO Issues, \textit{State J. Reg.} (Springfield, Ill.), Oct. 7, 1999, at 4 (arguing that HMOs will pass on their litigation costs to their members in the form of higher premiums), available at 1999 WL 29250262.

\textsuperscript{14} See Richard L. Cupp, Jr., Editorial, Tobacco’s Big Loss Sets a Bad Precedent, \textit{USA Today}, Nov. 24, 1999, at 31A (discussing how the tobacco settlement between the state attorneys general and cigarette companies encouraged other government entities to bring suits against the paint and firearms industries), available at 1999 WL 6859779; infra Part IV.A-B. Richard Cupp is a professor of law at Pepperdine University School of Law. See Cupp, supra.


\textsuperscript{16} See Judyth Pendell, Editorial, Trial Lawyers’ Next Target: The Paint Industry, \textit{Wall St. J.}, Oct. 18, 1999, at A9 (stating that the deception with which the paint makers are charged occurred in the 1920s and 1930s); infra Part IV.A.2. Judyth Pendell is the Executive Director of the Center for Legal Policy at the Manhattan Institute. See Pendell, supra.


\textsuperscript{18} See id.
Part I of this Note provides a brief history of the tobacco litigation that is the fountainhead of the current lawsuits against the managed care industry, gun manufacturers, and the former makers of lead paint. This Note in Part II surveys the history of health care in America, reviews the crisis faced by the traditional system, and discusses the solution that managed care appeared to provide. Part III of this Note discusses class action lawsuits recently filed against HMOs, the proposed theories of recovery, and some of the litigation tactics employed. Part III also critiques the merits of the managed care lawsuits and concludes that victory for the plaintiffs would be harmful to the American health care system. Part IV examines the use of certain litigation strategies, borrowed from the tobacco suits, against gun manufacturers and the paint industry. Finally, in Part V, this Note argues that these lawsuits are an unwise attempt to turn over to the courts what should be legislative policy decisions.

I
TOBACCO LITIGATION

After a winning streak that spanned more than forty years,19 strategic lawyering finally brought cigarette manufacturers to the bargaining table, and in November 1998, the tobacco industry and the attorneys general of forty-six states reached a landmark settlement.20 Pursuant to the agreement, the five major tobacco companies agreed to reimburse the states' Medicaid agencies over $200 billion for the costs of treating tobacco-related illnesses.21 In return, the states pledged to forgo any future lawsuits against the tobacco companies.22 This remarkable turn of events was the result of an ingenious new legal strategy that circumvented the fundamental flaws of previous tobacco litigation.

A. The First Wave: 1950s and 1960s

Litigation by smokers against tobacco companies falls into three distinct temporal waves, each distinguished by a different plaintiff legal theory.23 The first wave involved lawsuits during the 1950s and 1960s in which plaintiffs utilized theories of deceit, breach of war-

19 See infra Part I.A-B.
20 See Tobacco Settlement, supra note 1, at 1.
21 See id. at 5.
22 See id.
ranty, and negligence. In *Lartigue v. R.J. Reynolds Tobacco Co.*, the widow of a lifetime smoker brought suit against a group of cigarette makers, alleging that the defendants' cigarettes caused her husband's lung cancer. The jury, in finding for the defendants, concluded that the tobacco companies could not have foreseen the harmful effects of smoking. This result proved typical of the period.

For every case like *Lartigue* that made it to trial, plaintiffs filed dozens more. These other cases did not reach settlement—settlement was a result no tobacco company considered an option. Rather, the plaintiffs' attorneys felt compelled to abandon their cases because of the "king of the mountain" strategy that tobacco companies employed. During this first wave of litigation, tobacco companies exploited their financial advantage by taking every deposition, filing every motion, and pursuing every alternative, all in an effort to bankrupt their opponents—a strategy that almost always worked. If plaintiffs could sustain their suits long enough to reach a jury, the question the jury faced was not causation but foreseeability.

During the early years of tobacco litigation, whether smoking posed any harm was still an open question. For the most part, the public still believed that the cigarette manufacturers knew of no link between smoking and disease. However, cigarette makers actually knew otherwise, and when that secret became public a generation

25 317 F.2d 19 (5th Cir. 1963).
26 Id. at 23.
27 See id. at 39-40.
28 Field, supra note 24, at 101.
30 Richard A. Daynard & Graham E. Kelder, Jr., The Many Virtues of Tobacco Litigation, Trial, Nov. 1998, at 34, 35. In an internal memo, a tobacco lawyer summed up the benefits of a "king of the mountain" defense: "To paraphrase General Patton, the way we won these cases was not by spending all of [the tobacco company's] money, but by making [the plaintiff] spend all his." Id. (quoting J. Michael Jordan, an attorney who defended R.J. Reynolds in the 1980s).
31 See id. at 35. As an example of this strategy, Daynard and Kelder cite the case of Rose Cipollone, who brought a landmark tobacco lawsuit during the second wave of tobacco litigation. See Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986); Player, supra note 29, at 318-19. In the *Cipollone* case, parties filed more than one hundred motions and four interlocutory applications, and the trial lasted four months. See Daynard & Kelder, supra note 30, at 35. The *Cipollone* case, which eventually reached the U.S. Supreme Court, cost the plaintiff's attorneys more than $3 million in out-of-pocket expenses and lawyer and paralegal time. See id. at 35-36.
32 See Field, supra note 24, at 105-06. In *Lartigue*, a suit filed during the first wave of litigation, the trial judge's jury instructions excluded from liability "manufactured products, the harmful effects of which no developed human skill or foresight can [avoid]." 317 F.2d at 59.
33 See Field, supra note 24, at 106.
later, it provided plaintiffs with powerful ammunition. Nevertheless, throughout the first wave of lawsuits, the tobacco companies responded to the plaintiffs' challenges with overwhelming success. The companies' defense seemed unassailable: because a link between smoking and illness remained unproven, the plaintiff could not show that the defendant knew its product to be harmful; thus, the plaintiff's breach-of-warranty claim collapsed. Even if a smoker could overcome this hurdle, he still faced the scorn of a jury who believed he had contributed to his own injury.

The first wave of litigation came to a close with the publication of the *Restatement (Second) of Torts*. The Restatement seemingly codified the tobacco companies' defense by stating in a comment that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." Many commentators viewed this statement as an indication of per se immunity for the tobacco industry. Courts, in turn, responded by nullifying claims against cigarette companies.

B. The Second Wave: 1980s

Smoking victims lost badly during the first wave of tobacco lawsuits. Before mounting a second challenge, assistance and a change in tactics was necessary. The government provided help in 1964 when the Surgeon General concluded that smoking was incontrovertibly a threat to health. In response, Congress passed the Cigarette Acts of 1965 and 1969. The 1965 Act required the placement of a warning on all cigarette packaging. The warning announced: "Caution: Cigarette Smoking May Be Hazardous to Your Health." To keep states from subjecting cigarette makers to inconsistent labeling require-
ments, Congress prohibited any other warnings from appearing on cigarette packaging.\textsuperscript{43} Ironically, this provision would turn out to be one of the tobacco companies' favorite defenses.\textsuperscript{44} In addition, the 1969 Act banned all cigarette advertisement from television and radio.\textsuperscript{45}

Plaintiffs' lawyers were very busy in the interim between the first and second litigation waves. Because the theories of recovery they argued during the first wave of lawsuits failed, plaintiffs' attorneys sought a change in tactics. One new idea was to attack the presumption created by the \textit{Restatement (Second) of Torts} by asserting that cigarettes were unreasonably dangerous and that their manufacturers should incur strict liability for the harm they caused.\textsuperscript{46} Legal theorists also provided plaintiffs' lawyers with additional tools.\textsuperscript{47} The new risk-utility theory reasoned that a manufacturer should be liable for injuries that its product caused if the product's risks outweighed its beneficial effects.\textsuperscript{48} Plaintiffs' attorneys felt that they could apply this theory to the cigarette industry on the basis that the social enjoyment of smoking did not outweigh the consequent increased cost of health care. In addition, the rise of comparative fault removed the all-or-nothing results previously available to plaintiffs under the traditional assumption-of-risk rationale.\textsuperscript{49}

Tobacco companies did not rest as their adversaries prepared new strategies.\textsuperscript{50} To counter the Surgeon General's evidence, the tobacco companies pointed to the findings of the Council on Tobacco Research, a research organization funded by the tobacco companies that disputed the existence of a link between smoking and disease.\textsuperscript{51} Moreover, in response to the growing belief that nicotine was addictive, tobacco defense lawyers began pointing to examples of numerous ex-smokers who had quit the habit cold turkey.\textsuperscript{52} Finally, to preclude courts from applying the risk-utility test, tobacco lawyers argued that no one knew of an alternative, safer design for cigarettes.

\textsuperscript{43} \textit{Id.} § 5.
\textsuperscript{44} \textit{See infra} notes 57-61 and accompanying text.
\textsuperscript{46} \textit{See Player, supra} note 29, at 315-16.
\textsuperscript{47} \textit{See id.}
\textsuperscript{48} \textit{See id.}
\textsuperscript{49} \textit{See id.}
\textsuperscript{50} \textit{See id. at} 316.
\textsuperscript{51} \textit{Id.} One of the most embarrassing revelations to come to light during the third wave of tobacco litigation is the fact that tobacco companies used the Council on Tobacco Research (CTR) as nothing more than a public relations tool, particularly as a means to perpetuate the debate over the connection between smoking and illness. \textit{Id.} at 323-24. Tobacco companies also made sure that attorneys were involved in all aspects of CTR research so that tobacco attorneys could invoke attorney-client privilege and the work product doctrine to deny plaintiffs' attorneys access to CTR research. \textit{Id.}
\textsuperscript{52} \textit{Id.} at 318.
In some states, tobacco lobbyists even persuaded legislatures to pass bills requiring courts to use the consumer expectations test rather than the risk-utility test—a test more favorable to cigarette makers.53

In the end, the result of the plaintiffs' new theories and the manufacturers' new defenses was the same as in the first wave of litigation: not a single victory for smokers.54 As in the first wave, the majority of cases never made it to trial as the tobacco companies simply outspent their opponents.55 In the few cases that did make it to trial, for most juries, the issue remained simple: smokers chose to engage in an activity they knew to be harmful.56

The Cigarette Acts ironically helped cigarette makers defend themselves by limiting the extent of state regulation of tobacco packaging and by providing cigarette companies with a preemption defense. The extent of the preemption defense, however, was unsettled among federal district courts and courts of appeals; in 1991, the Supreme Court granted certiorari in order to resolve the differences.57

*Cipollone v. Ligget Group, Inc.*,58 involved a plaintiff who was a lifetime smoker, and whose husband continued the lawsuit individually and as executor of her estate following her death from lung cancer.59 Plaintiff Rose Cipollone sought recovery alleging breach of express warranty, failure to warn, fraudulent misrepresentation, and conspiracy to misrepresent or conceal material facts.60 The defendants argued that the Cigarette Acts preempted such claims.61

The Supreme Court's decision in *Cipollone*62 was badly fractured. Justice Stevens, writing for a plurality, held that the Cigarette Acts preempted Cipollone's failure-to-warn claim.63 In reaching his conclusion, Stevens laid down a narrow rule of statutory construction that

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53 Id. at 316-17 ("Under a consumer expectations test, plaintiffs cannot recover if they knew the product was harmful to their health.").
54 Id. at 319.
58 789 F.2d 181 (3d Cir. 1986).
59 Id. at 183. At the trial level, the court awarded Mrs. Cipollone's husband $400,000 to compensate for the damages he suffered as a result of his wife's cancer. The jury, however, found Mrs. Cipollone 80% at fault for her illness. Under New Jersey comparative fault law, a plaintiff more than 50% liable for her injuries cannot recover. See 693 F. Supp. 208, 210 (D.N.J. 1988), *aff'd in part and rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992); Player, *supra* note 29, at 318.
60 See 789 F.2d at 184.
61 See *Cipollone v. Ligget Group, Inc.*, 593 F. Supp. 1146, 1148 (D.N.J. 1984), *rev'd*, 789 F.2d 181 (3d Cir. 1986); *Annas, supra* note 8, at 182. The issue for the Court, therefore, was whether the 1965 and 1969 Cigarette Acts precluded smokers and their families from suing tobacco companies under state tort laws. See 789 F.2d at 184-88.
63 Id. at 524 (plurality opinion).
required the resolution of stated preemption questions via analysis of only the express language of the statute, without consideration of the overall statutory scheme or the law's legislative history.\textsuperscript{64}

Although the result in \textit{Cipollone} foreclosed attacks against the tobacco companies based on failure to warn of the dangers of smoking,\textsuperscript{65} the decision was largely a victory for plaintiffs. The Court in \textit{Cipollone} essentially approved most of the intentional tort theories that the plaintiffs asserted.\textsuperscript{66} Despite this, the decision did not alter the dynamics of tobacco litigation which, for forty years, had resulted in nothing but defeat for plaintiffs.\textsuperscript{67} If plaintiffs were to succeed against the tobacco industry, they would need a fundamental change in strategy.\textsuperscript{68}

C. The Third Wave: 1990s to Present

The two flaws that proved fatal to the first and second waves of litigation were plaintiffs' inability to match the tobacco companies' war chests and juries' lack of sympathy for plaintiffs who willingly exposed themselves to harm.\textsuperscript{69} The current, third wave of tobacco litigation embodies innovative solutions to these problems.\textsuperscript{70} First, to match the resources of their opponents, plaintiffs have begun to unite by filing class action lawsuits on behalf of thousands, sometimes millions, of smokers.\textsuperscript{71} This tactic allows plaintiffs to rely on a team of well-financed and well-organized lawyers from dozens of law firms and stands in stark contrast to the prior situation in which a solo practitioner attempted to fund a lawsuit while representing just one victim.\textsuperscript{72} Second, to deny the tobacco companies the use of their powerful assumption-of-risk defense, plaintiffs' lawyers may now sue for damages using "blameless" plaintiffs.\textsuperscript{73} These new legal tactics,
combined with tobacco industry confessions,\textsuperscript{74} characterize the third wave of tobacco lawsuits. The new strategies allow plaintiffs to level the playing field between themselves and the tobacco companies. For the first time, plaintiffs have a chance to hold cigarette makers accountable for half a century's worth of injuries and illness.

