

98-7944

To be Argued by:

HERBERT M. WACHTELL

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

LABORERS LOCAL 17 HEALTH AND BENEFIT FUND; TRANSPORT WORKERS UNION NEW YORK CITY PRIVATE BUS LINES HEALTH BENEFIT TRUST, on behalf of themselves and all others similarly situated; UNITED FEDERATION OF TEACHERS WELFARE FUND; COMMUNICATIONS WORKERS OF AMERICA LOCAL 1180 SECURITY BENEFITS FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 891 WELFARE FUND and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—v.—

PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, USA; B.A.T. INDUSTRIES,
(caption continued on inside front cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT BRIEF FOR DEFENDANTS-APPELLANTS

Paul K. Stecker
Paul F. Jones
PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-8400

Herbert M. Wachtell
Peter C. Hein
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for Defendant-Appellant Philip Morris Incorporated
(Counsel continued on inside front cover)

P.L.C.; LORILLARD TOBACCO CO.; LIGGETT & MYERS, INC.;
AMERICAN TOBACCO COMPANY; UNITED STATES TOBACCO
COMPANY; COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.;
TOBACCO INSTITUTE, INC.; SMOKELESS TOBACCO COUNCIL, INC. and
HILL & KNOWLTON, INC.,

Defendants-Appellants.

Marjorie Press Lindblom
Peter A. Bellacosa
KIRKLAND & ELLIS
153 East 53rd Street
New York, New York 10022
(212) 446-4800

David M. Bernick
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Kenneth N. Bass
Jennifer Gardner
KIRKLAND & ELLIS
655 15th Street, NW
Suite 1200
Washington, D.C. 20005
(202) 879-5014

*Attorneys for Defendant-Appellant
Brown & Williamson Tobacco
Corporation, including as
successor by merger to Defendant-
Appellant The American Tobacco
Company*

David S. Eggert
James Rosenthal
ARNOLD & PORTER
555 12th Street, NW
Washington, D.C. 20004-1202
(202) 942-5000

*Of Counsel to Defendant-Appellant
Philip Morris Incorporated*

Robert W. Gaffey
Michael S. Chernis
JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, New York 10022
(212) 326-3939

Robert F. McDermott, Jr.
Donald B. Ayer
JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, NW, Suite 700
Washington, D.C. 20005-2088
(202) 879-3939

*Attorneys for Defendant-Appellant
R.J. Reynolds Tobacco Company*

Alan E. Mansfield
GREENBERG TRAURIG
MetLife Building
200 Park Avenue
New York, New York 10166
(212) 801-9200

Robert E. Northrip
Bruce R. Tepikian
Samuel B. Sebree
SHOOK, HARDY & BACON, L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
(816) 474-6550

*Attorneys for Defendant-Appellant
Lorillard Tobacco Company*

Peter J. McKenna
Eric S. Sarner
Mark S. Cheffo
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

*Attorneys for Defendant-Appellant
United States Tobacco Company*

Anthony Mansfield
SEWARD & KISSEL
One Battery Park Plaza
New York, New York 10004
(212) 574-1200

*Attorneys for Defendant-Appellant
The Tobacco Institute, Inc.*

Steven Klugman
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

*Attorneys for Defendant-Appellant
The Council for Tobacco
Research—U.S.A., Inc.*

Michael M. Fay
KASOWITZ, BENSON, TORRES
& FRIEDMAN
1301 Avenue of the Americas
36th Floor
New York, New York 10019
(212) 506-1700

*Attorneys for Defendant-Appellant
Liggett & Myers, Inc.*

Bruce M. Ginsberg
Michael C. Lasky
DAVIS & GILBERT
1740 Broadway, 3rd Floor
New York, New York 10019
(212) 468-4800

*Attorneys for Defendant-Appellant
Hill & Knowlton, Inc.*

Barry S. Schaevitz
JACOB, MEDINGER & FINNEGAN, LLP
1270 Avenue of the Americas
31st Floor
New York, New York 10020
(212) 332-7700

*Attorneys for Defendant-Appellant
Smokeless Tobacco Council, Inc.*

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PRELIMINARY STATEMENT

This appeal is from an order by the Hon. Shira A. Scheindlin denying in part a motion to dismiss for failure to state a claim. The opinion is reported at 7 F. Supp. 2d 277 (A 587).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(b). The district court made the findings required by 28 U.S.C. § 1292(b) (A 640), and on July 14, 1998 this Court granted defendants permission to appeal (A 643). There was no cross petition or cross appeal. Plaintiffs assert subject matter jurisdiction under 28 U.S.C. §§ 1331, 1337(a) and 1367. A 42.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW*

