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COMMON LAW RESTITUTION IN THE MISSISSIPPI TOBACCO SETTLEMENT: DID THE SMOKE GET IN THEIR EYES?

*Doug Rendleman**

Consider the following hypothetical. In 1994, in the ivory tower of a law school, a newly-minted law professor discovers a scholarly subject she believes is sufficiently “paradigm-shifting” to earn her tenure. The paradigm in tobacco products liability litigation, which has been “tobacco companies win,” will, she thinks, crumble. She launches the first of a series of heavily-footnoted articles into the law review sea. A state government which has paid Medicaid for eligible citizens’ tobacco-caused infirmities may, she contends, recover restitution from the tobacco companies that sold the tobacco. Her articles argue that the tobacco companies have been unjustly enriched or benefitted because the state’s Medicaid payments saved them the money they ought to have paid the smokers. In addition to preventing the tobacco companies’ unjust enrichment, restitution of the tobacco companies’ savings to the state government will advance two of the common law’s major goals: it will align legal rules with social aspirations, and it will internalize a significant externality.

If these articles had been written and if the leading lights in the fraternity of scholarly restitution studies had examined them as “outside reviewers” in the professor’s tenure review, the publications would probably have been called “dreamy” and found “deficient”—two of the reviewers’ kindest statements—and would not have qualified her under her law school’s tenure standard. In short, the law school’s paradigm would not have budged and the professor may

* Huntley Professor of Law, Washington & Lee University School of Law. I thank the Frances Lewis Law Center for supporting my research, Ms. Danielle Smith for helping with the footnotes, and the *Georgia Law Review* staff. I dedicate this article to the memory of my late mother, Mrs. Odetta Rendleman, who helped me think I could add something to the world’s store of knowledge, but who died with emphysema associated with decades of cigarette smoking.

even have been advised to seek other employment. But this is a hypothetical ivory tower.

Cut now to the real world. In 1994, in isolated Mississippi, thirteen law firms began the Medicaid restitution action against the tobacco companies summarized above.¹ They filed in Chancery, on behalf of the State of Mississippi in the name of the State's attorney general.² Thirty-nine other states' attorneys general's Medicaid recovery actions followed. The Mississippi lawsuit was settled in July of 1997 for \$3.3 billion over twenty-five years and a "most favored nation" clause, under which other states' more favorable later settlements augmented Mississippi's recovery.³ After the "global" 1997 settlement foundered in Congress, the other states' attorneys general's lawsuits were settled in 1998. The unsuccessful 1997 settlement differed from the successful 1998 settlement in a crucial way: the legislation implementing the 1997 settlement would have circumscribed smokers' products liability actions against tobacco companies, but the 1998 settlement does not.

The 1998 settlement left to the states the question of how to spend the \$206 billion plus the separate settlements, including Mississippi's, which the tobacco companies agreed to pay.⁴ Shortly before Christmas 1998, an arbitration panel assessed the Mississippi law firms' attorney fees at more than \$1.4 billion.⁵ One Mississippi firm is scheduled to receive \$874 million from the Mississippi settlement and its role in two other settlements, with the likelihood of more to come later.⁶ Creativity counts, for the old paradigm "tobacco companies win," if it has not shifted, has at least twitched.

One provocative question the settlements left unanswered is Professor Tom Mason's: whether the facts really would have

¹ Complaint, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed May 23, 1994) (No. 94-1429) (source on file with author).

² *Id.*

³ *Mississippi Law Firm to Receive \$874 Million from Tobacco Pacts*, WASH. POST, Dec. 20, 1998, at A26.

⁴ Sandra Torry, *Anti-Smoking Efforts Getting Little From Deal*, WASH. POST, Apr. 28, 1999, at A3.

⁵ Sandra Torry, *Huge Fees for Anti-Tobacco Lawyers: Cigarette Firms Call Record \$8 Billion Award "Outrageous,"* WASH. POST, Dec. 12 1998, at A1.

⁶ *Mississippi Law Firm to Receive \$874 Million from Tobacco Pacts*, *supra* note 3.

supported restitution recovery from the tobacco companies to the State of Mississippi.⁷ To speculate about an answer to Professor Mason's question requires me to inquire whether the State's restitution theory would be viable under the common law of restitution. This Article focuses on restitution and indemnity because combined they comprised the keystone of the State's substantive doctrines. This piece of the whole complex tobacco controversy is small enough to comprehend in a journal article, yet large enough to have set the compass for many other states' attorney generals' suits and for the states' ultimate 1998 settlement.

In addition to the mammoth stakes, the restitution issue itself is worth examining to evaluate the quality of the State's and the tobacco companies' analysis and the nature of common law change. In addition to Mississippi, several other states' Medicaid recovery lawsuits had counts for unjust enrichment, restitution, or indemnity, including Oklahoma,⁸ New Jersey,⁹ and Iowa.¹⁰ Alabama's private attorney general lawsuit contains a restitution count.¹¹ There is an analogous unjust enrichment case in the United Kingdom where private medical insurers can subrogate to an insured's tort claim and recoup the cost, but the National Health Service cannot.¹²

⁷ Panel Discussion, *The Tobacco Settlement: Practical Implications and the Future of the Tort Law*, 67 MISS. L.J. 847, 881 (1998) [hereinafter *Practical Implications*].

⁸ *3 Industry Law Firms Named in Oklahoma's Medicaid Recovery Action*, 10 n.9 MEALEY'S LITIG. REP.: Tobacco 12, Sept. 6, 1996.

⁹ *15 States Now Seek Medicaid Recovery from Tobacco Industry; Iowa is the Latest*, 10 n.16 MEALEY'S LITIG. REP.: Tobacco 19, Dec. 19, 1996.