1. Medicaid Reimbursement Suits

So far, the new strategies employed during the third wave of tobacco litigation have produced two unique methods of recovery. The more successful of the two involves lawsuits that state attorneys general, allied with private attorneys, have initiated seeking damages for the costs incurred by their state Medicaid programs in treating tobacco-related illnesses.\textsuperscript{75} The Attorney General of Mississippi filed the first of these lawsuits in 1994 in conjunction with private plaintiffs' attorney Richard Scruggs.\textsuperscript{76} Scruggs was the attorney who first conceived of using a "blameless" state agency, Medicaid, as a plaintiff in a suit against the tobacco companies.\textsuperscript{77} The tactic effectively denied the tobacco companies their assumption-of-risk defense; against the state, tobacco companies could not argue that the plaintiff had engaged in voluntary exposure to harm from cigarettes.\textsuperscript{78} Interestingly, Scruggs is the same attorney who would make headlines several years later as the leader of a group of attorneys filing class action lawsuits on behalf of aggrieved members of HMOs.\textsuperscript{79}

The benefits of this new strategy quickly became apparent to other attorneys general, and soon the tobacco industry faced Medicaid suits from nearly every state in the country.\textsuperscript{80} In November of 1998, the overwhelming breadth of these legal challenges forced the tobacco industry to settle forty-six of the state claims for an amazing

\textsuperscript{74} See Cupp, supra note 35, at 481.
\textsuperscript{75} See Kearns, supra note 23, at 1340.
\textsuperscript{77} See Cupp, supra note 35, at 476-77.
\textsuperscript{78} See Cupp, supra note 35, at 471. ("A unifying theme of the recent third wave tobacco cases is their effort to structure recovery theories in a manner that minimizes focus on consumer assumption of risks in choosing to smoke.").
\textsuperscript{79} See id. at 37 & n.19.
\textsuperscript{80} See Plaintiffs' Lawyers Step Up Pressure Against HMOs, LIABILITY WK., Nov. 29, 1999, available at 1999 WL 13960687.
$206 billion, to be paid over the following twenty-five years.\textsuperscript{81} This agreement followed settlements reached by the tobacco companies and four states for $40 billion.\textsuperscript{82}

2. \textit{Class Action Lawsuits}

The second prong of lawsuits comprising the third wave of tobacco litigation involves class action lawsuits filed on behalf of millions of addicted smokers. Until recently, this challenge to the tobacco companies had met with less success than the Medicaid reimbursement suits. Although these lawsuits possessed the two hallmarks of successful tobacco litigation—a lot of money and blameless plaintiffs\textsuperscript{83}—courts had been reluctant to certify such large classes of plaintiffs.\textsuperscript{84}

Then, in July 2000, ignoring the concern other courts expressed over a lack of commonality, a Florida state court allowed a tobacco-related class action lawsuit to reach a jury for the first time.\textsuperscript{85} The jury, citing the industry's blatant fraud and misrepresentation, awarded an amazing $145 billion to the 500,000 Florida smokers rep-

\begin{itemize}
\item \textsuperscript{81} See Tobacco Settlement, supra note 1, at 1.
\item \textsuperscript{82} See id. The four states that settled earlier were Mississippi, Florida, Texas, and Minnesota. See id. These states received more money than they would have under the national settlement, as well as nonmonetary concessions that the remaining forty-six states did not receive. See Michael V. Ciresi, \textit{An Account of the Legal Strategies That Ended an Era of Tobacco Industry Immunity}, 25 Wust. Mitchell L. Rev. 439, 441-42 (1999); Daynard & Kelder, supra note 30, at 42. The Mississippi, Florida, and Texas cases settled on the eve of trial, and the Minnesota case settled just before the case was to go to the jury. See Tobacco Settlement, supra note 1, at 1.
\item \textsuperscript{83} This prong began as a single, nationwide class action lawsuit, \textit{Castano v. American Tobacco Co.}, 160 F.R.D. 544 (E.D. La. 1995), rev'd, 84 F.3d 734 (5th Cir. 1996). \textit{Castano} purported to represent "[a]ll nicotine dependent persons in the United States." Id. at 549. The plaintiffs were well financed and constructed a representation team of over sixty law firms. Field, supra note 24, at 115. According to the plaintiffs, the tobacco companies concealed the addictive nature of nicotine and manipulated the levels of nicotine in cigarettes to increase their addictiveness. \textit{Castano}, 160 F.R.D. at 548. This theory shifted the blame from smokers to the tobacco companies and allowed the plaintiffs to gain the moral high ground. See Cupp, supra note 35, at 473.
\item \textsuperscript{84} Kearns, supra note 23, at 1354-55. The district court certified the class largely out of a desire to avoid the millions of individual lawsuits it saw as the alternative. \textit{Castano}, 160 F.R.D. at 555-56. In rejecting this rationale, the court of appeals criticized the district court for basing its decision on efficiency without considering how variations in state law might affect the predominance and superiority requirements of Rule 23 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 23; \textit{Castano}, 84 F.3d at 740-45. The Fifth Circuit was also suspicious that the plaintiffs' novel theory of recovery, addiction, would involve questions unique to each individual, thus destroying the commonality of the class. Id. at 742-43 n.15. Finally, the Fifth Circuit explained that "[t]he collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury." Id. at 752.
\end{itemize}
resented in the class action. The award was by far the largest in U.S. civil court history and greatly exceeded the combined market value of the five corporate defendants.

Much of the success that plaintiffs have realized during the third phase of tobacco litigation is attributable to the thousands of inculpatory documents that anonymous industry insiders have recently brought to light. These leaks from high-level officials paint a picture of an industry that engaged in a deliberate campaign of deceit and fraud against the American public. These embarrassing documents have added much weight to plaintiffs' theories of conspiracy, deceit, and fraud, and have played an important role in the third wave of tobacco litigation. Perhaps most damaging has been the evidence that tobacco companies were aware of the dangers of smoking and the addictive nature of nicotine well before even the Surgeon General, but chose to deny the existence of such findings. As the truth about cigarette makers came to light, juries no longer viewed smokers as the only culpable party, but saw them rather as victims of a manipulative and deceptive industry.

As the third wave of tobacco litigation continues to play out, its repercussions extend well beyond the parties involved. Most noticeably for the purposes of this Note, the recent successes of the tobacco litigation spawned similar legal attacks on other American industries,

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86 See Cohen, supra note 85, at 44.
87 See id. at 45. Although the $145 billion verdict is less than the $206 billion for which tobacco companies settled the Medicaid reimbursement suits, see supra note 81 and accompanying text, the Florida award poses a greater threat to the tobacco industry's economic viability because the judgment may require a lump-sum payment rather than a payment over a term of years. See Cohen, supra note 85, at 45. Ironically, if the Florida verdict stands, it could leave state governments rooting for the survival of tobacco companies to ensure the complete reimbursement of state Medicaid agencies.
88 See ANNAS, supra note 8, at 197-98; Cupp, supra note 35, at 474; Field, supra note 24, at 121-22.
89 See Field, supra note 24, at 120-22.
90 Cupp, supra note 35, at 489 ("New evidence of fraud by tobacco manufacturers is likely the most important factor distinguishing the third wave cases from earlier litigation." (footnote omitted)); Field, supra note 24, at 122, 124. Specifically, evidence of fraud may anger jurors and change their focus from the blameworthiness of the plaintiff-smoker to that of the deceptive cigarette maker. See Cupp, supra note 35, at 489-90.
91 See Field, supra note 24, at 121 n.232.
92 See, e.g., id. at 124. The tide of litigation might even be turning against the tobacco industry in what has historically been its area of greatest strength: suits brought by individual smokers. In California, a jury recently awarded a lifetime smoker $3 billion in punitive damages for the smoking-induced cancer that now threatens to kill him. See Gordon Fairclough, Philip Morris Is Hit with $3 Billion Verdict, WALL ST. J., June 7, 2001, at A3. The viability of suits brought by individual smokers received a recent boost when the U.S. Supreme Court declined to review and effectively upheld a Florida case in which the jury awarded an individual plaintiff damages against a tobacco company. See Brown & Williamson Tobacco Corp. v. Carter, 121 S. Ct. 2599 (2001) (mem.), denying cert. to 778 So. 2d 932 (Fla. 2000); Henry Weinstein, High Court Lets Smoker Award Stand, L.A. TIMES, June 30, 2001, at A1.
including providers of managed care, gun manufacturers, and the paint industry. However, those who cheer the fate of cigarette makers may find much less to celebrate as these other industries begin to grapple with these aggressive new plaintiff tactics.

II
A BRIEF HISTORY OF HEALTH CARE IN AMERICA

A. The Development of Unlimited Health Care

The recently filed class action lawsuits against managed health care companies come at a time when many Americans have a low opinion of the health care industry. Stories of just how bad managed health care can be have embedded themselves in the American psyche. Newspapers and commentators swarm to report the horror stories: the patient denied crucial tests because her HMO wanted to save a little money, or the nurse who misdiagnosed a patient because she was working far from her patient, sitting at the other end of an HMO's telephone "hotline." Stories like these motivate lawyers like Richard Scruggs, who proclaimed his class action suit against managed care provider Aetna to be "the last line of defense for millions of men, women, and children" against an industry run amok. The state of health care in America has truly reached a desperate stage when patients need protection from the health care providers. How could America's medical establishment, the undisputed world leader in medical science and technology, become so despised? The answer to that question begins with a brief look at where American health care started and where it has been.

Until the middle of this century it was rare for an individual to have health insurance. The rise of powerful labor organizations and a post-war economic boom, however, convinced American CEOs in

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93 See, e.g., Joan Biskupic, Court Weighs Doctor's Bonus vs. Patient's Care, Wash. Post, Feb. 17, 2000, at A1 (describing an example of the negative effects of physician incentives to limit treatment costs). Cindy Herdrich won $35,000 from her health care provider after it forced her to wait eight days before receiving a critical diagnostic test that would have revealed her inflamed appendix. Id. Herdrich's case eventually became the basis of a Supreme Court decision holding that mixed eligibility and treatment decisions by HMO physicians are not fiduciary acts under ERISA. See Pegram v. Herdrich, 530 U.S. 211, 237 (2000); infra notes 203-11 and accompanying text.

94 See, e.g., ANDERS, supra note 10, at 8-9. Anders relates the tragic story of little James Adams who, as an infant, became very ill. The gravity of the boy's situation was not apparent to the HMO nurse whom the child's parents consulted over the telephone. Because the nurse and an on-call doctor did not authorize emergency procedures, a delay occurred in James's treatment, resulting in the amputation of both his hands and both his feet. See id. at 1-13.

95 See supra notes 76-77 and accompanying text.

96 Nocera, supra note 7, at 38.

97 See ANDERS, supra note 10, at 22.

98 Id. at 19-20.
the 1950s that providing health care for their companies' employees could serve as an affordable, important tool in labor relations.99 Unfortunately, by the 1980s, what employers had initially considered affordable largess had become an intolerable drain on corporate resources.100 The economic boom of the 1950s that inspired employer insurance inevitably slowed, but in the interim, employees had come to consider employer-funded health care the employer's duty rather than choice.101

Meanwhile, a trip to the doctor took on different meaning. During the 1960s and 1970s, health care became a very specialized and expensive proposition.102 What may have been a simple visit to the doctor in 1950 came to involve, a generation later, an exhaustingly thorough examination that left no stone unturned.103 Modern treatment often involved a team of specialists using the most advanced (and expensive) diagnostic machines, ordering batteries of tests, and prescribing the latest in wonder drugs.104

As the methods for patient treatment changed, so did doctors' attitudes. Beginning in the 1960s, American medical schools encouraged their students to gravitate to the most narrow and difficult specialties.105 Doctors spent millions of employers' dollars not on curing or preventing disease, but in slowing down the effects of advanced illnesses.106 Because doctors received payment for each test they ran or for each drug they prescribed, the system encouraged doctors to use their advanced training and resources liberally—often at great cost to employers.107

B. The Rise of Managed Care

By the 1980s, health care expenses were responsible for an enormous amount of corporate resources, and the situation was growing

99 Id. at 20.
100 Id. at 20-25. Anders quotes Joseph Califano, a former Chrysler director: "Chrysler opened its treasury door to doctors and hospitals . . . Chrysler increasingly insulated its employees from any sense of what health care cost . . . This gave the doctors the power to write their own checks on the Chrysler account." Id. at 20.
101 See id. at 22 ("Workers had begun to regard health coverage as an unending free resource—an entitlement.").
102 See id. at 20-21.
103 See id.
104 See id. at 21.
105 See id.
106 See id.
107 See id. at 24-25. Anders relates one example of the peculiar effect that the opportunity for treatment can have on employees: "When Chrysler put in a generous mental-health benefit, psychiatric treatment of its workers and their families jumped fivefold. There was no sign that the car company had begun hiring workers who were more disturbed . . . Instead, the mere existence of the benefit was generating demand." Id. at 21.
worse each year. Nationwide, the cost of health care was increasing at an annual rate greater than ten percent, and many corporations' health plan costs were rising far faster than their overall corporate sales. However, changing the system would not be easy. Employers had created an ideal world for patients and doctors in which patients received the best health care, their doctors received payment based on the volume of services provided, and a deep-pocketed third party footed the bills. In addition, despite their financial incentive to overtreat patients, doctors had the privilege of controlling the entire system. In essence, then, American corporations had created a system in which they could not win. Whether a doctor overtreated a patient for his own financial benefit or acted out of a sincere desire to do everything possible for his patient, he had no incentives to limit that treatment. It was apparent that employers had written a blank check to the health care industry, and patients and doctors were taking full advantage of it.

The solution for corporations was "managed care." The HMO exemplified this new system, which fundamentally altered the way patients received care and doctors provided it. No longer would a doctor receive payment for each test he ordered or for each drug he prescribed; under managed care, a doctor would receive a flat fee to cover all patient care—a system known as "capitation." If the doctor provided no services to a patient, he could keep the entire fee; however, the cost of any treatment he provided would be deducted from his fee. This new strategy achieved exactly what corporations needed: it aligned doctors' financial interests with those of employers rather than with those of patients.

Managed care introduced other cost-control measures to the health care industry. From a doctor's perspective, the most invasive

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108 Id. at 22.
109 Id.
110 See id. at 24-25.
111 See id. at 25.
113 ANDERS, supra note 10, at 25.
114 See id. at 25-26; MICHAEL E. MAKOVER, MISMANAGED CARE: HOW CORPORATE MEDICINE JEOPARDIZES YOUR HEALTH 13 (1998). Managed care insurers "in effect hire doctors, hospitals, and other services to provide care to their subscribers, who pay the insurers to use those services. This critical difference [as compared with fee-for-service health plans] gives the insurance company direct control over those providing health care to subscribers." Id.
115 ANDERS, supra note 10, at 26.
116 See id.
117 Id. at 25-26; see MK Gaedeke Roland, Comment, Looking for a Prince Among the Frogs: Solutions to ERISA's Preemptive Effect on Improving Health Care, 47 Buff. L. Rev. 1487, 1523-25 (1999).
was the use of “managed care reviewers” to review a doctor’s method of treatment.\textsuperscript{118} These reviewers, usually an HMO’s own employees and sometimes not even doctors, check and second-guess the cost-effectiveness of a doctor’s method of treatment.\textsuperscript{119} For big-ticket items such as imaging tests or lengthy hospital stays, HMOs require doctors to gain prior approval.\textsuperscript{120} If the treatment does not meet an HMO’s standards for value, the reviewer denies the treatment.\textsuperscript{121} Under a managed care system, doctors find themselves relinquishing much of their professional autonomy.