1. Whether plaintiffs' RICO, fraud, and special duty claims must be dismissed under the rule barring remote and indirect claims.
2. Whether the RICO claims must be dismissed on the separate, alternative ground that plaintiffs do not allege injury to "business or property."
3. Whether the claims predicated upon allegations of fraud must be dismissed because plaintiffs have not alleged reliance with the particularity required by Rule 9(b).
4. Whether plaintiffs' special duty claim must be dismissed because the complaint fails to plead the prerequisite elements of such a cause of action.
5. Whether plaintiffs' fraud and special duty claims are preempted by the Federal Cigarette Labeling and Advertising Act.

* Judge Scheindlin identified two controlling questions of law in certifying her order pursuant to § 1292(b). A 642. However, certification of an order under § 1292(b) makes the entire order appealable. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996).

argued that their RICO claims were limited to expenses associated with addiction, such as cigarette purchases, and thus were not for physical injury. *Id.* at *2. Judge Gleeson rejected this argument because “plaintiffs’ core injuries are medical, not proprietary, and any incidental financial consequences do not give rise to a claim under 18 U.S.C. § 1964(c).” *Id.* Similarly, in *Allman v. Philip Morris, Inc.*, 865 F. Supp. 665, 668 (S.D. Cal. 1994), the court dismissed RICO claims by smokers seeking recovery of expenses for treating nicotine addiction and noted that “the courts have been clear that even the economic consequences of personal injuries are not compensable under RICO.” *See also Ehrich v. BAT Indus., P.L.C.*, 964 F. Supp. 164, 166-167 (D.N.J. 1997).

The requirement of “business or property” injury that bars claims for the supposed economic consequences to individuals of personal injuries from smoking applies *a fortiori* when a medical expense payor is bringing a claim that derives from personal injuries suffered by others. Thus, in *Stationary Engineers*, 1998 WL 476265 at *5 (S 13), the court dismissed RICO claims by a union fund, reasoning:

Although packaged as an injury to business or property, what plaintiffs actually seek is to recover for costs incurred because of personal injuries sustained by individual smokers . . . Despite plaintiffs’ assertions that defendants’ conduct has caused injury to plaintiffs’ business and property, it appears to the Court that plaintiffs’ claims as stated remain wholly derivative of the primary victims’ personal injury claims.

See also City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1139 (N.D. Cal. 1997) (“plaintiffs should not be allowed to avoid the bar against RICO recovery for the pecuniary loss associated with personal injury merely by asserting a derivative claim”).*

* Of course, the mere fact that the Funds parrot the language of the RICO statute and allege in conclusory fashion that the injuries they suffered were to “business or property” is of no consequence. *See p. 18, supra.*

cigarette advertising on youth” and issues of misleading advertising. 29 Fed. Reg. 8324, 8327-32, 8332-64 (July 2, 1964).

In 1965, Congress began to require health warnings on all cigarette packages. Since 1984, Congress has required all cigarette packages and advertising to contain one of four graphic rotating warnings, such as:

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy. (15 U.S.C. §§ 1333(a)(1) and (2).)

Numerous courts have recognized that the health risks associated with smoking are a matter of longstanding common knowledge. As this Court noted, “[t]obacco use has long been identified as a cause of death and disease in smokers.” *Beatie v. City of New York*, 123 F.3d 707, 709 (2d Cir. 1997). *See also Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988) (“Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community.”), *aff’g and quoting* 623 F. Supp. 1189, 1192 (E.D. Tenn. 1985); *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir.) (“Like the dangers of alcohol consumption, the dangers of cigarette smoking have long been known to the community”; no duty to warn plaintiff who started smoking in 1936), *cert. denied*, 117 S. Ct. 300 (1996).*

* *See also, e.g., Tompkin v. American Brands, Inc.*, No. 5:94 CV 1302, at 21 (N.D. Ohio Aug. 3, 1998) (S31) (“the health risks from smoking, particularly the risk of lung cancer, was ‘common knowledge’ in 1950”); *Vickrey v. R.J. Reynolds Tobacco Co.*, No. 96-2612, slip op. at 6 (W.D. La. April 3, 1997) (S 32) (“as early as 1952, . . . knowledge of the dangers of cigarettes was widespread”); *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 231 (N.D. Ohio 1993) (“knowledge of [the risks posed by smoking] has been common to the community since well before 1966”); *Johnson v. R.J. Reynolds Tobacco Co.*, 1986 WL 13937 at *1 (S.D. Tex. Dec. 5, 1986)

agreement of the parties.” 505 U.S. at 526 n.23. The “special duty” tort claim in this case seeks to impose a disclosure obligation by operation of state law and is preempted.