¹⁰ *19 States Now Seek Medicaid Recovery from Tobacco Industry; Iowa is the Latest*, 10 n.16 MEALEY'S LITIG. REP.: Tobacco 19, Sept. 6, 1996. See *Iowa ex rel. Miller v. Philip Morris Inc.*, 577 N.W.2d 401 (Iowa 1998), for a case where the trial judge granted defendants' motion to dismiss the state's unjust enrichment-restitution count, and, on appeal, the state did not contest that dismissal. The statutory "indemnity" provision, the Iowa Supreme Court held, is exclusive, and the state has no common law right to indemnity because the prerequisites, "an express contract, vicarious liability, or breach of an independent duty of the indemnitor to the indemnitee," were absent. *Id.* at 406. The damages were too remote. *Id.* Employers' or insurers' claims against the tobacco company for an employee's or insured's tobacco-caused medical expenses were too remote. *Id.* at 407.

¹¹ *Alabama Attorney General Won't Sue Industry over Medicaid, So Lt. Gov. Does*, 10 n.9 MEALEY'S LITIG. REP.: Tobacco 19, Sept. 6, 1996.

¹² Geraint Howells, *Tobacco Litigation in the U.S. - Its Impact in the United Kingdom*, 22 S. ILL. U. L.J. 693, 698-99 (1998).

Other states consciously developed their own substantive law. One attorney general even observed, “[w]e don’t have any courts of chancery in Minnesota. I’m not sure we know how to spell it.”¹³ Other substantive theories were conspiracy, concealment, consumer protection, deceptive advertising and trade practices, state anti-trust, and federal RICO.¹⁴

Foreshadowing my answer to Professor Mason’s question, I will conclude that the State’s success with common law restitution in a court of last resort was far from certain. This conclusion propels me to examine the anomaly of how a theory of restitution too “dreamy” for the world of “creative” scholars and courts of last resort might induce the profit-motivated leaders of business corporations to shovel billions of dollars at the states. It leads me to discuss common law change and to develop some conclusions about the role of settlement in legal change.

In the consensual Mississippi settlement, the tobacco companies appear to have paid the State’s contested claims in a discounted amount; the compromise indicates the litigants settled the issue of liability. The companies who compromised a legally and factually controverted claim may appear to have been indifferent to definitive legal answers; they seem to have settled the lawsuit amidst doubt about the substantive law and the facts. If the tobacco companies knew of their uncertainty, they waived their right to have the issues adjudicated later and they assumed the risk that the substantive law does not support the State’s recovery.

That the tobacco companies ponied up without definitively resolving the substantive law questions might compel an observer to inquire as to why substantive law is important. If the tobacco companies didn’t care, in other words, why should anyone? Why should you? The quality of the tobacco companies’ legal analysis, which I will examine, bears directly on the wisdom of their decision to settle. The settlement is a vital piece of the public policy debate focused on tobacco.

¹³ Colloquy, *Hubert Humphrey III*, 22 S. ILL. U. L.J. 467, 471 (1998) [hereinafter *Hubert Humphrey III*].

¹⁴ *Id.*

Indifference to the substantive law in the attorney generals' Medicaid recovery litigation is widespread, and it features endemic references to the Medicaid restitution litigation as "tort." For example, the speakers at the panel discussion at the University of Mississippi School of Law in October 1997, which triggered Professor Mason's question, included the State's principal lawyers, Richard Scruggs and Attorney General Michael Moore.¹⁵ The program was nevertheless inaccurately named *The Tobacco Settlement: Practical Implications and the Future of Tort Law*.¹⁶ Almost at the end of the more than thirty pages of complete transcript, Richard Scruggs, incidentally to answering a question about alcohol, finally disabused the sponsor about the accuracy of the title. "The Mississippi case," Scruggs remonstrated, "was not a tort case."¹⁷ He mentions the State's substantive theories without much explanation, and twice more in the same answer repeats, "[i]t's not a tort case . . . [t]his was not a tort case."¹⁸

Commentators exacerbate observers' confusion when they refer to the attorneys general's Medicaid recovery litigation as mass torts.¹⁹ The lawsuits, however, are neither mass nor torts. If "mass" means multiple plaintiffs, the Mississippi lawsuit is not mass anything, for although factually and legally complex, it was pursued by a single plaintiff. Nor is the Mississippi lawsuit a tort action, except in the most general usage of the word "tort" to mean a noncontractual civil wrong.²⁰ In fact, the State sought restitution precisely because hundreds of smokers and deceased smokers' families who had sued the tobacco companies for tort damages under products liability failed.²¹

¹⁵ *Practical Implications*, *supra* note 7, at 847.

¹⁶ *Id.*

¹⁷ *Id.* at 871.

¹⁸ *Id.* at 871-72.

¹⁹ See, e.g., Richard Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1124, 1126, 1152, 1185 n.258 (1998) (discussing proposals for settlement in attorneys general's suits as mass tort settlements).

²⁰ "Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2 (5th ed. 1984). The State's suit seeks restitution, however, not "damages."

²¹ *Practical Implications*, *supra* note 15, at 871-72.

Scruggs may have protested in vain, for in addition to tort nomenclature, articulation of tort policy goals for the Medicaid recovery lawsuits seems habitual. The authors of a recent *Trial* article argued against legislation and pronounced the goals of the attorneys general's lawsuits as tort policies—compensation, deterrence, and “justice”²²—not restitution policy, prevention of the defendants' unjust enrichment.

All the participants in complex litigation tend to lose track of the substantive core. Discussion of the Medicaid recovery lawsuits, while downgrading substantive law, has centered on ancillary issues such as the gargantuan attorney fees and secrecy-privilege issues in discovery. The procedural issue of standing was crucial to the Mississippi suit.²³ In tobacco litigation, the discovery process has served a vital publicity function, with thirty-three million pages of internal tobacco industry documents important for public notice and crucial to understanding.²⁴

I. THE MISSISSIPPI RESTITUTION THEORY

The named plaintiff in the Mississippi Chancery lawsuit is the State's Attorney General.²⁵ The complaint has four substantive-remedial counts, restitution-unjust enrichment,²⁶ indemnity,²⁷ public nuisance,²⁸ and injunction.²⁹ The first three counts seek money recovery from the tobacco companies on behalf of the State.³⁰ The injunction is the State's *parens patriae* remedy to protect the future

²² Richard Daynard & Graham Kelder, *The Many Virtues of Tobacco Litigation*, TRIAL, Nov. 1998, at 34.