In a managed care world, the patient and her doctor no longer determined between themselves what was in the best interests of the patient. Managed care introduced a new player into health care, someone whose primary job centered not on advancing the patient’s health, but rather on the HMO’s bottom line.\textsuperscript{122} Managed care trampled upon the sacred patient-doctor relationship, destroying doctors’ status as trusted confidants who are interested primarily in their patients’ well-being.\textsuperscript{123} In a managed care setting, a doctor’s interests are conflicted.\textsuperscript{124} Although his training and ethical duty tell him to do all he can to treat a patient, his supervisor and even his paycheck

\textsuperscript{118} See Anders, supra note 10, at 87. These managed care reviewers function as overseers of the HMO’s physicians and they “frequently relent if a doctor insists that good medical judgment requires an exception to [established HMO procedures].” Id.

\textsuperscript{119} See id. at 87-88. As an example of the detail with which managed care reviewers scrutinize doctors’ decisions, Anders reports the experience of one southern California doctor who attempted to prescribe a smaller-than-normal pill that his young patient could more easily swallow: “A Utah-based HMO clerk pulled up the child’s medical records and declared during a phone review, ’[The child] was able to swallow an even larger pill last week.’” Id. at 87-88. According to the plaintiffs who filed a class action suit against HMO Cigna Corporation, Cigna “analyzes the clinical practice patterns of individual physicians” and identifies both “cost effective” physicians and physicians “who utilize more than the optimal amount of health services.” Cigna Class Action Complaint, supra note 6, ¶ 73(e). Those doctors with “undesirable practice profiles . . . are [then] reminded that Cigna contracts only with practitioners who provide ‘appropriate utilization.’” Id.

\textsuperscript{120} See Anders, supra note 10, at 26, 78.

\textsuperscript{121} See id. at 86-87; Roland, supra note 117, at 1492. Under traditional fee-for-service plans, an insurer often disputed whether it was required to pay for a patient’s treatment, but that dispute took place after the patient received the care. Id. In a managed care world, the insurer may refuse payment for a service before a patient receives the service, leading HMOs to refuse more treatment than under the earlier fee-for-service regime. Id.

\textsuperscript{122} See Anders, supra note 10, at 25-26.

\textsuperscript{123} See id. at 78; Cerminara, supra note 112, at 14-15. Cerminara writes:

Patients thus have watched the traditionally personal physician-patient relationship transform into a sterile interaction in which care might be denied or might not be offered because of cost considerations. . . . Consumers of health care services hear that the system today depends not on confidence, trust and personal relationships, but on \textit{caveat emptor}.

urge him to provide nothing but the minimum amount of patient care.

For the patient, managed care limits the freedom to see a doctor of her choice. HMO members must choose a "primary care" physician from a list of preselected doctors affiliated with their particular HMO.\textsuperscript{125} If a patient wants to see a specialist, she first needs to visit her primary-care physician.\textsuperscript{126} This doctor, ever mindful of the accountant watching over his shoulder, then determines if more expertise is truly necessary.\textsuperscript{127} If the doctor deems a specialist necessary, the patient receives another list of names. This list does not necessarily identify the doctors most skilled in treating certain illnesses, but instead names those specialists with whom the HMO has arranged contracts for discounted services.\textsuperscript{128}

Although the managed care system may raise the ire of patients and doctors, it accomplished exactly what employers desired.\textsuperscript{129} HMOs made good on their promise to tame the sky rocketing costs of health care.\textsuperscript{130} For many companies, HMOs cut double-digit health care expenditures in half and left the companies with affordable health plans.\textsuperscript{131} State and local governments also recognized the relief that managed care could offer from budget-breaking health expenditures, and soon, government employees across the nation found themselves enrolled in HMOs.\textsuperscript{132} After the introduction of HMOs, the American health care scene changed dramatically within only a few years. By the late 1990s, estimates indicated that managed care, a system of health insurance that covered less than one in ten Americans in the mid-1980s,\textsuperscript{133} insured over eighty percent of working Americans with health insurance.\textsuperscript{134}

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\textsuperscript{125} & See id. at 26, 76. \\
\textsuperscript{126} & Id. at 76. \\
\textsuperscript{127} & See id. at 76, 78-79. The plaintiffs in the Cigna class action suit refer to a patient's primary-care physician in a managed care context as a "gatekeeper." Cigna Class Action Complaint, supra note 6, ¶ 59. This gatekeeper "provides the basic medical services for the [HMO] member, while coordinating any additional medical services that might be needed." Id. Among the responsibilities of the gatekeeper is the determination of "whether [an HMO] member should be referred to a specialist." Id. \\
\textsuperscript{128} & See Andere, supra note 10, at 80, 89. \\
\textsuperscript{129} & See id. at 29. \\
\textsuperscript{130} & See id. at 29-31 (reviewing the cost-cutting example of Allied Signal, which big companies across the nation emulated). \\
\textsuperscript{131} & See id. at 31; cf. Roland, supra note 117, at 1497 (arguing that HMOs reduced employers' expenditures on health care not by decreasing the cost of medical services, but by decreasing the amount of care provided). \\
\textsuperscript{132} & Andere, supra note 10, at 33. \\
\textsuperscript{133} & Id. at 29. \\
\textsuperscript{134} & Edith M. Kallas et al., Class Actions in the Healthcare Context, in Health Care Law and Litigation 505, 510 (ALI-ABA Course of Study, Oct. 14, 1999), available at WL SE34 ALI-ABA 505.
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Managed care is the dominant means of health insurance in America because it offers superior cost savings over any other type of insurance. The cost-containment systems that made the success of managed care possible, however, are precisely what has engendered the American public’s scorn of HMOs.\textsuperscript{135} Outraged at what they perceive as shortcomings in their health care, HMO members have filed class action lawsuits against their providers claiming they were denied necessary medical treatment because of the HMOs’ focus on cutting costs.\textsuperscript{136}

III
RECENT CLASS ACTION LAWSUITS AGAINST HMOs

A. Background

The 1999 Thanksgiving holiday did not find the managed care industry with much to celebrate. Earlier that week, five of the nation’s largest managed care providers became the targets of class action lawsuits.\textsuperscript{137} The plaintiffs, members of the defendant HMOs, allege that the HMOs misrepresented the coverage they provided and violated certain duties owed to their members.\textsuperscript{138} The Thanksgiving week lawsuits came on the heels of four similar lawsuits filed against HMOs.\textsuperscript{139}

\textsuperscript{135} See \textsc{Anders}, supra note 10, at 227-29.

\textsuperscript{136} See \textsc{Cerminara}, supra note 112, at 9-10.

\textsuperscript{137} Rubin & Weinstein, supra note 4. The Thanksgiving week lawsuits sought relief from the following HMOs: PacifiCare Health Systems Inc., Foundation Health Systems Inc., Cigna Healthcare, Prudential Health Care, and Humana Inc. \textit{Id.} The five suits were filed in the federal district court in Hattiesburg, Mississippi by a consortium of fourteen law firms led by Richard Scruggs. \textit{Id.; Five More HMOs Face Class-Action Lawsuits, Best’s Ins. News, Nov. 24, 1999, available at 1999 WL 21819664.}

\textsuperscript{138} See \textit{Five More HMOs Face Class-Action Lawsuits, supra note 137.}

\textsuperscript{139} See Rubin & Weinstein, supra note 4. The same group of attorneys had initiated similar lawsuits against PacifiCare and Aetna. \textit{See Five More HMOs Face Class-Action Lawsuits, supra note 137.} The first of these HMO suits, filed on October 4, 1999, names Humana as defendant and alleges that the health plan did not disclose the role that cost considerations played in making medical decisions. \textit{See Rebecca Lentz, \textit{See You in Court: HMOs Face a Groundswell of Lawsuits from Patients, Mod. Physician, Nov. 1, 1999, at 3, available at 1999 WL 8747968.} The health insurer, Aetna, found itself the subject of two lawsuits, each also filed during the first week of October 1999. \textit{Id.} The first, filed in federal district court in Philadelphia, accuses Aetna of breaching a duty to its members by failing to disclose information about physician compensation. \textit{Id.} The second Aetna suit, filed a day later in federal district court in Hattiesburg, Mississippi, alleges mail fraud and extortion. \textit{Id.} The group of lawyers responsible for the Thanksgiving week lawsuits has since succeeded in consolidating the suits before a single federal judge in Miami. \textit{See Panel Sends 50 H.M.O. Suits to One Judge, N.Y. Times, Oct. 25, 2000, at C9.}

The cases were consolidated before Judge Moreno of the District Court for the Southern District of Florida and renamed \textit{In re Managed Care Litigation. See In re Managed Care Litig., Nos. MDL 1334, 00-1534-MD, 2001 WL 660899, at *1 (S.D. Fla. June 12, 2001). On June 12, 2001, Judge Moreno partially dismissed the plaintiffs’ claims but allowed their attorneys to refile amended complaints. \textit{Id.} at *23. In his order, Judge Moreno explained that the plaintiffs did not provide enough examples of the documents and advertisements they claim misled them, thus failing to plead their RICO claims with sufficient specificity.}
In each lawsuit, the plaintiffs allege that their HMOs had breached a duty owed to their members by failing to disclose that the HMOs incentivized doctors to limit treatment in order to keep costs down.\(^\text{140}\) Without full disclosure, the plaintiffs allege, they "cannot make informed choices about which plans to enroll in or whether to seek care outside of a plan."\(^\text{141}\) The plaintiffs complain that these cost-reduction efforts interfered with their doctor-patient relationship and discouraged doctors from providing necessary medical care.\(^\text{142}\) According to the plaintiffs, this "heavy-handed extortionate conduct"\(^\text{143}\) constitutes a violation of the civil Racketeer Influenced and Corrupt Organizations Act (RICO)\(^\text{144}\) and the Employee Retirement Income Security Act (ERISA).\(^\text{145}\) The plaintiffs seek restitution, punitive damages, and an injunction to prevent HMOs from continuing to interfere with doctors' medical judgment.\(^\text{146}\)

\(^{140}\) Id. at *13. Judge Moreno also dismissed the plaintiffs' ERISA claims because the plaintiffs failed to show that they had exhausted their administrative remedies. \textit{Id.} at *19. The judge, however, invited the plaintiffs to replead showing exhaustion. \textit{Id.}

\(^{141}\) Despite dismissing most of the plaintiffs' claims, the judge appeared more receptive to the underlying theories of recovery than did the Third Circuit when it heard a similar lawsuit involving the insurer Aetna. \textit{See id.} at *4-*5 (criticizing \textit{Maio v. Aetna Inc.}, 221 F.3d 472 (3d Cir. 2000)); \textit{infra} notes 196-99 and accompanying text. In fact, Judge Moreno wrote that the \textit{Maio} court's reasoning should "not be adopted," explaining that health plan enrollees possess more than a mere contractual interest in their health plan. \textit{Managed Care}, 2001 WL 660869, at *4-*5. Judge Moreno suggested that enrollees can recover under RICO if they were fraudulently induced to purchase their health insurance, and that recovery would be possible even if the health care provider never breached its contracts with its enrollees. \textit{Id.}

\(^{142}\) \textit{Cigna Class Action Complaint, supra} note 6, ¶ 16; \textit{Five More HMOs Face Class-Action Lawsuits, supra} note 137.


\(^{144}\) \textit{See Cigna Class Action Complaint, supra} note 6, ¶ 11; \textit{Five More HMOs Face Class-Action Lawsuits, supra} note 137.

\(^{145}\) \textit{See Cigna Class Action Complaint, supra} note 6, ¶ 13.


\(^{148}\) \textit{See Cigna Class Action Complaint, supra} note 6, ¶ 1; \textit{Geyelin, supra} note 145. The Cigna class action complaint is typical of the other HMO suits that Richard Scruggs's team of attorneys filed Thanksgiving week of 1999 and is very similar to the lawsuit that his team filed against Aetna six weeks earlier. \textit{Compare Cigna Class Action Complaint, supra} note 6, with Amended Class Action Complaint, O'Neil v. Aetna, Inc., No. 2:99 CV 284 (S.D. Miss. filed Nov. 8, 1999) (on file with author) [hereinafter Aetna Class Action Complaint]. Some of the more notable allegations raised in the Cigna suit include the following: Cigna is engaged in a nationwide fraudulent scheme aimed at inducing the plaintiff class to enroll in Cigna's HMO plans. \textit{Cigna Class Action Complaint, supra} note 6, ¶¶ 4, 7. The scheme is fraudulent because it includes misleading and deceptive misrepresentations and omissions. \textit{Id.} ¶ 7. Specifically, Cigna states that it is committed to maintaining and improving the quality of health care it provides for its members, but in actuality, Cigna pursues a series of undisclosed policies aimed at reducing the quality and amount of medical
B. Theories of Recovery

RICO is a complex statute initially designed to combat organized crime. It is difficult to state a valid RICO claim, and a plaintiff in a civil suit needs to prove that a defendant violated two or more criminal laws, such as mail fraud, wire fraud, bribery, or extortion. The plaintiffs in the HMO suits claim that the bonuses which HMOs paid to doctors and claims reviewers who denied expensive treatments, along with the HMOs' use of interstate communications to advertise their services, satisfy RICO's statutory elements.

RICO was opened as a possible avenue of recovery for aggrieved HMO members after the Supreme Court's decision in *Humana Inc. v. Forsyth*. This 1999 case, originating in Nevada, involved beneficiaries of group health insurance policies issued by Humana. The beneficiaries learned that Humana had negotiated discounted contracts with the hospitals providing treatment without lowering the beneficiaries' premiums accordingly. The plaintiffs sued Humana under the federal RICO statute.