Second, as to the fraud claim, the *Cipollone* plurality ruled that what it described as a “fraudulent misrepresentation” claim — premised on the theory that the defendants’ advertisements or promotions were designed to “neutralize” the statutory warnings and “minimize the health hazards associated with smoking” — *was preempted*, despite its characterization as a fraudulent misrepresentation claim, because it was simply the “converse” of a requirement that different warnings should have been included. 505 U.S. at 527; *see also* 505 U.S. at 548-56 (separate two-justices’ opinion). Further, the plurality recognized that “fraudulent misrepresentation” claims which *were* predicated on a duty “based on smoking and health” and thus *were* preempted, included affirmative representations (1) that “associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness . . . at the same time suggesting that smoking is an activity at least consistent with physical health and well-being” and (2) that may convey “a false impression that smoking [is] innocuous,” 505 U.S. at 527. The plurality also *rejected* the suggestions that § 1334(b) “pre-empts liability for omissions but not for acts, or that [§ 1334(b)] pre-empts liability for unintentional torts but not for intentional torts.” 505 U.S. at 523.

Courts have repeatedly dismissed claims premised upon alleged fraudulent nondisclosure, suppression or concealment of information about smoking and health, even when brought by individual smokers. Just recently, in *Small*, the New York Appellate Division, reversing a trial court decision, held that the fraud and conspiracy claims of individual smokers were preempted “insofar as they allege fraudulent concealment and failure to warn of the dangers of nicotine” and that any common law fraud claim premised upon allegations that defendants “fraudulently concealed research results” was likewise preempted. 1998 WL 398176 at *9 (S 29).* *See also Allgood v.*

* Notably, the district court relied on the now-reversed trial court decision in *Small* in its opinion below. A 597.

R.J. Reynolds Tobacco Co., 80 F.3d 168,171 (5th Cir. 1996) (preempting claims alleging that “defendants discovered the health risks of tobacco through their research, and fraudulently concealed that information from the public”); *Lacey v. Lorillard Tobacco Co.*, 956 F. Supp. 956, 962 (N.D. Ala. 1997) (preempting “fraudulent suppression” claim when “plaintiff asserts that more information should have been provided by defendants in the marketing of their products”); *Cantley v. Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996) (preempting “fraudulent suppression” claim because it was inevitably based upon a “state law duty to disclose . . . facts through . . . advertising or promotion channels of communication”).*

To be sure, both the plurality opinion in *Cipollone* and some of the above cases express the view that certain claims based upon affirmative fraudulent misrepresentations are not preempted.** However, what the plurality described as fraudulent

* *DaSilva v. American Tobacco Co.*, 667 N.Y.S. 2d 653, 656 (N.Y. Sup. Ct. Dec. 12, 1997) (“applying the Supreme Court’s [*Cipollone*] decision to the complaint herein, the defendants’ motion to dismiss the plaintiffs’ claims based on a failure to warn, fraudulent concealment and implied warranty after the effective date of the Labeling Act in 1969 is granted”); *Hulsey v. American Brands Inc.*, 1997 WL 271755 at *4 (S.D. Tex. Apr. 7, 1997) (S 30) (applying *Cipollone* and *Allgood* to preempt “allegations of fraudulent concealment”); *Durkin v. Philip Morris Tobacco, Corp.*, No. 3:CV-97-0887, slip op. at 6-7 (M.D. Pa. Feb. 17, 1998) (S 34).

** It is by no means clear that this view of the *Cipollone*’s four justice plurality is controlling here. While three justices who joined in Justice Blackmun’s opinion would have limited preemption to cases involving state statutory provisions, they agreed with the view of the two justices who joined in Justice Scalia’s opinion that the plurality opinion’s analysis of what claims were and were not preempted was illogical and contradictory. 505 U.S. at 542-543, 552-54. Given the absence of any majority opinion by the Court in *Cipollone* and that five justices (albeit for different reasons) disagreed with the

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LABORERS LOCAL 17 HEALTH AND BENEFIT FUND; TRANSPORT WORKERS UNION NEW YORK CITY PRIVATE BUS LINES HEALTH BENEFIT TRUST, on behalf of themselves and all others similarly situated; UNITED FEDERATION OF TEACHERS WELFARE FUND; COMMUNICATIONS WORKERS OF AMERICA LOCAL 1180 SECURITY BENEFITS FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 891 WELFARE FUND and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—v.—

PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, USA; B.A.T. INDUSTRIES, P.L.C.; LORILLARD TOBACCO CO.; LIGGETT & MYERS, INC.; AMERICAN TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH—U.S.A., INC.; TOBACCO INSTITUTE, INC.; SMOKELESS TOBACCO COUNCIL, INC. and HILL & KNOWLTON, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

Melvyn I. Weiss
David J. Bershad
Michael C. Spencer
Kenneth J. Vianale
MILBERG WEISS BERSHAD HYNES
& LERACH LLP
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

Attorneys for Plaintiffs-Appellees

Herbert M. Wachtell
Peter C. Hein
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

*Attorneys for Defendant-Appellant
Philip Morris Incorporated*

(Counsel continued on inside front cover)

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**Docket in Laborers Local 17 Health & Benefit Fund, et al. v. Philip Morris Inc., et al.
[pp. A1-A17]**

APPEAL

U.S. District Court
Southern District of New York - Civil Database (Foley Square)

CIVIL DOCKET FOR CASE #: 97-CV-4550

Laborers Local 17, et al v. Philip Morris, Inc., et al Filed: 06/19/97
Assigned to: Judge Shira A. Scheindlin Jury demand: Both
Referred to: Magistrate Judge Michael H. Dolinger
Demand: \$0,000 Nature of Suit: 890
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 15:1 Antitrust Litigation

LABORERS LOCAL 17 HEALTH AND
BENEFIT FUND
 plaintiff

Perry Weitz
[COR LD NTC]
Weitz & Luxenberg, P.C.
180 Maiden Lane
New York, NY 10038
(212) 558-5500

THE TRANSPORT WORKERS UNION
NEW YORK CITY PRIVATE BUS
LINES HEALTH BENEFIT TRUST, on
behalf of themselves and all
others similarly situated
 plaintiff

Perry Weitz
(See above)
[COR LD NTC]

v.

PHILIP MORRIS, INC.
 defendant

Peter C. Hein
[COR LD NTC]
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
(212)403-1000

R.J. REYNOLDS TOBACCO COMPANY
 defendant

Robert W. Gaffey
[COR LD NTC]
Jones, Day, Reavis & Pogue
599 Lexington Avenue
New York, NY 10022
(212) 326-3939

BROWN & WILLIAMSON TOBACCO
CORPORATION
 defendant

Peter A. Bellacosa
[COR LD NTC]
Kirkland & Ellis

A 18

Docket in United Federation of Teachers Welfare Fund, et al. v. Philip Morris Inc., et al.
[pp. A18-A34]

REL CV 97
4550

U.S. District Court
Southern District of New York - Civil Database (Foley Square)

CIVIL DOCKET FOR CASE #: 97-CV-4676

United Federation, et al v. Philip Morris, Inc., et al Filed: 06/25/97
Assigned to: Judge Shira A. Scheindlin Jury demand: Both
Referred to: Magistrate Judge Michael H. Dolinger
Demand: \$0,000 Nature of Suit: 890
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 18:1962 Racketeering (RICO) Act

UNITED FEDERATION OF TEACHERS
WELFARE FUND
plaintiff

Arthur M. Luxenberg
[COR LD NTC]
Weitz & Luxenberg, P.C.
180 Maiden Lane
New York, NY 10038
(212) 558-5500

Perry Weitz
[COR LD NTC]
Weitz & Luxenberg, P.C.
180 Maiden Lane
New York, NY 10038
(212) 558-5500

Steven E. Fineman
[COR LD NTC]
Weitz & Luxenberg, P.C.
180 Maiden Lane
New York, NY 10038
(212) 558-5500

Robert J. Connerton
[COR LD NTC]
John McN. Broaddus
[COR LD NTC]
Connerton & Ray
1920 L Street, 4th Floor
Washington, DC 20036-5004
(202) 466-6790

COMMUNICATION WORKERS OF
AMERICA LOCAL 1180 SECURITY
BENEFITS FUND
plaintiff

Arthur M. Luxenberg
(See above)
[COR LD NTC]

Perry Weitz
(See above)

Complaint in Laborers Local 17 Health & Benefit Fund, et al. v. Philip Morris Inc., et al.