²³ *In re Fordice*, 691 So.2d 429, 433 (Miss. 1997) (stating that petitioner serving in his capacity as Governor does not meet statutory standing requirements to sue for mandamus); *In re Corr-Williams Tobacco Co.*, 691 So.2d 424, 426-27 (Miss. 1997) (stating that court would not issue writ of mandamus to require Chancery Court to dismiss suit against tobacco companies because it was brought by Attorney General).

²⁴ *Hubert Humphrey III*, *supra* note 13, at 474.

²⁵ Complaint, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed May 23, 1994) (No. 94-1429).

²⁶ *Id.* at 32.

²⁷ *Id.* at 34.

²⁸ *Id.* at 36.

²⁹ *Id.* at 37.

³⁰ *Id.* at 34-36.

health, safety, and welfare of its citizens.³¹ Our topic is the State's restitution theory, including indemnity.

The State's restitution count alleges the tobacco companies are knowingly promoting and selling an addictive and harmful product to smokers in the State, which, when used as intended, leads to addiction, harms addicted people, and creates medical expense.³² The State's Medicaid program pays some of the smokers' tobacco-related medical expenses, as do the State's own welfare program and its employees' health benefits.³³ The State argues that the tobacco companies prospered wrongfully by not paying the medical costs caused by tobacco; instead, tobacco's health costs are borne by the smokers themselves, their families, their insurance companies, and the government's social safety net, including Medicaid.³⁴ By evading these medical costs, the product's true expenses, the tobacco companies were unjustly enriched.³⁵ The State, having paid some of tobacco's health costs, should be able to recover restitution from the tobacco companies to prevent their unjust enrichment.³⁶

Count One for restitution-unjust enrichment picks up the thread and develops it as follows:

Many of the State's citizens who are afflicted with tobacco-related diseases are poor, undereducated, and unable to provide for their own medical care. These citizens rely upon the State to provide their medical care, which reliance results in an extreme burden on the taxpayers and the financial resources of this State. Yet, these very citizens, along with our youth, are targeted by tobacco promotional techniques. Mississippi taxpayers have thus unofficially expended hundreds of millions of dollars in caring for their fellow citizens who have and are suffering from lung cancer; cardiovascular disease; emphysema; chronic obstructive pulmonary disease; and

³¹ *Id.* at 37-38.

³² *Id.* at 29-31.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 32-33.

³⁶ *Id.*

a variety of other cancers and diseases that were and are caused by cigarettes. While Mississippi is perhaps the poorest state in the Union in per capita income, Mississippians lead the nation in their incidence of coronary heart disease, a disease which is directly related to cigarette smoking.

While the State and its various agencies and institutions are struggling to pay for the health care costs of tobacco, the tobacco cartel continues to reap billions of dollars in profits from the sale of cigarettes. Tax revenues generated by the cigarette smokers help defray but a tiny fraction of the health care costs resulting from tobacco use in this state.

The defendants are able legally to promote the sale of their cigarettes to the citizens of Mississippi by continuing to misinform the federal and State authorities about the true carcinogenic, pathologic and addictive qualities of cigarettes. Instead of honestly disclosing the genuine health risks of smoking cigarettes, the tobacco companies have spent billions in slick, sophisticated marketing tactics designed to make smoking appear to be glamorous to our youngsters.

In equity and fairness, it is the defendants, not the taxpayers of Mississippi, who should bear the costs of tobacco inflicted diseases. By avoiding their own duties to stand financially responsible for the harm done by their cigarettes, the defendants wrongfully have forced the State of Mississippi to perform such duties and to pay the health care costs of tobacco-related disease. As a result, the defendants have been unjustly enriched to the extent that Mississippi's taxpayers have had to pay these costs.³⁷

The State's Count Two is for indemnity;³⁸ for our purposes indemnity resembles restitution enough to be called a restitution

³⁷ *Id.*

³⁸ *Id.* at 34-36.

claim, summarized and discussed as follows. The tobacco companies are primarily liable for smokers' tobacco-related medical expenses.³⁹ The State is secondarily liable for these expenses under its programs.⁴⁰ When the State with secondary liability discharged its responsibility with Medicaid payments to infirm smokers, that occurrence unjustly enriched the tobacco companies which were primarily liable; the tobacco companies' unjust enrichment gave rise to their duty to pay indemnity to the State.⁴¹

The relief the State seeks under the restitution-indemnity counts money recovery labeled "damages," pre-judgment interest, attorney fees, expert witness fees, costs, and punitive damages.⁴² The restitution-indemnity counts close with a prayer for general equitable relief, for an "effective remedy . . . as the court deems just and proper."⁴³

II. DEEP STRUCTURE: THE COMMON LAW

The common law which came with the colonists from England in the seventeenth and eighteenth centuries remains part of the structure of the United States states' legal culture. The common law process's central ideas are adversary procedure, the lay jury, and judicial development through reasoned articulation. All three

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* The State's Count Three for public nuisance is conclusory and seeks the same relief as the two restitution counts. *Id.* at 36. The State's public nuisance count also resembles a restitution theory. The tobacco companies' addictive and harmful product caused a public nuisance by interfering with public health. *Id.* The State abated the nuisance when it paid some of the smokers' expenses. *Id.* Therefore, the State may recover those payments from the tobacco companies. *Id.* Normally, however, a public nuisance comes from the way defendants use property, not from the sale of a product. *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 972-73 (E.D. Tex. 1997). Count Four is based on the State's duty to protect its citizens, not on the State's right to be reimbursed. *Id.* at 37. After assailing the tobacco companies' advertising and sales to children, it seeks an injunction. *Id.* at 37-38.

⁴² *Id.* at 34-35.