At issue in the lower courts was whether the McCarran-Ferguson Act, passed in 1945 by Congress to protect states' efforts in regulating insurance, barred the plaintiffs in *Forsyth* from bringing their insurance suit under RICO. The case eventually reached the Supreme Court, where it was decided that RICO could be used to sue for fraudulent practices in the insurance industry.
Court, where Justice Ginsburg, writing for a unanimous Court, explained that the McCarran-Ferguson Act did not cede the entire field of insurance regulation to the states.\(^{156}\)

Justice Ginsburg wrote that federal law may apply so long as it "does not directly conflict with state regulation, and . . . [its application] would not frustrate any declared state policy or interfere with a State's administrative regime."\(^{157}\) Applying this rationale, the Court concluded that the RICO suit did not impair Nevada insurance laws nor frustrate Nevada policy simply because RICO provided stiffer penalties for insurance fraud.\(^{158}\) In fact, the Court concluded that RICO "appears to complement Nevada's statutory and common-law claims for relief"\(^{159}\) and "advances the State's interest in combating insurance fraud."\(^{160}\) Therefore, the McCarran-Ferguson Act did not bar the plaintiffs from suing Humana under the federal RICO statute.\(^{161}\)

As a second ground of recovery, plaintiffs in the HMO lawsuits cite the Employee Retirement Investment Security Act (ERISA).\(^{162}\) ERISA is a federal statute regulating the relationship between HMOs and employees who receive their medical coverage through their employer.\(^{163}\) Traditionally, ERISA served as a shield for insurers because it barred members of employer-sponsored health plans from suing their health care provider.\(^{164}\) Plaintiffs' attorneys, however, found a way around ERISA: by alleging a breach of fiduciary duty, they are able to bring suits against HMOs on behalf of employees.\(^{165}\) In these cases, plaintiffs claim that HMOs breach their obligation to put the

\(^{156}\) 525 U.S. at 308.
\(^{157}\) Id. at 310.
\(^{158}\) Id. at 303, 311, 314.
\(^{159}\) Id. at 313.
\(^{160}\) Id. at 314.
\(^{161}\) Id. See generally Eric Beal, Note, It's Better to Have Twelve Monkeys Chasing You than One Gorilla: Humana Inc. v. Forsyth, the McCarran-Ferguson Act, RICO, and Deterrence, 5 Conn. Ins. U.J. 751 (1999) (discussing how the availability of RICO actions deters insurers from defrauding policyholders).
\(^{163}\) Roland, supra note 117, at 1489-90; Levey, supra note 162. Congress passed ERISA in 1974 as a means of protecting employees' pensions. See Roland, supra note 117, at 1489. As part of its goal to create a national standard, Congress included in ERISA a clause that preempted states from regulating employer pension plans. See id. at 1493-94. The broad preemption language, however, also preempted states from regulating health benefits that employees receive from their employers. See id. at 1494-95. As a result, employees essentially lost their state law causes of action against health insurers covered under ERISA and retained only the partial remedies that federal courts provide. See id. at 1498, 1499-1501.
\(^{164}\) See Levey, supra note 162.
\(^{165}\) Id.
patients' needs first by financially incentivizing doctors to limit the medical treatment they provide. Thus, after Forsyth and plaintiffs' attorneys' circumvention of the ERISA shield, the stage was set for plaintiffs to initiate class action lawsuits against the managed care industry. All that was needed were the right players.

C. Tactics

The settlement between tobacco companies and the state attorneys general of less than a year earlier conveniently provided a company of experienced and well-financed lawyers to lead the HMO class action lawsuits. In fact, roughly half the attorneys in the loosely assembled network of plaintiffs' lawyers who brought the lawsuits against the managed care industry are veterans of the tobacco litigation. The group's leader is Richard Scruggs, the attorney who played a pivotal role in the tobacco suits. His team, emboldened by its successes against the tobacco corporations and fueled by the staggering attorneys fees it collected, seeks to repeat its success in the health care arena. The presence of these attorneys, and the legal tactics they bring, make the HMO suits a derivative of the successful tobacco settlement reached in the fall of 1998.

Although the suits against HMOs are based on RICO grounds, Scruggs and his group of lawyers are borrowing at least two of the techniques they used to force tobacco companies to the bargaining table: pressure from Congress and pressure from Wall Street.

1. Political Action

Before the first HMO lawsuit was filed in October 1999, Congress was well aware of the criticism that HMOs faced for their cost-reduction policies. The House considered, and passed, a patients' rights bill that would have expanded an HMO member's ability to sue an HMO. The Senate passed its own version of the bill, but the con-

166 Id.; see supra note 140 and accompanying text.
167 See Plaintiffs' Lawyers Step Up Pressure Against HMOs, supra note 79.
168 Id.
170 See Milo Geyelin, Lawyer Seeks Support for Settlement with HMOs, WALL ST. J., Nov. 22, 1999, at B2; Torry, supra note 169. One of the authors of the Patients' Bill of Rights Act in the House, although still supporting increased liability for insurers, criticized the recent class action lawsuits filed against the managed care industry and sought to amend the patients' rights bill to prohibit class action lawsuits against HMOs. See Norwood Seeks Amendment Barring HMO Class-Action Suits, BEST'S INS. NEWS, Jan. 12, 2000, available at 2000 WL 4084395.
gressional term ended without resolution of how far the right to sue should extend.\textsuperscript{171}

Scruggs's team of lawyers has met with lawmakers on Capitol Hill in an attempt to lay the groundwork for a global settlement akin to the agreement Congress nearly reached with the tobacco companies in 1997.\textsuperscript{172} Building on the action already taken in Congress, Scruggs proposes a bill that would cap the annual liability exposure HMOs would face in return for an end to HMOs' placing limitations on patient care.\textsuperscript{173} However, unlike the case of tobacco lawsuits, in which various liability theories were well tested over decades, many legal questions regarding HMO liability remain outstanding. At this point most HMOs seem willing to test their defenses in court before relinquishing perhaps billions of dollars in a settlement. In addition, public criticism of HMOs has yet to reach the level of vitriolic fury projected toward the tobacco companies in the months before that industry settled.

2. Financial Pressure

The financial markets provide a source of leverage that may prove even more powerful than politics. In addition to his efforts on Capitol Hill, Scruggs has visited Wall Street to "educate" analysts there about the problems with HMOs and just how vulnerable his lawsuits

\textsuperscript{171} See A Survey of the Voting Record of the 106th Congress, N.Y. TIMES, Dec. 17, 2000, at 48. Technically, a patient already had the right to sue her HMO for allegedly bad care, but could recover only the cost of the denied treatment. Torry, \textit{supra} note 169. Patients complained that without a cause of action for damages, their rights were severely limited, and it was this limitation that Congress sought to change with its patients' rights bill. \textit{Id.}

In June of 2001, following a change of party control in the Senate, the Democrats succeeded in passing their version of a patients' bill of rights. See Helen Dewar & Amy Goldstein, \textit{Senate Passes Patients' Rights Bill}, WASH. POST, June 30, 2001, at A1 (discussing passage of the Bipartisan Patient Protection Act, S. 1052, 107th Cong. (2001)). The Senate bill includes three key rights: it guarantees enrollees access to basic services, provides for independent review of disputed decisions, and gives patients the right to sue their insurer in state as well as federal court. See S. 1052; David Rogers, \textit{Democrats Hope Senate Bridge-Building Wins GOP Patients-Rights Votes in House}, WALL ST. J., July 2, 2001, at A3. President Bush has threatened to veto the legislation, arguing that expanding an individual's ability to sue in state court would result in higher insurance costs and ultimately greater numbers of uninsured people. See Dewar & Goldstein, \textit{supra}.

Rather than await federal action, several states have already enacted legislation to improve patient care. See Kallas et al., \textit{supra} note 134, at 512 (describing managed care liability laws in Texas and California); Roland, \textit{supra} note 117, at 1515-16 (describing legislation in Georgia, New York, and Maine designed to improve patient care provided by managed care organizations).

\textsuperscript{172} See Geyelin, \textit{supra} note 170. This unprecedented "global tobacco agreement" would have capped annual damages the tobacco companies could be forced to pay. \textit{Id.}

The bill, however, failed to gain a consensus in Congress and ultimately collapsed, leaving the states to arrange the less ambitious settlement of November 1998. \textit{Id.}

\textsuperscript{173} \textit{Id.}
have made investors' money. The effect of such "education" was apparent in late September 1999 when, spooked by the first wave of HMO lawsuits, nervous investors in a single day sold off more than $12 billion in shares of the targeted HMOs. For some HMOs, the sell-off wiped out between ten and twenty percent of their market value.

Shareholder nervousness stems from the enormous punitive-damage verdicts that juries have recently awarded plaintiffs in corporate tort actions, some of which were large enough to threaten businesses with bankruptcy. Investors worry even more now that plaintiffs' lawyers, who traditionally work alone, have pooled their resources and are now able to fund extensive and protracted litigation. The fear that a company could be in court for years, only to lose a decision that may result in bankruptcy, is more than enough to scare away risk-averse investors. Attorneys successfully used this strategy of pressuring corporate CEOs with investors' concerns in the tobacco lawsuits, where cigarette makers eventually paid enormous settlements to end lawsuits despite their string of courtroom victories. In anticipation of that global settlement agreement, the market rewarded the cigarette companies by boosting their stock prices. Scruggs and his legal team hope the same formula will work against HMOs.

D. A Critique of the Legal Merits

As in the tobacco litigation, the recovery theories that plaintiffs have proposed in the HMO lawsuits are both novel and of questionable legal merit. Plaintiffs in the health care actions have advanced two primary grounds for recovery: the federal RICO and ERISA statutes.


175 See Segal, supra note 174.

176 See id.

177 See id.

178 See id.

179 See id.

180 See id.

181 See id.


183 See, e.g., Cigna Class Action Complaint, supra note 6, ¶ 1; Aetna Class Action Complaint, supra note 146, ¶ 1; supra Part III.B.
1. **RICO-Based Recovery: Maio v. Aetna**

Of the class action lawsuits alleging RICO violations by managed care organizations, the first to receive a judge's attention was *Maio v. Aetna Inc.*[^184] That suit named Aetna, a managed care provider, as defendant.[^185] The district court judge, however, dismissed the suit in late September 1999, concluding that "[a] vague allegation that 'quality of care' may suffer in the future is too hypothetical an injury to confer standing upon plaintiffs."[^186]

The lawsuits filed Thanksgiving week of 1999 alleged essentially the same RICO violations as *Maio.*[^187] In each case, the plaintiffs alleged that they were the victims of fraud because they were led to believe that their HMO put its members' medical needs first when, in actuality, the HMO sought to restrict the treatment it provided in order to boost profits.[^188] The result of this failure to disclose, according to the plaintiffs, is that the health insurance that the plaintiffs purchased is worth less than what they paid for it.[^189] As the judge in *Maio* pointed out, however, the plaintiffs did not list a single specific injury that resulted from any denial of treatment.[^190] The type of harm alleged is merely speculative, and, as the judge suggested, if plaintiffs were indeed denied necessary medical care in the future, the HMOs themselves would not be the proximate cause of the plaintiffs' harm; rather, the attending physician would be to blame.[^191]

In addition to the absence of an injury in fact, the judge in *Maio* found other problems with a suit based on RICO grounds. The judge questioned whether Aetna truly committed any fraud,[^192] determining that Aetna's quality-of-care promises were merely "puffery," and that "the complained-of cost containment provisions are disclosed to pro-

[^184]: No. CIV. A. 99-1969, 1999 WL 800315 (E.D. Pa. Sept. 29, 1999), aff'd, 221 F.3d 472 (3d Cir. 2000). The gravamen of the plaintiffs' complaint was that Aetna fraudulently induced them to enroll in Aetna's HMO plan. *Id.* at *1.* The plaintiffs alleged that whereas Aetna represented that it was primarily concerned with providing the highest quality of care for the plaintiffs, Aetna was primarily interested in maximizing profits and containing costs. *Id.*

[^185]: *Id.* at *1.*

[^186]: *Id.* at *2.*

[^187]: See, e.g., Cigna Class Action Complaint, *supra* note 6, ¶ 118; Aetna Class Action Complaint, *supra* note 146, ¶ 177; *supra* note 146 and accompanying text.

[^188]: See, e.g., Maio, 1999 WL 800315, at *1; Cigna Class Action Complaint, *supra* note 6, ¶¶ 7, 9, 10; Aetna Class Action Complaint, *supra* note 146, ¶¶ 7, 9, 10.


[^190]: See *Maio*, 1999 WL 800315, at *2.* The court noted that the plaintiffs explicitly disclaimed "any injury due to the denial of benefits, reduction of benefits, inferior care, malpractice, negligence and breach of contract—in short, . . . any injury that has the potential to decrease the value of defendants' plans. The HMOs simply cannot be 'worth less' unless something plaintiffs were promised was denied them." *Id.*

[^191]: See *id.*

[^192]: *Id.*
Most notably, the judge concluded that the corporate relationship between an insurer and its subsidiary HMO, or between an HMO and the doctors with which it contracts, do not constitute the type of “enterprise” that the RICO statute intends to target. As a final note, the judge emphasized that “plaintiffs’ ... dissatisfaction with ... HMOs in general ... is more appropriately directed to the legislatures and regulatory bodies of the several states.”

In August 2000, the Third Circuit affirmed the Maio decision, stating that the plaintiffs could not prove any “tangible economic harm compensable under RICO.” Like the district court, the Third Circuit focused on the speculative nature of the plaintiffs’ claims, describing them as “conclusory” as the alleged harm might occur “in some undefined way at some later point in the future.” The court also determined that the plaintiffs’ fundamental argument, that the HMO’s system of rationing care rendered their health insurance inferior, was undermined by the Supreme Court’s decision in Pegram v. Herdrich. There, the Court concluded that it was not the place of the federal judiciary to determine the legal validity of an HMO’s underlying structure.

The Maio dismissal was not encouraging news for supporters of the remaining class action lawsuits that allege similar RICO violations against other HMOs. However, before the courts can reach the merits of these remaining class actions, the plaintiffs in those suits will need to pass an important hurdle: they must convince a judge that there is one overriding issue among them that warrants treating them as a single class. Achieving class certification will not be easy. The five

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193 Id.
194 Id.
195 Id. But see Kallas et al., supra note 134, at 520-21 (arguing that class actions are an appropriate vehicle to resolve health care disputes because: (1) the small amount of financial harm that most enrollees suffer is minimal, making an individual action impractical; (2) under a managed care regime, health care issues are systemic, making it difficult for an aggrieved patient to receive better care simply by changing doctors; and (3) managed care providers market their services nationwide with few variations, producing widespread and similar harm); cf. Cerminara, supra note 112, at 44-46, 58 (concluding that beneficiaries of managed care organizations are unlikely to achieve individual empowerment from class action lawsuits, but should continue to bring these suits in order to spotlight health care issues and spur government regulatory agencies into action).
197 Id. at 494.
198 530 U.S. 211 (2000); Maio, 221 F.3d at 496-97; see also discussion infra Part III.D.3 (discussing plaintiffs’ attempts to overcome the hurdle posed by Herdrich).
199 530 U.S. at 232-34.
200 The plaintiffs in the Cigna and Aetna class actions claim that their suits are appropriate for class certification under Rule 23(b)(3), which requires, in relevant part, that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3); Cigna Class Action
HMOs named in the Thanksgiving week lawsuits include over thirty-two million members, and defense lawyers will surely argue that there are at least some issues among such a large class that are unique to certain individuals. One possible source of difficulty will be the differing coverage levels among most of the thirty-two million HMO members, a result of the varied plans that their employers chose to negotiate with the HMOs.