[pp. A35-A151]

JUDGE SCHEIDT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LABORERS LOCAL 17 HEALTH AND
BENEFIT FUND, and THE TRANSPORT
WORKERS UNION NEW YORK CITY
PRIVATE BUS LINES HEALTH BENEFIT
TRUST, on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

PHILIP MORRIS, INC.; R.J. REYNOLDS
TOBACCO COMPANY; BROWN &
WILLIAMSON TOBACCO CORPORATION;
B.A.T. INDUSTRIES P.L.C.; LORILLARD
TOBACCO COMPANY, INC.; LIGGETT &
MYERS INC.; THE AMERICAN TOBACCO
COMPANY; UNITED STATES TOBACCO
COMPANY; THE COUNCIL FOR TOBACCO
RESEARCH -- U.S.A., INC.; THE
TOBACCO INSTITUTE, INC.;
SMOKELESS TOBACCO COUNCIL, INC.;
HILL & KNOWLTON, INC.,

Defendants.

97 CIV. 4550

Civil Action No.:



CLASS ACTION COMPLAINT

AND

DEMAND FOR JURY TRIAL

2000 JUN 19 11 53
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

illnesses and to obtain appropriate injunctive relief against the Tobacco Companies' continuing illegal conduct. Among other things, Plaintiffs seek a permanent injunction to require the Tobacco Companies and their agents to disclose their research on the health consequences of tobacco use and the addictiveness of nicotine, to fund a remedial public education program on the health consequences of tobacco use, and to finance smoking and smokeless tobacco cessation programs for nicotine-dependent tobacco users.

8. The trustees of Plaintiffs and the other similarly situated union health and welfare trust funds in New York are bound by their fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., to ascertain the legal liability of third parties to pay for care and services paid for by Plaintiffs and the Class of similarly situated funds, and to seek reimbursement to the extent of such legal liability. Plaintiffs have discovered that the Tobacco Companies and the other defendants have been engaged in a protracted and willful course of fraudulent conduct in violation of numerous federal and state laws, including civil RICO, federal and state antitrust laws and the common law doctrines of fraud (concealment and misrepresentation), strict products liability, negligence, breach of undertaking, breach of warranties and unjust enrichment.

II. JURISDICTION AND VENUE

9. This Court has federal subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337; 15 U.S.C. § 15; and 18 U.S.C. §§ 1961-1964.

10. This Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant 28 U.S.C. § 1367(a).

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391 (b) and (c);

LABORERS LOCAL 17 HEALTH & BENEFIT
FUND and The Transport Workers Union New
York City Private Bus Lines Health Benefit Trust,
Plaintiffs,

v.

PHILIP MORRIS, INC., R.J. Reynolds Tobacco
Co., Brown & Williamson Tobacco
Corp., B.A.T. Indus. P/L/C/, Lorillard Tobacco
Co., Inc., Liggett & Myers
Inc., The American Tobacco Co., United States
Tobacco Co., The Council for
Tobacco Research-USA, Inc., The Tobacco
Institute, Inc., Smokeless Tobacco
Council, Inc., and Hill & Knowlton, Inc.,
Defendants.

Nos. 97 Civ. 4550(SAS), 97 Civ. 4676, 97 Civ.
7346, 97 Civ. 8462, 97 Civ. 9395-
9402.

United States District Court,
S.D. New York.

March 25, 1998.

Labor union health and welfare trust funds brought action against tobacco companies and public relations firms, alleging that companies' conspiracy to deceive general public about dangers of smoking caused funds to pay out millions of dollars more than they otherwise would have to provide treatment for participants' tobacco-related disease. Tobacco companies moved to dismiss action for failure to state a claim. The District Court, Scheindlin, J., held that: (1) funds' allegations that tobacco companies proximately caused funds harm were sufficient to defeat tobacco companies' motion to dismiss for failure to state a claim; (2) funds' claims were not extinguished by any right of subrogation funds may have had based on benefit contracts; (3) funds' intentional fraud claims were not preempted by Cigarette Labeling and Advertising Act; (4) funds' voluntary assumption of special duty claims were not preempted by Cigarette Labeling and Advertising Act; (5) funds' unjust enrichment claims were not preempted by Cigarette Labeling and Advertising Act; (6) funds stated prima facie claim against tobacco companies under Racketeer Influenced and Corrupt Organizations Act (RICO); (7) funds could not bring claims against tobacco companies under state and federal antitrust laws; (8) funds stated prima facie fraud claims against tobacco

companies; (9) funds stated prima facie breach of special duty claim against tobacco companies; and (10) funds failed to state prima facie unjust enrichment claim against tobacco companies.