⁴³ *Id.*; see Jonathan S. Massey, *The Florida Tobacco Liability Law: Fairy Tale Objections to a Reasonable Solution to Florida's Medicaid Crisis*, 46 FLA. L. REV. 591, 594-98 (1994) (articulating sympathetic summary of the Mississippi complaint).

are important here, but adversary procedure and law development by judges are central.⁴⁴

The United States states' common law, as used in this Article, includes both "law" and "equity." Its nucleus is comprised of the private law subjects courts originated, maintained, and developed, including property, contracts, and torts.⁴⁵ Judges used common law techniques to form and evolve our subject–restitution—which is another of the common law's subjects as I am using it.

The common law which originated in feudal England predates the rise of representative government based on elections. It grew out of a system of government that the states of the future United States rejected in a lengthy revolution. The conservative continuity of the English common law courts' technique and its subjects, property, contracts, torts, and restitution, presents modern courts with an enigma.

The common law process is government through courts in action. Designed and administered for the good of the community as a whole, the common law requires substantial support in the polity. Our analysis of governmental policymaking begins with constitutions and representative government based on elections, which lead us to seek principles of confinement of judicially created common law rules. For one thing, even though many state judges are elected, courts cannot run too far in front of public opinion. Judicial formation of common law rules without open political debate colors controversial decisions with questions about legitimacy.

Judges' rhetoric associated with creatively developing the common law typically includes statements of both disinclination to enlarge common law and deference to the legislature. Courts today develop the common law at the sufferance of legislatures, which have the last word, within constitutional limits. In the sense used here, common law is state law.⁴⁶ Today common law subjects have

⁴⁴ See NORMAN CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 196 (1997) ("It was how attorneys presented the issue in the case and how judges responded to this presentation and instructed the jury that was far more important now.").

⁴⁵ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 25 (5th ed. 1998) (stating in an economic sense common law consists of property, contract, and tort law).

⁴⁶ "There is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

a statutory component; for example, the statutory component of contracts is the *Uniform Commercial Code*.

The common law court's formal or primary sources are the jurisdiction's binding precedents and its statutes. Courts' secondary authoritative sources for the common law are judicial decisions from other jurisdictions and other professional sources, including law reviews, treatises, and restatements. A *Restatement of Restitution*,⁴⁷ our subject, was published in 1937. Two tentative drafts for a second *Restatement* were circulated in the 1980s before the project was abandoned, and a new *Restatement*, numbered third, has begun.⁴⁸

One of the principal common law practices is to allocate decisions and entrust authority, at least initially, to judges. Common law courts simultaneously settle the litigants' disputes and, through their decisions, generate rules for future disputes. The Mississippi Supreme Court claims responsibility for the state's common law. "The common law is the perfection of reason."⁴⁹ When a common law rule ceases to be "reasonable and just," it ceases to be part of Mississippi common law.⁵⁰ Rules "unsuited to our conditions, or repugnant to the spirit of our institutions" are not part of Mississippi common law.⁵¹

Judges develop common law rules in response to lawyers' arguments. To advance a client's cause, the creative advocate will accept the Mississippi Supreme Court's invitation to argue in favor of a "reasonable and just" decision and against a rule "unsuited to our conditions or repugnant to the spirit of our institutions."⁵² The lawyer's argument will perforce transcend the unsuitable existing rules and categories; it will identify the social and political environment, formulate the underlying policies, and articulate just and reasoned alternative doctrine. The judges developing the common

⁴⁷ RESTATEMENT OF RESTITUTION (1937).

⁴⁸ RESTATEMENT (THIRD) OF RESTITUTION (Preliminary Draft No. 1, 1998). Until it is officially considered, the preliminary draft is not American Law Institute policy. The author is an advisor to this Restatement.

⁴⁹ *Planters' Oil Mill v. Yazoo & M.V.R. Co.*, 121 So. 138, 140 (Miss. 1929).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

law perforce focus their eyes above the content of rules; they will consider, in addition, economic, moral, and administrative factors.

The State's lawyers understood the common law's creative possibilities well enough to make imaginative connections to alternative formulations of rules and to articulate the moral and economic arguments for recovery. Many lawyers, however, think within settled categories, do not perceive analogies among the fields, and cannot conceive shifting a dispute from one field to another. Perhaps because the existing law appeared to favor their clients, the tobacco companies' lawyers stated the common law as unchanging. The tobacco companies' argument postulated a rule structure that Professor Schauer described as so stable that a court may not impose liability "unless the grounds for liability [are] apparent in the existing set of legal rules."⁵³ By another way of looking at it, however, the tobacco companies' lawyers never seemed to catch on to the State's creative approach.

Stability and predictability which encourage market transactions are facilitated by the common law doctrine of *stare decisis*—find out what we did last time and decide the dispute according to the precedent articulated in the earlier decision. Precedent guides peoples' behavior; those who understand how past disputes have been decided know their legal rights and may bargain and plan their activities accordingly. Under the doctrine of precedent, an earlier decision is, without referring to its content, a reason for a judge to decide a similar later dispute the same way.⁵⁴

Stability and predictability, although important attributes of the common law system, are not its only attributes. Rules embedded in decisions about past disputes are always ambiguous. Times and needs change. Legal doctrine, which never exactly reflects changing social realities, lags behind social change. Future disputes probe

⁵³ FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE* 195 n.38 (1991).

⁵⁴ *Pulliam v. Coastal Emergency Servs., Inc.*, 509 S.E.2d 307, 312 (Va. 1999). The Virginia doctrine of *stare decisis* is so strong that the state supreme court says it will not "ignore" a precedent "in the absence of flagrant error or mistake." *Id.* That court, it seems, will follow a precedent which is merely an "error or mistake" and will only depart from it if the error or mistake is "flagrant."

that ambiguity and test whether the judges see differences or similarities.

Adopting to economic and cultural change is also one of the common law's features. Another is the flexibility and ability of courts to tailor a solution in a particular dispute. The faster a society is changing, the less effect earlier decisions have. Precedents become irrelevant, or worse, incorrect. From time to time, the common law's features come into conflict. While legal stability usually facilitates market transactions, sometimes the public begins to view the adverse consequences of economic activity as insupportable.