2. ERISA-Based Recovery

Initially, the ERISA avenue of recovery appeared more promising than that of RICO. In *Herdrich v. Pegram*, the Seventh Circuit endorsed an ERISA-based suit. *Herdrich* involved a woman who claimed that her HMO, in an effort to save money, delayed performing diagnostic tests that would have revealed an inflamed appendix, which later ruptured. According to the plaintiff, the delay resulted in an infection and the need for emergency surgery.

The Supreme Court granted certiorari in the case and, in June 2000, reversed the Seventh Circuit. The Court concluded that an HMO does not breach a fiduciary duty under ERISA by giving its doctors financial incentives to ration medical care. The Court explained that when doctors administer medical care, they are making “mixed” eligibility and treatment decisions that are not fiduciary deci-

Complaint, supra note 6, ¶ 3; Aetna Class Action Complaint, supra note 146, ¶ 3; see also Hanna, supra note 147 (“This litigation has a great number of barriers in front of it, the most significant of which is securing class certification.” (quoting John Coffee, professor of law at Columbia University)).

201 See Rubin & Weinstein, supra note 4.

202 Id.; see also Matthew C. Browndorf, Note, *Castano v. American Tobacco Co.: Joe Camel and the Marlboro Man Take On Class Actions*, 7 Widener J. Pub. L. 87, 99 (1997) (“At the time of enactment of [Rule 23 permitting class actions], the theory of ‘mass tort litigation . . . did not exist.’ The only comparable theory was the single-event accident, and the Advisory Committee’s Notes explicitly state that ‘[a] “mass accident” . . . is ordinarily not appropriate for a class action.’” (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 n.23 (5th Cir. 1996); Fed. R. Civ. P. 23(b)(2) advisory committee note to the 1966 amendments) (footnotes omitted)). Courts have often denied class certification because they found that “mass torts have individual and significant issues that predominate over the common issues.” Id. at 98-99; see also supra note 139.

203 154 F.3d 362 (7th Cir. 1998), rev’d, 530 U.S. 211 (2000).

204 See id. at 373. The court held that incentives can rise to the level of a breach where, as pleaded here, the fiduciary trust between plan participants and plan fiduciaries no longer exists (i.e., where physicians delay providing necessary treatment to, or withhold administering proper care to, plan beneficiaries for the sole purpose of increasing their bonuses).

Id.

205 Id. at 365-66.

206 See id.


208 Id. at 227.
The Court reasoned that an opposite result would eliminate the for-profit HMO, a result contrary to Congress's expressed intent as manifested in its extensive legislation promoting HMO formation. Furthermore, the Court explained that the larger issue—the wisdom of a medical system based on care rationing—is a complex, fact-intensive issue involving social judgments better left to Congress.

3. Borrowing a Strategy from the Tobacco Litigation

It would appear that in the wake of Herdrich and Maio, plaintiffs in HMO lawsuits will find it difficult to make out a cause of action under either RICO or ERISA. However, the fact that RICO allows for treble-damage awards lends considerable strength to the plaintiffs' suits by exposing HMOs to tremendous potential liability. Plaintiffs may anticipate that defendant HMOs, facing the possibility of paying damage awards to millions of members, will respond to the pressure by seeking a settlement. In fact, the same strategy worked in the Medicaid reimbursement suits against the major tobacco companies in 1998. In those cases, the defendants settled their cases against the state attorneys general largely to avoid bankruptcy, which an adverse judgment might have produced. Cigarette makers settled despite the novelty and untested nature of the legal theories with which plaintiffs threatened them. The managed care industry finds itself on the receiving end of similarly unique and unproven theories of liability.

The pressure on HMOs has been steadily increasing, as it previously had for the tobacco companies in the months leading to the 1998 settlement. Indeed, despite the legal hurdles created by the Herdrich and Maio decisions, the Connecticut Attorney General recently launched a class action lawsuit against several HMOs. In its lawsuit,
the state alleges that several HMOs used arbitrary guidelines to deny coverage, blocked access to prescription drugs, and frustrated beneficiaries’ attempts to file claims. To avoid the ramifications of the Herdrich decision, Connecticut focused its complaint on perceived inadequacies in the HMOs’ disclosure of their rationing schemes.

Although attorneys employed novel and untested legal theories against tobacco companies, several distinctions make their use harder to justify in the case of HMOs. Although tobacco companies sold a legal product, information has come to light in recent years revealing that the industry systematically deceived its customers. Tobacco manufacturers concealed the true dangers of cigarettes from the public and even manipulated the addictiveness of their product. HMOs, on the other hand, market a product that helps rather than hurts its consumers. Granted, HMOs seek to achieve a profit, but by working to keep health care affordable they also serve a public purpose—a difficult claim for cigarette companies to make.

The managed care industry replaced an ailing health care regime that was proving financially unsustainable. Because the managed care industry evolved as a market response, at least one commentator suggests that it should be left to the market to resolve any problems with HMOs. HMOs cover a majority of people today because they represent a more attractive alternative to the former system of health care that provided unlimited access, but at a prohibitive cost. If consumers decide that the pendulum has swung too far toward sacrificing medical care for affordability, then the marketplace should be allowed to supply its own solution. The most desirable result may be a health care system that provides more care than an HMO, yet at a lower cost than the fee-for-service system that dominated a decade ago.


The Anthem Blue Cross & Blue Shield suit followed a similar class action suit filed by the state of Connecticut on behalf of beneficiaries of a health plan. The district court, however, dismissed this first suit as the state lacked standing to sue under ERISA. See Connecticut v. Physicians Health Servs. of Conn., 103 F. Supp. 2d 495, 511 (D. Conn. 2000).

215 See Plan Liability: Connecticut Attorney General Files Suit Against State’s Largest Managed Care Firms, supra note 214; Julien, supra note 214.

216 See Julien, supra note 214.

217 Player, supra note 29, at 324.

218 Id. at 325-26.

219 See supra Part II.B.


221 See id.

222 See id. ("Litigation to take the teeth out of the HMOs will distort and delay the natural evolution of a U.S. health-care marketplace.").
If HMO lawsuits were assessed solely on their legal merits, it is likely that they would be rejected and the marketplace allowed to produce a solution. Granted, most managed care litigation is in its early stages, but judicial action to date confirms the weakness of these suits' legal arguments. Unfortunately, extrajudicial tactics available to plaintiffs and their attorneys to use against HMOs may bring the litigation to a premature end, denying courts the opportunity to scrutinize the plaintiffs' recovery theories. Using economic and political pressure to short-circuit the legal process would be regrettable because these tactics are likely to result not in rational solutions to health care issues, but rather in the extraction of financial concessions from a defeated opponent.

E. The Wisdom of Dismantling the Managed Care System

Using court action as leverage to extract policy concessions from an industry constitutes ad hoc legislation. Initially, in the tobacco litigation, the state attorneys general hoped to induce the tobacco companies to agree to broad policy goals, including drastic cuts in cigarette marketing and consent to federal nicotine regulation, in addition to reimbursement of the states' tobacco-related Medicaid expenses. Ultimately, states only obtained pecuniary damages, the goal that litigation is most suited to provide.

The present status of the HMO lawsuits is similar to the early stages of the tobacco litigation; the plaintiffs want compensation for perceived injuries, as well as fundamental change from an industry that affects most Americans. The plaintiffs' means of attaining these goals, however, is questionable. If the plaintiffs succeed in their class action lawsuits, a likely result will be higher premiums for HMO members as managed care entities pass the cost of any adverse judgment or settlement on to their customers. Moreover, if a plaintiff victory results in a general condemnation of the managed care concept, a dismantling of HMOs' cost-containment mechanisms could result. Without the ability to hold costs down, health care will revert to the unaffordable and wasteful fee-for-service regime of a decade ago. The risks of restoring a financially unsustainable health care system are obvious: a decline in the amount and quality of medical services available to many Americans. In this light, a courtroom victory for the class action plaintiffs seems shortsighted and hollow.

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223 See supra Part III.C.
224 See infra note 329 and accompanying text.
225 See infra note 334 and accompanying text.
226 See Cerminara, supra note 112, at 48-50.
227 See supra note 12 and accompanying text.
Encouraged by the huge settlement paid by the tobacco industry, state officials and plaintiffs' lawyers are searching for another industry to target: along with HMOs, the paint industry now finds itself in their crosshairs. The legal theory behind most of the paint industry suits is that paint makers sold lead-based paint even after discovering a link between lead and illness. One suit in particular borrowed a page directly from the tobacco litigation playbook when the Rhode Island Attorney General filed suit in state court against eight paint manufacturers and the industry's trade association. The Attorney General has even gone so far as to hire a plaintiffs' law firm that is a veteran of the tobacco settlement. Rhode Island is seeking compensatory damages for its lead poisoning-related costs. Over the years, Rhode Island has spent millions of dollars on the treatment and special education needs of children with lead poisoning, as well as millions more to remove lead paint from contaminated schools, hospitals, and public housing.

1. Liability Issues in the Lead Paint Cases

Lead poisoning is a serious medical condition; elevated levels of lead in the bloodstream can damage the brain, kidneys, and nervous system of children. The resulting mental and physical damage often leads to learning disabilities, attention deficit disorder, and, ac-

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228 See Cupp, supra note 14 (discussing how the tobacco settlement between the state attorneys general and cigarette companies encouraged other government entities to bring suits against the paint and firearms industries).
231 Pendell, supra note 16 (criticizing the state of Rhode Island for bringing suit against paint makers when the industry acted responsibly in dealing with the danger of lead paint).
232 See Rhode Island First State to Sue Makers of Lead Paint, supra note 230.
234 Donovan et al., supra note 233.
ccording to some researchers, increased criminal behavior.\textsuperscript{235} Although the problem was much worse before the federal government banned lead-based paints in 1978,\textsuperscript{236} millions of children who live in older homes continue to suffer from lead poisoning.\textsuperscript{237} Children are at particular risk because their smaller, less mature bodies make even small doses of lead highly toxic.\textsuperscript{238} Exposure generally occurs when children ingest flakes or dust from old lead paint.\textsuperscript{239}

The recent suits against paint makers are arguably less justifiable than those against cigarette makers. In the tobacco lawsuits, the defendant was an industry that grew rich selling dangerous products to American consumers. Furthermore, the industry intentionally misled the public about the health risks inherent in its products while knowing for decades of a link between smoking and disease.\textsuperscript{240} While cigarettes are legal products that many Americans voluntarily consume, nicotine’s addictive properties and cigarette makers’ exploitation of its addictiveness shift at least some of the blame from the plaintiffs to the industry.

The proactive nature of the paint industry’s response stands in stark contrast to the decades-long campaign of deceit and deliberate obfuscation waged by the tobacco industry. In the 1950s, when lead paint use was still legal but concerns over its safety were surfacing, the industry funded research to determine the dangerousness of its product.\textsuperscript{241} Researchers indeed determined that lead paint was a health hazard; nevertheless, the industry helped publicize the adverse findings.\textsuperscript{242} The paint industry took further steps, voluntarily placing warnings on its products and even beginning to phase lead paint out entirely—all before the federal ban.\textsuperscript{243} At least one court refused to find the existence of a conspiracy within the paint industry to squelch information of lead paint’s dangers, ruling that there was “‘no evi-

\textsuperscript{235} See Paul J. Bottari & Michael L. Bouhiosa, A Complete Guide to Lead Paint Poisoning Litigation, at xviii (Alan Kaminsky ed., 1998); Spake & Couzin, supra note 213, at 54-56 (reporting on the dangers of lead paint to children, the cost of removal, and Rhode Island’s recent legal effort to receive compensation from paint manufacturers).
\textsuperscript{236} See 16 C.F.R. § 1303.1 (2000).
\textsuperscript{237} See Bottari & Bouhiosa, supra note 235, app. A, at 164-67; Spake & Couzin, supra note 213, at 54. A significant reason for the decrease in blood-lead levels of children since the 1970s is the decline in the use of leaded gasoline. Bottari & Bouhiosa, supra note 235, app. A, at 162 fig. 2-5.
\textsuperscript{238} See Bottari & Bouhiosa, supra note 235, app. A, at 155-57.
\textsuperscript{239} See id. app. A, at 161-63. The problem is especially bad in Rhode Island, where in 1999 nearly one in five children entering kindergarten showed elevated blood-lead levels. Flynn, supra note 229. Rhode Island’s problem is significant, because 80% of its homes predate the 1978 ban on lead paint. R.I. Sues Makers of Lead Paint, L.A. TIMES, Dec. 5, 1999, at K6.
\textsuperscript{240} See supra Part I.C.2.
\textsuperscript{241} See Smith, supra note 15.
\textsuperscript{242} See Pendell, supra note 16; Smith, supra note 15.
\textsuperscript{243} See Pendell, supra note 16.
dence whatsoever [that the industry's trade association] concealed any studies, altered any documents or misrepresented any finding."

Questions of causation also warrant a different treatment of paint makers. Unlike cigarettes, lead paint is not inherently dangerous. In many cases, lead poisoning occurs in homes where the paint is not well maintained, and children are often poisoned after digesting paint chips that flake off peeling walls or after inhaling paint dust. Paint maker liability may therefore hinge on the actions of third parties responsible for maintaining the homes containing lead paint, such as landlords, building supervisors, or public housing officials. A child's developmental difficulties may be the result of factors other than lead poisoning, including birth trauma and genetics. The issue of time also dilutes lead paint makers' accountability. While cigarette makers continued their deception up until the point they were sued, the deception with which the paint makers are charged occurred in the 1920s and 1930s.

Finally, it would be exceedingly difficult for a plaintiffs' lawyer to show which manufacturer's paint poisoned his client. Today, no paint manufacturer produces lead paint, and some of the companies that once produced it are no longer in business—facts that make an attorney's job difficult and would require him to convince a judge to hold an entire industry liable for the actions of only some of its

244 Smith, supra note 15.
245 See Thomas J. Donohue, Editorial, . . . But Litigating Isn't the Answer, BOSTON GLOBE, Nov. 22, 1999, at A13 (referring to a conclusion by the Environmental Protection Agency that lead paint is not dangerous when well maintained).
246 See Cupp, supra note 14.
247 See Donohue, supra note 245.
248 See Bottari & Bouhosa, supra note 235, at 31 ("The mere fact that a child tests positive for lead poisoning does not mean that any and all problems a child experiences are attributable to his or her elevated blood-lead levels."). The mother's use of drugs, cigarettes, or alcohol during pregnancy may also be the source of harm. See id. at 29-30. To establish a causal connection between a child's lead poisoning and developmental problems, it may be useful to test the intelligence and cognitive functions of the child's siblings and parents. See id. at 32-34.