So ordered.

[1] FEDERAL CIVIL PROCEDURE Ⓒ1829
170Ak1829

In deciding a motion to dismiss for failure to state a claim, the court must accept all material facts alleged in the complaint as true and must draw all reasonable inferences in the nonmovant's favor. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[1] FEDERAL CIVIL PROCEDURE Ⓒ1835
170Ak1835

In deciding a motion to dismiss for failure to state a claim, the court must accept all material facts alleged in the complaint as true and must draw all reasonable inferences in the nonmovant's favor. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE Ⓒ1772
170Ak1772

The court may not grant the motion to dismiss for failure to state a claim merely because recovery seems remote or unlikely. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] NEGLIGENCE Ⓒ60
272k60

The concept of "proximate cause" prevents a recovery from a party for remote and derivative injuries to a plaintiff resulting from that party's conduct toward another.

See publication Words and Phrases for other judicial constructions and definitions.

[4] DAMAGES Ⓒ43
115k43

Under the common law, one who pays the medical expenses of another may not recover those expenses from the third-party tortfeasor who caused the damage.

[5] TORTS Ⓒ15
379k15

Factors that courts may consider when determining proximate cause in intentional tort cases include: 1) the defendant's intent to do harm, 2) the degree of moral wrong involved, and 3) the seriousness of the

Order of Judge Scheindlin, dated April 28, 1998, on Defendants' Application Pursuant to 28 U.S.C. § 1292(b) for Certification of Court's March 25, 1998 Order (7 F. Supp. 2d 294) 7 F. Supp. 2d 294 [pp. A640-A642] Page 22
(Cite as: 7 F. Supp. 2d 294)

LABORERS LOCAL 17 HEALTH & BENEFIT
FUND and the Transport Workers Union New
York City Private Bus Lines Health Benefit Trust,
Plaintiffs,

v.

PHILIP MORRIS, INC., R.J. Reynolds Tobacco
Co., Brown & Williamson Tobacco
Corp., B.A.T. Indus. P/L/C/, Lorillard Tobacco
Co., Inc., Liggett & Myers
Inc., The American Tobacco Co., United States
Tobacco Co., The Council for
Tobacco Research-USA, Inc., The Tobacco
Institute, Inc., Smokeless Tobacco
Council, Inc., and Hill & Knowlton, Inc.,
Defendants.

No. 97 CIV. 4550(SAS), 97 CIV. 4676, 97 CIV.
7346, 97 CIV. 8462, 97 CIV. 9395,
97 CIV. 9396, 97 CIV. 9397, 97 CIV. 9398, 97
CIV. 9399, 97 CIV. 9400, 97 CIV.
9401, 97 CIV. 9402.

United States District Court,
S.D. New York.

April 28, 1998.

Labor union health and welfare trust funds brought action against tobacco companies and public relations firms, alleging that defendants engaged in conspiracy to deceive them as to health risks associated with smoking in violation of state law and Racketeer Influenced and Corrupt Organizations Act (RICO). Defendants moved to dismiss for failure to state a claim. After the District Court, 1998 WL 146217, granted motion in part and denied it in part, defendants sought certification for interlocutory review. The District Court, Scheindlin, J., held that: (1) certification was not warranted on question of whether funds pled a direct claim for injuries proximately caused by defendants or whether funds pled injury to their business or property; (2) certification was warranted on question of whether economic injuries incurred by fund were too remote to permit recovery; and (3) certification was warranted on question of whether the Cigarette Labeling and Advertising Act preempted state law fraud and breach of fiduciary duty claims.

Ordered accordingly.

[1] FEDERAL COURTS ⇨ 660.5
170Bk660.5

In action by labor union health and welfare trust funds alleging that tobacco companies conspired to deceive funds regarding health risks associated with smoking in violation of Racketeer Influenced and Corrupt Organizations Act (RICO), certification for interlocutory appeal was not warranted on question of whether funds pled a direct claim for injuries proximately caused by defendants or whether funds pled injury to their business or property; such questions merely challenged sufficiency of the pleadings. 18 U.S.C.A. § 1961 et seq.; 28 U.S.C.A. § 1292(b).

[2] FEDERAL COURTS ⇨ 660.5
170Bk660.5

In action by labor union health and welfare trust funds alleging that tobacco companies conspired to deceive funds regarding health risks associated with smoking in violation of Racketeer Influenced and Corrupt Organizations Act (RICO), certification for interlocutory appeal was warranted on question of whether economic injuries incurred by fund were too remote to permit recovery; such issue was at the heart of the action, and controlling case law was conflicting. 18 U.S.C.A. § 1961 et seq.; 28 U.S.C.A. § 1292(b).