The tobacco companies' view of unchanging legal rules belongs to the tradition Professor Schauer refers to as seeking "stability for stability's sake, unwillingness to trust decisionmakers to depart too drastically from the past, and a conservatism committed to the view that changes from the past are more likely to be for the worse than for the better."⁵⁵ As Professor Leon Green observed, however, "Doctrine for doctrine's sake may become an obsession with lawyers as it does with preachers and politicians. It feeds on itself; hardens into cliches and blocks the arteries of thought. It may be identified as law and become sacrosanct. The more passionately embraced the deadlier its kiss."⁵⁶

III. THE TECHNIQUES OF COMMON LAW CHANGE

The common law, creative, always incomplete and in conflict with itself, absorbed and adopted historical, scientific, and political change. In order to last for centuries, the judges' reasoned articulation had to profess stability while accommodating change. In response to disputes and lawyers' arguments, the judges worked out common law principles and procedures. Proponents of the idea that while applying the common law rules the judge changes them accept the uncertainty, unpredictability, and instability necessary to achieve flexibility and correct decisions in particular disputes.

⁵⁵ SCHAUER, *supra* note 53, at 174.

⁵⁶ Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 257, 266 (1960).

In practice common law rules which include the practice of following precedent have presumptive, but not conclusive, force. Common law judges alter known, existing rules when the features of the particular dispute persuade them to do so. The judge may "modify the previous rule at the moment of application."⁵⁷ Judges' reasoned articulation usually takes several incremental steps in a series of decisions to develop a new rule. At some point, an observer can say a new rule has emerged. A legal rule's status cannot be determined solely by examining its content.

The common law, as we know it, simultaneously emerges from and fosters a market economy. Common law doctrines define litigants' property and contract rights in ways that encourage future market transactions. Common law solutions often resemble market solutions. When something happens outside the market and injures someone, common law tort rules frequently charge the person who might better have prevented the loss or insured against it; this liability for damages in turn encourages potential defendants to take cost-effective precautions. Thus, one of common law courts' important economic functions is to internalize externalities.

A common law court will favor respect and accuracy over predictability, stability, or reliance. The practices of the common law give the judge the authority to change the rules, but not to change the practices of the common law. The judge should apply the rule unless the judge is persuaded that a "particularly exigent reason" exists to change it.⁵⁸ The best answer requires a new rule.

Professor Melvin Eisenberg's terminology, which influenced much of what comes below, differs a little from the preceding vocabulary. According to him, rules are "doctrinal propositions."⁵⁹ The overarching justifications, reasons, and policies are "social propositions."⁶⁰ The common law's answers are usually, but not always, found in rules stated in prior court decisions.⁶¹ The common law "consists of the rules that would be generated at the present moment by application of the institutional principles [that govern common law]

⁵⁷ SCHAUER, *supra* note 53, at 175.

⁵⁸ *Id.* at 2-3.

⁵⁹ MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 1 (1988).

⁶⁰ *Id.* at 1-2.

⁶¹ *Id.* at 148-49.

adjudication."⁶² Although social propositions always figure into common law decisions, a court's most difficult decisions are those where social propositions are incongruent with doctrinal rules.⁶³

Courts may overturn defunct doctrinal rules and establish doctrinal rules more nearly congruent with moral and economic principles. Common law courts have only the blunt tools of judicial remedies—money recovery, damages, restitution, injunctions, and other personal orders. Some social problems are not amenable to the common law technique and judicial remedies. Legislatures correct common law courts' excesses and omissions; they do things courts either cannot do or do only poorly; they draw distinct lines, define crimes, establish taxes, enact subsidies, and create bureaucracies.

Professor Leon Green stressed the creative and regenerative nature of the common law.

Precedents are the seeds of the law and nothing so quickly displaces the parent stalk as does its own seeds. It is through precedent that the law responds to the living world. Whether the response shall be adequate may well depend upon its choice and use, but that in turn depends upon the lawyer, judge or administrator whose power it is to make the choice. As the desires of people grow and proliferate endlessly requiring the protection of law, conflicts must be adjusted, modifications made of old right and old law. There is no place to stop. *Stare decisis* is an illusion. It can exist but momentarily in other than a dead society. In a world of living, restless, venturesome, and inventive people the work of the law and of lawyers is never done.⁶⁴

The structure of the common law begins with principles, reasons, and justifications. Then it moves from justifications to the narrower rules used to decide disputes. Finally, it moves from rules to results

⁶² *Id.* at 154.

⁶³ *Id.* at 2-3.

⁶⁴ Leon Green, *The Regenerative Process in Tort Law*, 33 *IND. L. REV.* 166, 180 (1958).

in particular disputes. Commentators discussing the technique of change focus on the relationship between the justifications and the rules.⁶⁵ Rules which are sometimes over-inclusive and sometimes under-inclusive identify and isolate sometimes more and sometimes less conduct than would be necessary to serve the justification for the rule. A decision faithful to a rule may not be faithful to the justification for the rule. Narrow rules are under-inclusive, as they leave the victims of particular instances of "injustice" remediless; in other words, when the rule's justification would support a plaintiff's relief, but the rule does not, there exists a wrong without a remedy. In 1994, when Mississippi's Medicaid recovery action was filed, many observers thought that form of litigation was where tobacco products liability litigation was mired.

When a justification points to a decision in one direction but the rule points in a different direction, the court may either follow the rule or change it. Several significant social benefits flow from following established rules: predictability, stability, reliance, efficiency, allocation of power, and constraint on decisionmakers. These benefits are important enough to sustain some decisions based on the rules independent of the other reasons for them. In decisionmaking based strictly on rules, the judge decides a dispute according to the rule even when the decision differs from the decision he or she would make by applying the justification for the rule. Professor Schauer, advocating what he named "presumptive positivism," says society ought to accept some of these results as a "cost" of the stability and predictability it achieves with precise rules.⁶⁶ Rule-based decisionmaking exists, he says, when the judge resolves a dispute on a rule and resists efforts to ignore it even though following the rule's justification would lead the court to decide differently.⁶⁷

Rule-based systems have a diminished capacity to adapt to the changing times, to deal with unpredicted twists. Are the government and the people "willing to tolerate suboptimal results in order

⁶⁵ See EISENBERG, *supra* note 59, at 151-53 (discussing technique of common law change); SCHAUER, *supra* note 53, at 8-9 (relating formulation of judicial rules to justification for those rules).