The possibility that factors other than lead poisoning may have caused a child's developmental troubles makes class action lawsuits brought on behalf of injured children problematic. One may analogize a lead-poisoning class action to the Castano class action that failed to gain certification for a group of plaintiffs that was to include America's entire population of addicted smokers. See supra notes 83-84 and accompanying text. As the Fifth Circuit explained in Castano, when the alleged injury is of a personal nature, courts hesitate to grant certification, because each plaintiff's harm is likely to turn on facts specific to each individual. See supra note 84 and accompanying text.
249 See supra note 90 and accompanying text.
250 See Pendell, supra note 16.
251 Cupp, supra note 14.
252 See Pendell, supra note 16.
members. Such a recovery theory would closely resemble the market share liability theory that has been successful in other contexts.

The market share liability theory releases a plaintiff from one of the traditional tort law constraints: the burden of proving that a specific defendant caused the alleged harm. For most lead paint poisoning victims, whose homes were painted in the distant past by unknown persons using untraceable paint, a theory that permits recovery without requiring identification of the precise tortfeasor holds an obvious attraction. However, courts have so far rejected the application of the market share theory to lawsuits involving lead paint. The most recent court to do so was an intermediate appellate court in New York state. The court, while acknowledging the applicability of the market share theory in certain tort actions involving prescription drugs, distinguished lead paint poisoning victims, explaining that they could not identify a sufficiently narrow time period in which to apply the market share theory. Moreover, lead paint was not a generic, fungible product like the prescription drugs in previously successful market share liability tort actions, and did not produce a signature injury to which the paint could be incontrovertibly linked. The court concluded that the application of a market share theory on these facts would result in "liability disproportionate to the risk created."

253 See id.
254 In the 1970s and 1980s, makers of the prescription drug diethylstilbestrol (DES) found themselves besieged by suits brought by classes of women alleging that they had developed cancer as a result of their mothers' DES use during pregnancy. See Sindell v. Abbott Labs., 607 P.2d 924, 927-28 (Cal. 1980). Although the women could not name the exact manufacturer of the drug that their mothers had ingested, courts in several states allowed the women to recover on a theory of "market share" liability. See id. at 927 n.7, 937. Under this theory, DES manufacturers' liability would correspond to their respective market shares during the period of injury. See id. at 937-38 (discussing the market share theory along with the practical problems involved in defining the market and in assessing market share). Acceptance of the market share liability theory was mixed. See, e.g., Tidler v. Eli Lilly & Co., 851 F.2d 418, 424 (D.C. Cir. 1988) (refusing to employ a market share theory in applying Maryland or District of Columbia law); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989) (adopting a market share theory). Courts endorsing the theory, such as the New York Court of Appeals, considered it a fair method of apportioning blame as the liability will thereby "correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large." Hymowitz, 539 N.E.2d at 1078.
257 See id. at 852-53.
258 Id. at 853. For similar reasons, the New York Court of Appeals recently held that the market share theory of liability was also inapplicable in a suit brought by gunshot victims against gun manufacturers. See infra notes 301-05 and accompanying text.
259 699 N.Y.S.2d at 852. Although courts facing the issue of market share liability in a lead paint context have so far rejected the argument, proposed legislation in Massachusetts, Maryland, and Rhode Island would expressly allow plaintiffs in lead paint poisoning cases to proceed on a theory of market share liability. See Joe Maty, Industry Could Face Series
In their actions against the tobacco companies, plaintiffs' attorneys and state attorneys general justified their actions as a necessary last resort in the face of legislative capitulation to cigarette makers.\textsuperscript{260} However, in the case of the paint industry, federal, state, and local governments have been very proactive. Every year, governmental entities provide millions of dollars to programs that reduce the threat of lead poisoning\textsuperscript{261} and support efforts to educate the public about the risks that lead paint poses.\textsuperscript{262} Most importantly, the federal government took the ultimate action two decades ago by outlawing the sale of the product in question—a step never taken with cigarettes.\textsuperscript{263}

Lead paint is certainly a danger, and lead poisoning a serious illness, but finding a party to blame appears difficult at best and a corporate lynching at worst. With these suits against the paint industry, plaintiffs move deeper into territory where it becomes increasingly more difficult to uncover evidence of wrongdoing.\textsuperscript{264}

2. \textit{Application of Tobacco Litigation Strategies Against Lead Paint Makers}

With adverse case law and an industry that appears to have acted responsibly, why are trial lawyers attacking paint makers with legal theories usually reserved for tobacco companies? The likely answer is that the lawyers know very well the weakness of their cases, but do not plan to win on the merits. Instead, the attorneys may be using aggressive rhetoric in order to severely discredit the paint industry and inspire other plaintiffs to file similar suits against the industry. If enough plaintiffs join the cause, paint makers will have to defend

\begin{footnotesize}
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\item \textsuperscript{260} See Nocera, \textit{supra} note 7, at 39.
\item \textsuperscript{261} See Spake \& Couzin, \textit{supra} note 213, at 56.
\item \textsuperscript{262} See Pendell, \textit{supra} note 16.
\item \textsuperscript{263} \textit{Id.}
\item \textsuperscript{264} Taking the slippery-slope logic to its extreme, one commentator was inspired to ask, “who’s next?” Half-jokingly, he writes:

When we run out of socially unpopular products, such as cigarettes, guns and latex, to go after in court, we’ll have to be creative. . . . Some additional candidates could include cars and trucks, which, as we’ve known for years, cause pollution. It’s time they paid for irritating our eyes and lungs. Some people are allergic to nuts, and while people could simply avoid eating them, the latex glove case shows that states should make companies pay for producing foods or products that cause allergic reactions. I’m sure states would sue beekeepers, too, if their pockets were deep enough. Breweries, wineries and distilleries can’t be far behind. Consumption of alcohol causes some people to lose their wits and harm themselves and others.

State and local governments are limited only by their imaginations and their greed.

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themselves on multiple fronts in multiple courts. Paint makers may then choose the cheaper route of settlement over a costly litigation strategy.\textsuperscript{265}

The success that can result from overextending one’s opponent was a lesson many of these same attorneys learned when they, along with forty-six state attorneys general, forced the tobacco industry to pay an enormous settlement before the plaintiffs’ legal theories were even tested in court.\textsuperscript{266} The sheer scope and breadth of the lawsuits filed against the tobacco industry, and the fear that a judgment against it would be large enough to cause bankruptcy, largely motivated the cigarette makers to settle.\textsuperscript{267} Plaintiffs in the paint industry lawsuits hope that the same strategy will work against the paint makers, forcing the industry to settle before it can have its day in court.\textsuperscript{268} The strategy seems to be gaining momentum. Rhode Island’s suit against lead paint makers has induced similar suits by the cities of St. Louis and Milwaukee, and by Santa Clara County, California.\textsuperscript{269} In addition, Chicago; Newark, New Jersey; and Providence, Rhode Island appear ready to jump on the bandwagon.\textsuperscript{270}

The new style of class action is essentially a no-lose situation for government plaintiffs. If they prevail, the government plaintiffs are likely to collect millions of dollars.\textsuperscript{271} On the other hand, if they fail, the government plaintiffs and their taxpayers are unlikely to pay substantial legal fees because the private attorneys representing them work on a contingency basis.\textsuperscript{272}

Besides presenting another front against which the industry must defend, the participation of states and cities in a lawsuit brings credibility and a “moral authority” to the cause.\textsuperscript{273} As a result, an industry that initially appeared blameless slowly takes on an air of culpability as the public authorities align themselves against it. Eventually, paint

\textsuperscript{265} See Smith, supra note 15.
\textsuperscript{266} See supra Part I.C.
\textsuperscript{267} See Cohen, supra note 85, at 46; Spake & Couzin, supra note 213, at 56; supra Part I.C.
\textsuperscript{268} See Cupp, supra note 14. Normally, plaintiffs’ lawyers could not afford to fund the years of litigation needed to bring an entire industry to the bargaining table. See Field, supra note 24, at 114. The new type of class action, however, is marked by a pooling of resources among plaintiffs’ attorneys. See Pamela Coyle, N.O. Lawyers Target HMO in Class Action, TIMES-PICAYUNE (New Orleans), Jan. 4, 2000, at A1, available at 2000 WL 6527494. By combining their assets (a sizeable figure once tobacco settlement fees are added), plaintiffs’ lawyers may survive protracted litigation against a wealthy opponent. See Smith, supra note 15.
\textsuperscript{269} See Maty, supra note 259, at 114; Sara Hoffman Jurand, Ruling May Boost Lead Paint Litigation, TRIAL, June 1, 2001, at 19.
\textsuperscript{270} See id.
\textsuperscript{271} See Cupp, supra note 14.
\textsuperscript{272} See id.; supra Part I.C.1.
\textsuperscript{273} See supra Part I.C.1.
makers, like HMOs and the tobacco companies before them, may find themselves in the frustrating position of having the better legal argument, yet powerless to use it against this new form of class action—when victories in the courtroom count for little if the industry has already lost in the forum of public opinion.

B. Class Action Lawsuits Against Gun Manufacturers

By the fall of 2000, dozens of cities and counties had filed suits against the nation's gun industry.\textsuperscript{274} Like the state attorneys general who preceded them in the tobacco litigation, these cities sought to recover public expenditures made in response to the detrimental effects of an industry's harmful product, while trying at the same time to reform a business that many consider criminal.\textsuperscript{275}

The many similarities between the tobacco and gun industries make handgun manufacturers a natural target for the type of social-policy litigation that plaintiffs' attorneys unleashed against cigarette makers. Like the tobacco industry, gun makers manufacture a product that has the potential to cause serious harm to its consumers and to the public. Although firearms are heavily regulated,\textsuperscript{276} it is still possible for nearly anyone to buy a gun.\textsuperscript{277} The industry has managed to circumvent highly restrictive federal and state legislation, resulting in the same "something must be done" mentality of the public that fueled the tobacco litigation.\textsuperscript{278} Furthermore, gun makers, like cigarette companies, face accusations of knowingly manipulating their marketing strategies in order to improve their bottom line at the cost of public safety.\textsuperscript{279} Finally, the most important shared characteristic

\textsuperscript{274} See Frank Main, Judge Tosses Out City's Gun Lawsuit, CHI. SUN-TIMES, Sept. 16, 2000, at 1.

\textsuperscript{275} See Frank J. Vandall, O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers, 44 VILL. L. REV. 547, 549 (1999); Main, supra note 274. The evils of gun violence, especially American gun violence, have been headline news for years. On an average day, for example, over fifteen American children die from gunfire; in an average year, gunfire kills 35,000 Americans. Vandall, supra, at 548. Of these 35,000 dead, roughly 9,000 are homicides—compared to merely a few dozen gun-related murders in Japan and Great Britain combined. Id.


\textsuperscript{277} See Kairys, supra note 17, at 6.


\textsuperscript{279} See Kairys, supra note 17, at 10-12. Another similarity that gun companies share with cigarette makers is the presence of internal company whistleblowers who are willing to expose embarrassing industry secrets. Robert Hass, a former executive with Smith & Wesson, explained that gun makers are fully aware that many of their guns end up in the hands of criminals because of the industry's refusal to investigate or regulate wholesale distributors and retailers known to be gun conduits for criminals. See id. at 6-7 (citing Affidavit of Robert I. Haas, ¶¶ 20-21, Hamilton v. Accu-Tek, 935 F. Supp. 1307 (E.D.N.Y. 1996) (No. CV-95-0049)).
between tobacco and handgun companies is that they both sell legal
products that engender strong public disapproval.

Traditionally, gun makers have been immune from tort liability
for the simple reason that they did not pull the trigger. Just as
smokers were unable to overcome causation hurdles when suing ciga-
rette companies, individual plaintiffs have had similar problems when
suing gun manufacturers. For opponents of the tobacco industry,
four decades of almost universal defeat finally ended when a "blame-
less" plaintiff, not subject to the contributory-fault stigma that had
plagued individual plaintiff-smokers, sued and succeeded against the
industry. The "blameless" plaintiff was state Medicaid agencies, and
the result was a $246 billion settlement.

Opponents of the tobacco industry found greater success in suits
brought by Medicaid, an agency indirectly harmed by smoking, than
suits brought by individual smokers. Similarly, opponents of gun
manufacturers are hoping that municipalities will have greater success
suing the industry than did individual victims of gun violence. The
plaintiff cities allege that the gun companies' marketing, distribution,
and promotional tactics had adverse and harmful effects. The cities
seek compensation for expenditures arising from the criminal use of
handguns, namely, the costs of maintaining a police force, a court
system, and an emergency medical system.

Among the traditional tort claims available to the cities are public
nuisance, negligence, fraud, and product liability. One theory re-

280 See id. at 12-13.
281 See id.
282 See supra Part I.C.1.
283 See supra Part I.C.1. Because gun makers have been immune from tort liability, the
costs of gun violence have been borne by private and corporate taxpayers. Vandal, supra
note 275, at 552-53. Holding gun makers liable would shift that burden to the industry by
forcing them to internalize the costs of gun violence. See id. at 553. This internalization
would likely result in higher prices for guns, the bankruptcy of some gun companies, and
the withdrawal of certain guns from the market. See id. at 553-56.
284 Municipalities and counties that have initiated suits against gun manufacturers in-
clude Chicago (seeking $433 million in damages); Atlanta; Bridgeport, Connecticut; Cin-
cinnati; New Orleans; and Miami-Dade County. See Main, supra note 274. Among these,
however, Bridgeport, Cincinnati, and Miami-Dade County have seen the courts dismiss
their suits. See id. Most recently, New Orleans's suit was dismissed when the Louisiana high
court ruled that a state law barring such suits may apply retroactively. Morial v. Smith &
Wesson Corp., 00-CA-1132 (La. 4/3/01), 785 So. 2d 1.
285 See Kairys, supra note 17, at 13.
286 See id.
287 See id. at 13-16. First, advancing under a public nuisance theory, cities may argue
that gun manufacturers flood the legitimate gun market despite knowledge that guns are
thereby made readily available to criminals. Id. at 14. Second, cities may press a claim of
negligence against the gun makers by arguing that the flooded handgun market is a result
of negligent marketing and distribution strategies. See id. at 15. A recent decision by the
New York Court of Appeals, however, has indicated that this theory may not be viable. See
infra notes 294-303 and accompanying text. Third, cities may bring their suits on a theory
cently received approval from a federal judge in a personal-injury action. In Hamilton v. Accu-Tek, a federal judge broke new ground when he dismissed motions to set aside a jury verdict that had found a group of gun manufacturers liable for the harm caused to one of the plaintiffs, a victim of an accidental shooting involving an illegally acquired handgun. The theory that the jury adopted and that the court approved was that many of the nation's handgun manufacturers market and distribute their products negligently, resulting in the illegal acquisition of guns. In reviewing the defendants' motions, the court conducted an exhaustive analysis of the three necessary elements of a negligence claim—duty, breach, and causation. In assigning damages, the court adopted a market share liability theory of fraud, arguing that gun makers mislead the public into believing that a gun enhances personal safety when in fact those who live in homes with a firearm are at far greater risk of injury than those who live in gun-free homes. Cities may sue under a product liability theory. Although a suit alleging a manufacturing defect could not succeed (because guns work exactly as intended), and a suit under a traditional failure-to-warn theory would fail (because the open and obvious dangers of handguns render warnings unnecessary), a suit may succeed if it alleges a unique version of failure to warn. Under this version, the plaintiffs would allege that gun makers fail to warn handgun owners of the likelihood that their guns will be used against themselves or family members. One commentator discusses a possible defense for gun manufacturers: superseding cause. In tort law, a superseding cause severs a defendant's liability when it is unforeseeable, when it leads to the plaintiff's harm, and when it occurs after the defendant's negligent act. Gun makers may argue that even if they were negligent in marketing their products, any liability they have to a gunshot victim is superseded by unforeseeable criminal intervention. The superseding-cause defense appears to have received tacit approval by a recent New York Court of Appeals decision. Cities may counter that the economic harm to the city is equally foreseeable whether the violence results from a legitimate handgun purchase or from a gun bought on the black market.