[3] FEDERAL COURTS ⇨ 660.5
170Bk660.5

In action by labor union health and welfare trust funds alleging that tobacco companies deceived funds regarding health risks associated with smoking, certification for interlocutory appeal was warranted on question of whether the Cigarette Labeling and Advertising Act preempted state law fraud and breach of fiduciary duty claims. Federal Cigarette Labeling and Advertising Act, §§ 2-12, as amended, 15 U.S.C.A. §§ 1331-40; 28 U.S.C.A. § 1292(b).

*295 Perry Weitz, Arthur M. Luxenberg, Steven E. Fineman, Karen J. Mandel, Weitz & Luxenberg, P.C., New York, NY, Melvyn I. Weiss, David J. Bershad, Michael C. Spencer, Kenneth J. Vianale, Milberg Weiss Bershad Hynes & Lerach LLP, New York, NY, William S. Lerach, Patrick J. Coughlin, Allen M. Mansfield, Milberg Weiss Bershad Hynes & Lerach LLP, San Diego, CA, Robert J. Connerton, James S. Ray, John McN. Broadbuss, Connerton & Ray, Washington, DC, Stephen Gordon, Joel Spivak, Mirkin & Gordon, Great Neck, NY, for Laborers Local 17 (97 Civ. 4550), UFT (97 Civ. 4676).

A 643

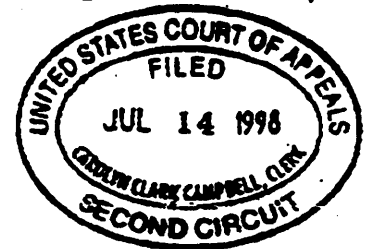
Order of Second Circuit Court of Appeals, dated July 14, 1998, Granting Defendants'
Petition Pursuant to 28 U.S.C. § 1292(b)
[pp. A643-A644]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SONY
97-cv-4550
Scheidlin
Dolinger

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14 day of July one thousand nine hundred and ninety-eight.

Present: HONORABLE RALPH K. WINTER,
Chief Judge,
HONORABLE AMALYA L. KEARSE,
HONORABLE JOHN M. WALKER, JR.,
Circuit Judges.



Laborers Local 17 Health &
Benefit Fund, et al.,

v.

98-8022

Phillip Morris, Inc., et al.

The application for leave to appeal pursuant to 28 U.S.C. § 1292(b) is granted.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk

Lucille Carr
by: Lucille Carr, Deputy Clerk

**Mrs. Samuel E. ALLGOOD, Individually and as Independent Executrix of the Estate
of Samuel E. Allgood, Marcus Allgood, and Malcolm Allgood, Plaintiffs-
Appellants,**

v.

**R.J. REYNOLDS TOBACCO COMPANY, the American Tobacco Company, the Tobacco
Institute, Inc., and the Council for Tobacco Research-U.S.A., Inc., Defendants-
Appellees.**

No. 95-20363.

**United States Court of Appeals,
Fifth Circuit.**

April 16, 1996.

Representatives of deceased smoker brought action against cigarette manufacturers and cigarette trade associations, alleging claims of negligence, conspiracy, products liability, breach of warranty, fraudulent misrepresentation, and concealment. The United States District Court for the Southern District of Texas, Vanessa D. Gilmore, J., granted summary judgment for manufacturers and trade associations. Representatives appealed. The Court of Appeals, Goodwin, Circuit Judge, sitting by designation, held that: (1) claims of negligence, conspiracy, and products liability accrued when physician told smoker that he had emphysema; (2) representatives provided no evidence that trade associations manufactured or sold cigarettes as required to maintain claims for breach of warranty against them; (3) statements or advertisements of cigarette manufacturers did not explicitly extend to future performance as required to toll limitations period for breach of warranty claims; and (4) evidence that smoker read news periodicals did not establish that he relied on alleged misrepresentations of cigarette manufacturers as required to maintain claims for fraudulent misrepresentation.

Affirmed.

[1] DEATH k15
117k15

Under Texas law, in survival action, plaintiffs may bring those personal injury claims which decedent himself could have brought immediately prior to his death.

[2] LIMITATION OF ACTIONS k55(1)
241k55(1)

Under Texas law, generally, claim accrues, for limitations purposes, at time of tortious behavior.