⁶⁶ SCHAUER, *supra* note 53, at 54, 72.

⁶⁷ *Id.* at 76.

that those affected by the decisions . . . will be able to plan certain aspects of their lives?"⁶⁸ Professor Schauer answers his own question. Reversing Justice Brandeis's famous quotation,⁶⁹ he says, "Sometimes it is more important that things be settled correctly than that they be settled for the sake of settlement."⁷⁰ Common law judges revise past rules in the process of applying them to particular disputes. The court may interpret the rule, expand a rule to include more conduct, shrink it to include less, abandon a rule, choose one rule over another, or classify a dispute under a different rule. The court's judicial techniques may be called distinguishing, overruling, and characterization.

When should a common law court depart from or overrule an earlier decision? The court should dispense with an earlier decision, Professor Eisenberg maintains, when the contested doctrine fails substantially the tests of social congruence and systemic consistency, and when the values of stability and stare decisis would be no better served by keeping the rule than by overruling it.⁷¹ The latter values are evenhandedness, protecting justified reliance, preventing unfair surprise, replicability, and support.⁷²

Scholars' articles detecting the "wrong without a remedy" mentioned above protested the paradigm "tobacco companies win." They argued that for smokers' lawsuits, the law of products liability is too narrow and it should be defined more expansively to support smokers' tort recovery from tobacco companies.⁷³

The State of Mississippi's argument in the Medicaid restitution lawsuit was more creative than "reverse prior decisions," or "expand tort liability." The State first maintained the matter was restitution case in Chancery. The State's technique I call characterization

⁶⁸ *Id.* at 140.

⁶⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.").

⁷⁰ SCHAUER, *supra* note 53, at 142.

⁷¹ EISENBERG, *supra* note 59, at 44-47.

⁷² *Id.* at 47-49.

⁷³ David Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241 (1994); Frank Vandall, *The American Law Institute is Dead in the Water*, 26 HOFSTRA L. REV. 801 (1998); Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429 (1994).

differs from a request to overrule. Commentators have focused on overruling an earlier decision. How does the State's novel characterization differ from overruling?

IV. CHARACTERIZATION: THE LAWYER'S PART, NAMES AFFECT IDEAS

The common law is divided into subject categories named property, contract, tort, and restitution, each with its particular structure of liability rules or doctrine based on overarching policy and justifications. Although most disputes fall clearly into one subject or another, the categories are not self-defining. If a dispute has attributes of more than one subject, someone must decide which subject's set of rules and justifications governs. Typically, in the technique I am calling characterization, each litigant identifies a favorable category and stresses the features of the dispute, to convince the court to classify the dispute in what the litigant expects will be a beneficial way.

When the common law has categories labeled tort and restitution, with different characteristics for litigants—for the State, likely a lack of recovery in tort versus possible recovery in restitution—then the adversary system with lawyers vigorously representing clients will put pressure on the boundaries between the categories. The State's lawyers began with a litigation paradigm: smokers lose products liability lawsuits in tort against tobacco companies. The State changed the plaintiff from the smokers to the State. Furthermore, the State rearticulated its concerns in restitution, dropping tort.

The adversary system, and their desire for success for their clients, structured the State's lawyers incentives to "live" what S.F.C. Milsom identified as "the life of the common law."⁷⁴ Milsom wrote:

The life of the common law has been in the abuse of its elementary ideas. If the rules of property give what seems an unjust answer, try obligation; and equity has

⁷⁴ S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 6 (2d ed. 1981).

proved that from the materials of obligation you can counterfeit the phenomena of property. If the rules of contract give what now seems an unjust answer, try tort. Your counterfeit will look odd to one brought up on categories of Roman origin; but it will work. If the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence. And so the legal world goes round.⁷⁵

THE STATE'S ARGUMENT

The State's argument proceeds through two of what I will call characterizations and then argues for an extension of existing doctrine. The State's first characterization is chancery. The State's second characterization is restitution. The State then argues for an extension of restitution to provide for recovery. Throughout its argument, the State insists on its anti-characterization: this is not a products liability case.

The State's first characterization: this is a Chancery-Equity case.⁷⁶ To begin with, the State affirms a plaintiff's prerogative to define the claims and theories of recovery.⁷⁷ Then follows the Chancery characterization. The State seems to have sued in Chancery for two reasons. The first was to claim a maxim of equity. "The first and foremost maxim of equity . . . is: Equity will not suffer a wrong without a remedy. . . . This Honorable Court of equity should intervene and fashion a remedy to right this wrong."⁷⁸

⁷⁵ *Id.*

⁷⁶ The word "equity" has several confusing and overlapping meanings. To reduce the confusion, this Article calls the court "Chancery" not "Equity" and the decisionmaker "Chancellor."

⁷⁷ Plaintiff's Memorandum Brief and Response to Defendants' Motion for Judgment on the Pleadings at 3-4, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Nov. 28, 1994) (No. 94-1429); Memorandum in Support of Plaintiff's Motion to Strike Challenges to the Sufficiency of the Complaint and the Subject Matter Jurisdiction of the Chancery Court at 6-7, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429) [hereinafter Plaintiff's Motion to Strike Challenges].

⁷⁸ Plaintiff's Motion to Strike Challenges at 24, *Moore* (No. 94-1429) (citation and emphasis omitted).