287 See id. at 808-09, 839.
288 See id. at 839; cf. Timothy D. Lytton, Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers, 64 B.U. L. Rev. 681 (1998). Writing before the jury verdict in Hamilton, the author discusses the only other handgun case to reach a jury on the grounds of negligent marketing. The jury rejected plaintiffs' claim as the plaintiffs "failed to present sufficient evidence to substantiate the alleged link between the arms industry and violent crime." Id. at 682.
289 See Hamilton, 62 F. Supp. 2d. at 818-39. Beginning with duty of care, the court found that gun manufacturers, because of the inherent dangerousness of their products, have a special relationship with those that their products foreseeably place in harm's way. See id. at 821. In addition, the court found that gun makers have "sufficient authority and ability to control" the practices and conduct of downstream distributors and retailers in order to improve potential victim safety. Id. The New York Court of Appeals, however, in answering questions certified by the Second Circuit concerning duty under New York state law, did not agree. See infra notes 294-303 and accompanying text.
290 See supra notes 254-59.
and instructed the jury to apportion damages according to each defendant's share of the national handgun market.293

Following the jury’s verdict, the defendants appealed to the Second Circuit Court of Appeals, arguing that the gun makers owed no duty to plaintiffs when marketing and distributing handguns.294 The Second Circuit, however, explained that the question of duty involved balancing competing policies and could not be resolved by reviewing New York state precedents.295 Accordingly, the Second Circuit certified two questions to the New York Court of Appeals: first, whether the plaintiffs’ negligent marketing theory was cognizable under New York law; and second, whether damages could be apportioned among the defendants on a market share basis.296

In April of 2001, New York’s high court answered both questions in the negative.297 The court explained that, notwithstanding the District Court’s imposition of a duty of care upon gun manufacturers, courts should hesitate before “extending liability to defendants for their failure to control the conduct of others.”298 The New York Court of Appeals reasoned that, before a duty could exist, there must be a more tangible connection between a gun manufacturer and either the criminal wrongdoer or the victim, and that this relationship must “realistically [place gun makers] in a position to prevent the wrongs.”299 Moreover, the court noted that “we should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales in the United States remains the focus of a national policy debate.”300

Although the New York Court of Appeals concluded that gun manufacturers did not owe a duty to the plaintiffs, the court proceeded to analyze the question of market share liability certified to them.301 On this issue, the court found that the special situation justi-

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293 See Hamilton, 62 F. Supp. 2d at 849-50. The court explained further that policy reasons support placing the costs of gun violence on manufacturers rather than on individual victims, including the defendants’ superior ability to absorb and minimize these costs. See id. at 842. Commentators have further argued that losses which products cause should fall on the party better able to avoid the accident. Vandall, supra note 275, at 569 (citing an approach developed twenty years earlier by Judge Guido Calabresi). Although individual gun owners are best able to secure their guns, gun makers have more knowledge of and ability to control the overall gun market. Id. Gun companies can make safer guns, pull guns from the market, and raise their guns’ market price. See id.


295 Id. at 42.

296 Id. at 39.


298 Id. at 252-53.

299 Id. at 254.

300 Id. at 240.

301 Id.
fying the use of a market share theory of liability was not present.\textsuperscript{302} Namely, there was no problem identifying the maker of a handgun used in a crime (provided the handgun itself could be found), and because gun makers market their products in different ways, each defendant exposed the plaintiffs to varying degrees of risk.\textsuperscript{303}

The jury's verdict in \textit{Hamilton} and the trial judge's subsequent dismissal of the defendants' motions to set aside the verdict certainly encouraged those cities that later brought suits against the gun-manufacturing industry.\textsuperscript{304} There is a crucial distinction, however, between \textit{Hamilton} and the two dozen city lawsuits. While \textit{Hamilton} was a class action lawsuit brought by direct victims of gun violence, the cities' lawsuits assert the public's costs associated with gun violence as their injury.\textsuperscript{305} Damages of this nature are inherently indirect and, as such, courts are likely to dismiss the cities' negligence claims for lack of proximate cause. Moreover, in light of the New York Court of Appeals decision not to impose upon gun manufacturers a duty of reasonable care in the marketing of their products, the district court's decision in \textit{Hamilton} is likely to be overturned,\textsuperscript{306} further undermining the cities' suits.

Courts have already dismissed suits initiated by Bridgeport, Connecticut; Cincinnati, Ohio; and Miami-Dade County, Florida.\textsuperscript{307} In each case, the trial judges found that the plaintiffs lacked standing or failed to state a cause of action.\textsuperscript{308} In dismissing the city of Bridgeport's suit, the judge explained in detail the problems these

\textsuperscript{302} Id.
\textsuperscript{303} Id. at 240-41. For similar reasons, a New York appellate court also refused to apply the market share theory of liability in a suit against former manufacturers of lead pigment used in paint. \textit{See supra} notes 256-59 and accompanying text.
\textsuperscript{304} \textit{See Main}, \textit{supra} note 274.
\textsuperscript{305} \textit{Vandall}, \textit{supra} note 275, at 549.
\textsuperscript{308} \textit{See Smith & Wesson}, 1999 WL 1241909, at *2; \textit{Beretta}, 1999 WL 809838, at *1; \textit{Arms Tech.}, 1999 WL 1204353, at *2. A suit that Chicago initiated recently joined the ranks of other gun industry suits to be thrown out of court. \textit{See Main}, \textit{supra} note 274. In that case, the city of Chicago asserted theories of negligence and public nuisance, but the judge seemed to suggest that the issue was one better left to legislators. \textit{See id.} In other parts of the country, results have been mixed, with lawsuits filed by various cities and counties in California, as well as the cities of Detroit, Atlanta, Boston, and Cleveland going forward. \textit{See Pam Belluck, Chicago Gun Suit Fails, but California's Proceeds}, \textit{N.Y. Times}, Sept. 16, 2000, at A9.
types of suits raise. Unlike the states that filed suit against the tobacco industry, the cities in the gun litigation do not have statutory authority to sue. In the tobacco litigation, states had standing to sue via either state statute or their sovereign right to protect their citizens' welfare. In the Bridgeport case, there was no statute authorizing the city's suit nor, as a municipality, did Bridgeport possess the rights associated with state sovereignty.

In addition, the city of Bridgeport was unable to rest its case on common law tort principles. The court explained that, despite Bridgeport's apparent belief that the tobacco litigation marked the "dawning of a new age of litigation," a plaintiff must still show proximate cause and an injury that is not remote in order to recover. In the case of a municipality's suit against gun manufacturers, the increase to a city's budget allegedly caused by a defendant's handguns will not suffice to establish proximate cause. Likewise, expenditures that are purely contingent upon harm to third parties are too remote to be recoverable. The court explained that the appropriate plaintiffs to recover from the gun manufacturers might be Bridgeport citizens themselves.

310 Id. at *4-5.
311 Id.
312 Id. at *7.
313 Id. at *9-10.
314 Id. at *5.
315 Id. at *9.
316 Id.
317 Id. at *11; see also Beretta, 1999 WL 809838, at *3 (barring the city of Cincinnati's claims based on the "doctrine of remoteness"). In dismissing Cincinnati's suit, the court explained that the City's complaint is an improper attempt to have this Court substitute its judgment for that of the legislature, something which this Court is neither inclined nor empowered to do. Only the legislature has the power to engage in the type of regulation which is being sought by the City here.

Id. at *1. The city of Cincinnati alleged many of the wrongs that are typical among these types of lawsuits, including negligent marketing methods, public nuisance, and unjust enrichment. See id. at *2-3. In dismissing these claims, the Ohio court found that no special relationship existed between gun makers and the city of Cincinnati that would require the gun makers to protect the city, rendering a negligence claim insupportable. See id. at *2. In rejecting the city's public nuisance claim, the judge explained that "public nuisance simply does not apply to the design, manufacture and distribution of a lawful product." Id. at *2. As for the city's theory of unjust enrichment, the court held that the city's expenditures arose from the city's duty to protect its citizens, and did not confer a benefit to the defendants. Id. at *3. In addition, the losses that its citizens suffered were too remote to be compensable to the city. Id.

In rejecting the Miami-Dade County lawsuit, the Florida trial judge held that the county did not have standing to sue and explained that the right to sue gun makers for negligence and product liability lies with "a specific plaintiff who alleges a specific harm." Arms Tech., 1999 WL 1204953, at *3.
As with the tobacco lawsuits, the plaintiffs' attorneys in the gun industry lawsuits are arguably less concerned with succeeding on the merits of their novel legal theories than with aligning a group of plaintiffs so large that their opponent buckles under the enormous economic pressure.\textsuperscript{318} Coming on the heels of the tobacco litigation as these suits do, the plaintiffs' attorneys cannot help but be aware of the leverage that public entities bring in a suit against an unpopular corporate defendant. The Pittsburgh City Council took heed of this perspective when it offered to drop its suit if gun makers would agree to install trigger locks.\textsuperscript{319} Ultimately, the gun industry may fold in the face of high legal costs associated with defending itself in multiple suits in various courts, just as the much wealthier tobacco companies did just a few years ago.\textsuperscript{320}

Not only are the merits of the gun industry lawsuits dubious, but these suits, along with those against HMOs and the paint industry, raise policy questions similar to those provoked by the tobacco litigation—questions that extend beyond the parties involved. One may question whether it is fair to force a defendant to the bargaining table on an untested legal theory simply because the defendant cannot afford to maintain its defense or pay for an adverse judgment.\textsuperscript{321} Addi-

\textsuperscript{318} Levy, supra note 276.


\textsuperscript{320} See Levy, supra note 276.

\textsuperscript{321} In March 2000 Smith & Wesson, one of the nation's leading gun makers, signed a code-of-conduct agreement with federal regulators in which it promised to equip its firearms with trigger locks and accept a higher level of regulatory oversight. See Gary Fields, For Smith & Wesson, Blanks Instead of a Magic Bullet, WALL ST. J., Aug. 24, 2000, at A24. In return, the gun maker had hoped to escape from the government lawsuits filed against the industry. \textit{Id.} According to Yale Law School professor Peter Schuck, Smith & Wesson had a strong legal argument available for trial. \textit{See Barry Meir, Bringing Lawsuits to Do What Congress Won't}, N.Y. TIMES, Mar. 26, 2000, \$ 4, at 3. Nevertheless, the financial pressure of funding a legal defense brought Smith & Wesson to the bargaining table. \textit{See id.}


A recent decision by the Louisiana Supreme Court, which dismissed a lawsuit brought by New Orleans against the gun industry, demonstrates the success that these statutes may have in preventing such suits in the future—or even deactivating those suits that have already been filed. \textit{See Morial v. Smith & Wesson Corp.}, 00-CA-1132 (La. 4/3/01), 785 So. 2d 1 (holding that state legislation may retroactively bar lawsuit by a city against gun manufacturers because the city, as a political subdivision of state, is not entitled to the protections afforded by Due Process and Contract Clauses of federal and state constitutions); Richard B. Schmitt, Antigun Lawsuit Gets Thrown Out by Louisiana Court, WALL ST. J., Apr. 4, 2001, at B8 (discussing Louisiana Supreme Court decision).
tionally, one may ask whether plaintiffs’ lawyers should be the champions of social policy.

Perhaps most fundamental is that these lawsuits attempt to turn over to the courts what should be legislative policy decisions. If successful, these class action lawsuits will affect the goods and services that consumers purchase by forcing the targeted industries to change their business practices. In addition, the industries will most likely pass on to the consumer any costs of litigation, judgment, or settlement. In other words, the class action lawsuits essentially co-opt legislative functions by imposing a tax on consumers and by regulating whole industries.

V
LITIGATION AS PUBLIC POLICY

In considering the outcome of the pending lawsuits against HMOs, gun manufacturers, and paint makers, it is useful to look to the tobacco litigation as a model. Although the class action lawsuits filed on behalf of injured smokers appear to be foundering (with the exception of the recent Florida judgment),322 other innovative litigation tactics that plaintiffs have brought to bear against the tobacco industry in recent years have resulted in enormous settlements.323 However, before deeming the third wave of tobacco litigation a success, two important questions require resolution. First, despite the billions of dollars the state Medicaid suits extracted from tobacco companies, did the litigation allow the states to achieve their public policy goals? Second, and more fundamentally, should courts decide questions of public health policy that are traditionally reserved for elected legislators?