[3] LIMITATION OF ACTIONS k95(1)
241k95(1)

Under Texas law, pursuant to "discovery rule," claim does not accrue, for limitations purposes, until plaintiff knows, or should know, of resulting injury.

See publication Words and Phrases for other judicial constructions and definitions.

[4] LIMITATION OF ACTIONS k95(5)

(Cite as: 865 F.Supp. 665)

John G. ALLMAN, T. Ronald Gosling, Claudia Kiessel, Larry Alan Higley, Carolyn R. Cauley, Carl Rosenberg, Irwin Wolf, Richard Hess, Thomas R. Karrenberg, David E. Sharpe, Nancy Patterson, Ivan Sommer, Albert Stultz, Niel J. Johnson and Martin S. Lerner, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs,

v.

PHILIP MORRIS, INC., Liggett Group, Inc., The American Tobacco Co., Inc., R.J. Reynolds Tobacco Co., U.S. Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., Hill & Knowlton, Inc., Tobacco Institute, Inc., and Council for Tobacco Research, Defendants.

No. 94-0504-IEG (CM).

United States District Court,

S.D. California.

Sept. 22, 1994.

Class of smokers brought action against tobacco companies and others for violations of Racketeer Influenced and Corrupt Organizations Act (RICO). Tobacco companies moved to dismiss. The District Court, Gonzalez, J., held that smokers' complaint which sought damages for expense of purchasing nicotine patch did not allege injury to "business or property" within meaning of RICO. Dismissed.

[1] FEDERAL CIVIL PROCEDURE k1829
170Ak1829

In considering motion to dismiss for failure to state claim upon which relief may be granted, all allegations of material fact alleged in complaint are taken as true and construed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[1] FEDERAL CIVIL PROCEDURE k1835
170Ak1835

In considering motion to dismiss for failure to state claim upon which relief may be granted, all allegations of material fact alleged in complaint are taken as true and construed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE k1772
170Ak1772

Dismissal of complaint is improper unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS k59
319Hk59

Smokers' complaint, which alleged that tobacco companies violated Racketeer Influenced and Corrupt Organizations Act (RICO) by conspiring to cause smokers to be addicted to cigarettes requiring smokers to incur expense of purchasing nicotine patches to cure addiction, did not allege injury to "business or property" within meaning of RICO and, thus, failed to state a claim; economic consequences of personal injury such as cigarette addiction were not compensable under RICO. 18 U.S.C.A. s 1964(c).

116 S.Ct. 619
(Cite as: 516 U.S. 199, 116 S.Ct. 619)

YAMAHA MOTOR CORPORATION, U.S.A., et al., Petitioners,
v.
Lucien B. CALHOUN, etc., et al.
No. 94-1387.
Supreme Court of the United States
Argued Oct. 31, 1995.
Decided Jan. 9, 1996.

Parents of nonseaman who was killed in accident in territorial waters while using jet ski for recreational purposes sued jet ski's manufacturer under Pennsylvania's wrongful death and survival statutes. The United States District Court for the Eastern District of Pennsylvania, Louis H. Pollak, J., granted partial summary judgment for manufacturer. Parents appealed. The Court of Appeals for the Third Circuit, Becker, Circuit Judge, 40 F.3d 622, affirmed in part and reversed in part. Certiorari was granted. The Supreme Court, Justice Ginsburg, held that state remedies remain applicable in wrongful death and survival actions arising from accidents to nonseamen in territorial waters.

Court of Appeals' judgment affirmed.

[1] FEDERAL COURTS k751
170Bk751

Under statute that permits district court to certify for immediate interlocutory appeal order that involves controlling question of law as to which there is substantial ground for difference of opinion, court of appeals may exercise jurisdiction over any question that is included within order that contains controlling question of law identified by district court; jurisdiction applies to order certified to Court of Appeals, and is not tied to particular question formulated by district court. 28 U.S.C.A. s 1292(b).

[2] FEDERAL COURTS k751
170Bk751

Under statute that permits district court to certify for immediate interlocutory appeal order that involves controlling question of law as to which there is substantial ground for difference of opinion, Court of Appeals may not reach outside certified order to address other orders made in case. 28 U.S.C.A. s 1292(b).

[3] ADMIRALTY k18
16k18

Case that involved watercraft collision on navigable waters fell within admiralty's domain.

[4] ADMIRALTY k1.11
16k1.11

With admiralty jurisdiction comes application of substantive admiralty law.

[5] ADMIRALTY k1.20(1)
16k1.20(1)