The State maintains it need not identify an exact precedent to support relief.⁷⁹ The State's theories are "well established in Mississippi jurisprudence," but they lack direct precedential support because they "have not been applied heretofore to the defendants' conduct."⁸⁰ It suffices "that under the established principles of the law of the land some relief is clearly requisite and a practical remedy consonant with established principles of procedure may be applied."⁸¹ The State is not asking "the court to create a new judge-made liability out of whole cloth."⁸² The court, the State argues, ought to "recognize a suit under existing and long-established equitable theories."⁸³

The tobacco companies assail the State's equitable-chancery characterization and assert that this lawsuit is not a Chancery case.⁸⁴ They plant their flag on the State's anti-characterization: the tobacco companies' obligations to buyers "arising from the sale of tobacco is created not by equitable considerations, but by the law of products liability."⁸⁵

The tobacco companies maintain that the State is using its Chancery characterization to invite the court to develop a new and easier substantive theory of recovery.⁸⁶ "[A] chancellor's subjective sense of fairness cannot . . . substitute for the established elements of a claim."⁸⁷ Further they contend that the "[P]laintiff cannot simply invent new duties, denominate them as 'equitable,' and then

⁷⁹ *Id.* at 75.

⁸⁰ Plaintiffs Reply Memorandum to Defendants' Memorandum in Opposition to Plaintiffs Motion to Strike Challenges to the Sufficiency of the Complaint and the Subject Matter Jurisdiction of the Chancery Court at 7, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Dec. 9, 1994) (No. 94-1429) [hereinafter Plaintiffs Reply Memorandum].

⁸¹ Plaintiffs Motion to Strike Challenges at 75, *Moore* (No. 94-1429).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 15, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429) [hereinafter Defendants' Motion for Judgment].

⁸⁵ *Id.*

⁸⁶ Defendants' Memorandum in Opposition to Plaintiffs Motion to Strike Challenges to the Sufficiency of the Complaint at 12, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429) [hereinafter Defendants' Memorandum in Opposition].

⁸⁷ *Id.* at 1-3; Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 5, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429) [hereinafter Reply Memorandum in Support of Motion for Judgment].

seek to impose liability on defendants for breaching those duties. He is limited to those duties that already exist under Mississippi law."⁸⁸ Believing that the court should apply the law of products liability, the tobacco companies interpose a counter-maxim: "Equity follows the law."⁸⁹

So far we have dueling maxims: the State's "Equity will not suffer a wrong without a remedy" stands poised against the tobacco companies' "Equity follows the law." How do modern "Chancellors" take equitable maxims into account when deciding disputes? The maxims of equity resemble proverbs. Vague and often, as here, contradictory, the maxims lend a flavor of antiquity to the arguments without conveying much information about the law. Typically judges use the maxims of equity to dress up conclusions arrived at by applying narrow rules. The reasons are apparent. Not deduced from an overarching idea of equity as fairness, the maxims are stated so generally that they express an attitude rather than possess any analytical power.

Here the contradictory maxims leave the contest undecided. The State, however, has selected a maxim congruent with the creativity it seeks. Consistent with the State's grasp of the common law's possibilities, its maxim expresses a theory of legal change more in tune with what actually happens than the tobacco companies'.

The State's maxim is "Equity will not suffer a wrong without a remedy." Although the claimant must usually find the defendant's "wrong" in positive law before receiving a remedy, McClintock explained the maxim carefully to leave play in the joints for courts to accomplish the creative and adaptive expansion of law discussed above.

Equity does not undertake to redress wrongs which are violations of moral, as distinguished from legal, obligations, but the final test to distinguish a legal from a moral obligation is whether it will be enforced, or at least recognized as binding, by courts. But the maxim does operate when there is presented to a court of equity

⁸⁸ *Id.* at 16.

⁸⁹ *Id.* at 15.

a claim to protection against a wrong which is of a nature similar to that which has been recognized and protected, but for which there is no relief established by precedent.⁹⁰

Even if the tobacco companies cannot block the State's equity characterization, nevertheless, they argue, the game ought to be played according to the customary legal rules. Their maxim is "Equity follows the law." The maxim of stand pat sometimes fails to overcome the quest for creativity. "[T]he maxim that equity follow the law," McClintock observed, "is disregarded much more frequently than it is applied; necessarily so, since equity is a system for the correction of the defects in the law."⁹¹

The State's version of Chancery resembles the equitable discretion the New Mexico court articulated in *Navajo Academy v. Navajo United Methodist Mission School*.⁹² This point requires a summary and a quotation. The Academy was operating a school for Navajo youngsters on the Mission School's property, but the relationship deteriorated.⁹³ After the Academy's lease of Mission School's facilities expired and renewal negotiations failed, the Mission School sued in magistrate's court to evict the Academy.⁹⁴ The Academy reacted with an action in district court seeking a "declaration that it was entitled to continued occupancy of the property under a 'constructive' long-term lease."⁹⁵ The district judge, although not finding a lease, thought it "impractical" for the Academy with its 250 students to vacate the premises and granted it three years to leave.⁹⁶ The New Mexico Supreme Court held that "[g]iven the trial court's findings and the unusual circumstances of this case, the court did not abuse its equitable discretion as a court of equity in

⁹⁰ HENRY LACEY MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 29, at 77 (2d ed. 1948).

⁹¹ *Id.* § 24, at 53.

⁹² *Navajo Academy, Inc. v. Navajo United Methodist Mission Sch., Inc.*, 785 P.2d 235 (N.M. 1990).

⁹³ *Id.* at 237-38.

⁹⁴ *Id.*

⁹⁵ *Id.* at 238.

⁹⁶ *Id.* at 240.

permitting the tenant-[Academy] to remain on the property for three years following termination of the lease."⁹⁷

Flexible and discretionary equity provided a remedy even though the Academy had not mounted a successful argument that a substantive breach of property, contract, tort, restitution, or any other right had occurred.⁹⁸ The court, constrained to justify an equitable remedy for a litigant whose legal remedy was inadequate because it was absent, explained: "it is anything but new for this Court to validate an equitable solution to a problem such as the one before us when a party asks for justice and a 'legal' remedy is inadequate; 'equity frequently interferes.'"⁹⁹ The court also states, "[A] court of equity has power to meet the problem presented, and to fashion a proper remedy to accomplish a just and proper result."¹⁰⁰

The court continues:

Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.¹⁰¹

The court also notes that, "In the case at bar, the trial court devised a remedy that permits the Academy to continue functioning as a school as it searches for a new home. . . ."¹⁰² The Court concludes that,

⁹⁷ *Id.* at 236.