The tobacco settlement not only awarded states billions of dollars, but required the tobacco companies to limit outdoor advertisement of their products, contribute to research intended to help smokers quit, and establish a program to reduce teen smoking.324 For the tobacco companies, the settlement promised to end the state Medicaid suits and provide more certainty about the industry’s future litigation costs.325 As a sign of its approval of the deal, the financial markets pushed share prices for tobacco companies higher in anticipation of the settlement.326

Is this result adequate? When the attorneys general first announced their suits, they promised to save American children from

322 See supra notes 85-87 and accompanying text.
323 See supra Part I.C.
324 See Tobacco Settlement, supra note 1, at 5.
325 See id.
326 See Geyelin, supra note 182.
smoking and achieve regulatory restrictions on cigarettes.\textsuperscript{327} Indeed, these broader public health policies were part of a more ambitious settlement agreement that circulated during June 1997.\textsuperscript{328} This earlier proposal not only raised the price tag for tobacco companies to over $350 billion, but would have garnered more significant concessions from the tobacco industry, including consent to FDA regulation of cigarettes and further restrictions on cigarette advertising in stores and magazines.\textsuperscript{329} The proposal would have required Congressional approval.\textsuperscript{330} Congress’s failure to approve the earlier settlement proposal ultimately led to the much less comprehensive agreement of late 1998.\textsuperscript{331}

The history of the tobacco settlement highlights the ineffectiveness of using litigation to achieve public policy goals.\textsuperscript{332} A primary goal of litigation is to compensate an aggrieved party for past wrongs,\textsuperscript{333} and can cause a plaintiff’s focus to shift from public policy objectives to monetary damages. The tobacco settlement fell into this trap because the final settlement agreement failed to include any significant concessions from the tobacco industry that would improve public health.\textsuperscript{334} Even a $400 billion settlement seems meager to

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\footnotetext[327]{See Peter D. Jacobson & Kenneth E. Warner, \textit{Litigation and Public Health Policy Making: The Case of Tobacco Control}, 24 J. HEALTH POL. POL'y & L. 769, 780 (1999). The authors find that the state attorneys general initially pursued four primary goals: (1) to protect children, (2) to disclose evidence of the adverse affects of smoking by releasing tobacco industry documents obtained through litigation, (3) to reform the advertising and business practices of the tobacco industry, and (4) to recover the states’ tobacco-related health care expenditures. The authors find additional public-policy objectives “embedded” within the preceding four goals: (1) allowing for FDA regulation of tobacco, (2) funding programs to reduce teen smoking, (3) funding a public education campaign, (4) improving tobacco labeling, (5) disclosing more industry documents, and (6) compensating the states and individuals for tobacco-related diseases and the costs of quitting smoking. \textit{See id}. Measured against this ambitious list, the state attorneys general achieved only a minority of their goals.}
\footnotetext[328]{See \textit{Tobacco Settlement, supra note 1, at 1.}}
\footnotetext[329]{See \textit{Player, supra note 29, at 339; Tobacco Settlement, supra note 1, at 1}. The “global” settlement that cigarette makers and state attorneys general nearly reached would have meant a victory for the tobacco industry despite its $368 billion cost because it “prohibit[ed] the use of the very legal tactics that had brought the companies to the table.” Daynard & Kelder, \textit{supra note 30, at 34}. How sweeping was the “global” settlement? With the agreement, the tobacco industry made clear that it “[did] not plan to enter a courtroom again in defense of its product.” \textit{Player, supra note 29, at 340.}}
\footnotetext[330]{See \textit{Player, supra note 29, at 340.}}
\footnotetext[331]{See \textit{Geyelin, supra note 182.}}
\footnotetext[332]{See, e.g., Jacobson & Warner, \textit{supra note 327, at 795-97} (discussing various objections to judicial policymaking).}
\footnotetext[333]{\textit{Id. at 772-73}. Jacobson and Warner envision three functions for civil tort litigation: compensation, deterrence, and accountability. \textit{Id. at 772}. Following this paradigm, the state attorneys general used litigation to recover monetary damages resulting from the costs of treating tobacco-related diseases, to deter the tobacco industry from producing and marketing harmful products, and to seek punitive damages that would hold tobacco companies accountable for their actions. \textit{Id. at 772-73}.}
\footnotetext[334]{See \textit{id. at 772}.}
\end{footnotes}
some critics, who point to the hundreds of thousands of lives that cigarettes prematurely ended.\textsuperscript{335} Public health officials are also disappointed because much of that enormous sum of money will not go to smoking prevention programs as initially promised, but rather will flow into various public works projects.\textsuperscript{336} Today, the tobacco companies remain viable, and critics believe that the settlement could have been much higher.\textsuperscript{337} Now that state governments are set to receive payments from the tobacco industry, one may even argue that states have an interest in seeing cigarette companies maintain a healthy cash flow. Thus, it would appear that the industry essentially bought a license to continue business as usual, a reality that many state attorneys general might have considered unacceptable as a policy objective when the Medicaid suits began.\textsuperscript{338}

Despite the dubious result of the tobacco agreement, proponents are once again trumpeting litigation as the panacea for resolving problematic issues in American health policy. As plaintiffs file class action lawsuits against HMOs, gun manufacturers, and the former makers of lead paint, one must pay careful attention to the propriety of permitting the courts to perform legislative functions. In the American governmental scheme, characterized by a distinct separation of governmental powers, it is clearly the prerogative of the legislature and the executive's regulatory agencies to set public policy, and it is the courts' duty to discern and respect the intent of these governing bodies.\textsuperscript{339}

\textsuperscript{335} See Daynard & Kelder, supra note 30, at 38.  
\textsuperscript{337} Daynard & Kelder, supra note 30, at 38. The authors estimate that the industry's collective annual pretax income is about $7.7 billion, and could be as much as $32 billion if cigarette makers raise cigarette prices. \textit{Id.}  
\textsuperscript{338} Several commentators have also questioned whether the settlement met the states' stated policy objectives. See, e.g., Jacobson & Warner, supra note 327, at 801-02 (arguing that the Medicaid litigation stemmed from a desire to achieve broad public health goals, but realized only modest policy measures and monetary damages, partially because of the weakness of litigation as a vehicle for fundamental social change); Daynard & Kelder, supra note 30, at 38 (arguing that a cash settlement of even $400 billion would pale in comparison to the trillions of dollars in damage that the tobacco industry has inflicted upon Americans). But see Hyman, supra note 76, at 38 (arguing that the tobacco settlement was unfair to the industry because states sought to recover their total smoking-related costs rather than their incremental costs attributable to smoking). Hyman argues that the states, when estimating their Medicaid expenses, should have factored in the savings realized from smokers' premature deaths in the form of forgone pensions, Social Security, and Medicaid payments. \textit{Id.}  
\textsuperscript{339} See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43, 864, 885-66 (1984) (explaining that courts have a duty to respect legitimate policy choices made by the political branches of government); see also Abbott v. Bragdon, 107 F.3d 934, 938 (1st Cir. 1997) ("[W]e begin with the words of the statute, and we approach them with an understanding that our role is not to set public policy, but, rather, to discern the legislature's will.")., vacated by 524 U.S. 624 (1998).
The often unelected nature of the judiciary undercuts the idea of allowing judges to formulate policy affecting the nation as a whole. Although judges may be objective, without their own constituencies there is no guarantee that judges will hear or even consider a diverse range of opinions and alternatives.\textsuperscript{340} The structure of the judiciary also does not allow it to serve as an appropriate forum for the resolution of policy disputes.\textsuperscript{341} Without investigatory and research resources, a court’s opinion is likely less informed than that of a legislature or an executive agency.\textsuperscript{342} Devising a regulatory regime also requires the analysis of complex data and conflicting theories, tasks that regulatory agencies with their specialized expertise are better suited to perform.\textsuperscript{343}

There are also institutional limits on the ability of juries and the litigants themselves to successfully use litigation to construct public policy. Although a jury may be somewhat more representative than a lone judge, any jury faced with a complex case involving public policy issues would suffer from the same infirmities as a judge: lack of expertise and an inability to hear a broad range of viewpoints.\textsuperscript{344} Moreover, most litigation results in settlement before a judge has an opportunity to issue a final ruling or a jury is able to render a verdict.\textsuperscript{345} Finally, settlements often do not incorporate interests beyond those that are important to the litigants.\textsuperscript{346} A settlement’s terms may also result from a disparity in the bargaining power between the negotiating parties, preventing a “fair balancing of the relevant policy considerations.”\textsuperscript{347}

In contrast to the various players in the litigation arena, legislatures are well qualified to craft regulatory schemes. Legislatures, through committees and administrative agencies, have the resources and expertise needed to conduct thorough research.\textsuperscript{348} To the extent that research and debate fail to generate a clear solution, legislators, as elected representatives, have the authority to make political judgments and to reach a consensus that theoretically represents the majority’s will.\textsuperscript{349} Moreover, unlike the litigation context, in which only

\textsuperscript{341} See Roland, supra note 117, at 1531.
\textsuperscript{342} See Lytton, supra note 340, at 53-54, 73-74.
\textsuperscript{343} See id.
\textsuperscript{345} Id. at 1259.
\textsuperscript{346} Id. at 1270.
\textsuperscript{347} Id.
\textsuperscript{348} See Lytton, supra note 340, at 53-54, 73-74.
\textsuperscript{349} See id. at 73.
the plaintiff's and defendant's arguments are heard, legislatures serve as a forum in which more parties have a voice, either through testimony, lobbying groups, a letter to a legislator, or the ballot box.\textsuperscript{350} Finally, legislatures may defer judgment, return to an issue after time has passed, and modify programs after their implementation.\textsuperscript{351}

By assuming the role of the legislatures, the courts intrude upon the constitutional territory of another governmental branch.\textsuperscript{352} The form that gun, tobacco, and health care regulation should take is a divisive issue. Legislatures should therefore resolve the issue so that many viewpoints can be presented and a legitimate consensus reached.\textsuperscript{353} In contrast, when municipal governments and state attorneys general advance lawsuits against targeted industries, the only discernible voice is that of the executive.\textsuperscript{354} Legislators who tolerate this action, perhaps because enough of them agree with the executive's position, will hasten the erosion of power of their own branch of government.\textsuperscript{355}

On the other hand, appealing arguments can be made for allowing litigation to set public policy.\textsuperscript{356} These arguments, however, often focus on the failures of other governmental branches rather than on the inherent proficiency of courts to design social policy.\textsuperscript{357} For example, in the area of tobacco, Congress and state legislatures, as well as federal regulatory agencies, failed to construct anything but the most rudimentary tobacco regulatory scheme.\textsuperscript{358} According to some commentators, these governmental branches have succumbed to the tobacco industry's allies and are therefore incapable of re-

\textsuperscript{350} See Lytton, supra note 344, at 1251.
\textsuperscript{351} See Lytton, supra note 340, at 52, 73.
\textsuperscript{353} See id. at 452-54.
\textsuperscript{354} Id. at 466-67.
\textsuperscript{355} Id. at 467. At both the state and federal levels, legislatures have "power of the purse." Id. at 466. Using this power, legislatures can halt the executive branch's encroachment by cutting off the funding for their lawsuits. Id. In addition to raising separation-of-powers concerns, the government-sponsored lawsuits represent taxation through litigation. See William H. Pryor Jr., A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits, 74 Tul. L. Rev. 1885, 1898 (2000). In their suits against gun manufacturers, municipalities seek to recoup money spent on providing government services. It is the job of the legislatures, however, to raise money for public programs. James H. Warner, Municipal Anti-Gun Lawsuits: How Questionable Litigation Substitutes for Legislation, 10 Seton Hall Const. L.J. 775, 778 (2000).
\textsuperscript{356} See Jacobson & Warner, supra note 327, at 793-95.
\textsuperscript{357} See id. at 793.
\textsuperscript{358} See id. at 774-75, 793. The authors state that "[t]he political system had not attained the policy outcomes that the attorneys general believed were desirable and that they anticipated litigation would provide." Id. at 777.
sponding to the public’s need. Resort to the courts, therefore, became a necessary and final alternative. Another rationale in support of policy through litigation is that legislatures are peculiarly inactive in the area of public health law because individual constituents are naturally more concerned with their own immediate health than with threats to the health of the overall population. In addition, litigation’s discovery mechanism proved very effective in revealing to the American public the fraudulent practices of the tobacco companies. Some would argue that judicially-backed discovery may be effective in inducing other industries to reveal what they otherwise would not.

Opponents of this view argue that when democratically elected representatives choose not to implement regulations, it is not because they are “captured” by powerful lobbyist groups, but because they are simply better informed or have a greater awareness of the larger political context. As one commentator argued, it is unfair to allow groups who “have lost in the legislative and regulatory arenas [to] turn to the courts . . . for a third, unaccountable bite at the policymaking apple.” Resorting to the countermajoritarian courts rather than allowing the elected representatives to determine the policies by which the public is bound subverts the democratic process.

Sifting through the various arguments, it is difficult to construct a compelling case in favor of any of the lawsuits currently pending against HMOs, gun companies, and the former makers of lead paint. The pitfalls of the tobacco litigation, notably an inability to effect real change and the denial of a defendant’s day in court, are present in each lawsuit. Moreover, the rationales in support of the tobacco litigation do not apply to the more recent suits. Unlike the paralysis that governments exhibited during the tobacco debate, state and federal entities have not remained inactive in the face of health care abuses, handgun violence, or lead paint poisoning.

359 See id. at 793 (“[Tobacco litigation supporters] argue that the industry has a stranglehold on the bureaucracies charged with regulating cigarette-related health and safety matters.”); Matthew Baldini, Comment, The Cigarette Battle: Anti-Smoking Proponents Go for the Knockout, 26 SETON HALL L. REV. 348, 363-64 (1995) (discussing the strength of the tobacco lobby).


361 See id. at 1696-97.


363 Id. at 812-13.

364 See, e.g., supra notes 169-71 and accompanying text (discussing Congress’s efforts to pass a patients’ rights bill and various state legislation aimed at improving patient care); supra text accompanying note 263 (discussing the federal ban on lead paint).
posals are moving forward, rendering any circumvention of the legislative process unjustified.

If public policy decisions are to be kept out of the courts, it is necessary to prevent plaintiffs' attorneys from steamrolling other industries into settlement negotiations. The keystone to the success of the four classes of suits examined in this Note was the involvement of a public entity as plaintiff. Once a governmental entity joins a suit, its presence lends legitimacy to the plaintiffs' claims. This legitimacy serves as the critical mass needed to demonize an industry in the public's mind, after which the filing of lawsuits by more cities, counties, and states is virtually assured. Faced with such an overwhelming assault, an industry cannot afford to defend itself and will capitulate well before it can test its defenses in court. Therefore, a solution to this snowball effect must focus on the alliances formed between public entities and private attorneys. Bans on contingency fee agreements between state governments and private attorneys can stymie multigovernmental lawsuits. This prohibition would require a governmental entity to appeal to the legislature for funding to advance its lawsuits, thus allowing a diverse body of elected representatives to consider the wisdom of using the proposed litigation to achieve the desired policy goal.

**Conclusion**

The tobacco litigation christened a new form of class action in which teams of well-financed lawyers representing thousands, even millions, of individuals attempt to expose an entire industry to liability so expansive that it will capitulate and settle before the plaintiffs' legal theories are even tested in court. In the case of the Medicaid reimbursement suits filed against the major tobacco companies, plaintiffs' lawyers allied themselves with state attorneys general, who brought "moral authority" to the confrontation. In addition, these plaintiffs' attorneys supplemented their dubious legal arguments by going after their opponents where it counts most—the bottom line. The result of this multipronged strategy was a startling and unprecedented damage settlement. Whether or not this strategy was fair to the tobacco companies, many of the same lawyers who challenged the tobacco industry are seeking to duplicate their success by taking on other industries

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366 See Cupp, supra note 365, at 698.
they consider to have wronged the American public—particularly the health care, gun manufacturing, and paint industries.

Although the tobacco litigation and its end result may be justifiable, it was a fountainhead of wrongheaded litigation. The subsequent lawsuits target industries that are much less culpable than cigarette makers. As was the case with the tobacco suits, the litigation these industries now face seeks to fundamentally alter and extract enormous damages from unpopular but entirely legal industries. This development presents the pressing question of whether it is wise—or even constitutional—to allow class action and governmental plaintiffs to use the court system to formulate public policy, rather than pursuing reform through the more representative branches of government.