⁹⁸ DOUG RENDLEMAN, *REMEDIES: CASES AND MATERIALS* 229-33 (6th ed. 1999).

⁹⁹ *Navajo Academy, Inc.*, 785 P.2d at 240 (quoting *Romero v. Muños*, 1 N.M. 314, 316 (1859)).

¹⁰⁰ *Id.* (quoting *Hilburn v. Brodhead*, 444 P.2d 971, 975 (N.M. 1968)).

¹⁰¹ *Id.* (quoting 1 JOHN NORTON POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 109, at 305 (5th ed. 1941)).

¹⁰² *Id.* at 241.

We believe that this remedy did not “exceed the bounds of reason,” since, in addition to all the other factors, the numerous and costly improvements the Academy bestowed upon the Mission School campus can be viewed as the equivalent of several years’ rent. We conclude that the trial court’s order permitting the Academy to remain on the campus for a period of time not to exceed three years from the date of the judgment was not an abuse of discretion, and the judgment is affirmed.¹⁰³

Quite a beautiful sentiment, but a remedy without a right reverses the maxim “no right without a remedy.” Under a more rule-bound view of the court’s power, however, there is “no remedy without a wrong.” Remedies, even equitable remedies, follow breaches of substantive law—almost all the time. Unless a defendant violated a plaintiff’s rights as defined under substantive law, a judge should not enjoin that defendant. As Chief Justice Rehnquist stated in a footnote in *Madsen v. Women’s Health Center*,¹⁰⁴ “under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and there is a ‘cognizable danger of recurrent violation.’”¹⁰⁵ Similarly, the Court forbade a trial judge from enjoining defendants who had not violated the substantive law; the trial judge’s equitable power to enjoin “could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and extent of the violation.”¹⁰⁶ As often occurs, however, in dealing with a chancery remedy, the court’s dictum identified a safety valve: to grant a winning plaintiff complete relief, a defendant who has not

¹⁰³ *Id.*

¹⁰⁴ 512 U.S. 753 (1994).

¹⁰⁵ *Id.* at 765 n.3 (1994) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). “Constitutional” ought to be added to “statutory or common law.”

¹⁰⁶ *General Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 399 (1982); *see also* *Reuben H. Donnelly Corp. v. Mark I Mktg. Corp.*, 893 F. Supp. 285, 293 (S.D.N.Y. 1995) (“There is no ‘injunctive’ cause of action under New York or federal law. Instead [a plaintiff] must allege some wrongful conduct on the part of [a defendant] for which their requested injunction is an appropriate remedy.”).

violated the plaintiff's substantive rights may be affected by "minor and ancillary" provisions of the injunctive order.¹⁰⁷

Perhaps the State could have persuaded the court to create a precedent. Otherwise, unless the State could have convinced a trial judge and probably an appellate court to follow the *Navajo Academy* technique, it must find a "wrong" to pin its remedy on.

Inadequacy-Irreparability: In traditional terms, before Chancery will grant a plaintiff's request for an injunction or any other "equitable" remedy, the plaintiff must show its "legal" remedy to be inadequate. In other words, unless a plaintiff receives an equitable remedy, he will encounter irreparable injury. Accepting for the purpose of discussing this issue the idea that the State's request for restitution is equitable, I turn to the issue of whether the State's legal remedy was "inadequate."

First, what was the State's legal remedy? The Mississippi Medicaid statute has an assignment-subrogation provision.¹⁰⁸ The assignment-subrogation principle is straightforward: If a Tortfeasor injures a Citizen and if the State Medicaid program pays to patch Citizen up, then the State is substituted for Citizen to recover the portion of Citizen's tort cause of action against Tortfeasor paid by Medicaid. The Mississippi statute calls the State's assumption of Citizen's claim against Tortfeasor an "assignment."¹⁰⁹

The State's "legal" remedy is for Medicaid to pay the smoker-victim's medical bills and for the State to subrogate to each of the victims' "assigned" claims against the tobacco companies. The State's legal remedy, assignment-subrogation, is inadequate, the State maintained, because it is expensive, complex, and burdensome on judicial resources. In short, it will require a multiplicity of actions at law.¹¹⁰ Second, the Medicaid assignment-subrogation solution does not apply to the State's payments through its own

¹⁰⁷ *General Bldg. Contractors Ass'n*, 458 U.S. at 399.

¹⁰⁸ MISS. CODE ANN. § 43-13-305 (1998).

¹⁰⁹ *Id.* The reason for the "assignment" label is to avoid the collateral source rule, which, unless altered, would let Citizen recover full medical damages from Tortfeasor after Medicaid pays him. If Citizen "assigns" the claim to the State, that will prevent Citizen's double recovery.

¹¹⁰ Plaintiff's Reply Memorandum at 2, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Dec. 9, 1994); Plaintiff's Motion to Strike Challenges at 18, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

indigent care programs or for insurance claims of State employees.¹¹¹ Finally, the State statutes give the State the ability to sue: "The state shall be entitled to bring all actions and [seek] all remedies to which individuals are entitled . . ." ¹¹²

The tobacco companies argue against the State's Chancery characterization by contending that the State's "legal" remedy is adequate.¹¹³ The State's legal remedy of assignment-subrogation, however, exists under the Medicaid statutes¹¹⁴ where the State cannot recover from tobacco companies unless the smokers could have recovered from the tobacco companies. The statutes require Medicaid recipients to assign their rights against third party-tortfeasors to the Medicaid payor. The State is then subrogated to the smokers' rights against the tobacco companies; the State-subrogee takes the smokers' claim with its substantive elements and defenses. The State which provided medical benefits to infirm smokers now seeks to recover the cost from the tobacco companies. But the State has not shown the smokers have any right to recover from the tobacco companies. The State thinks assignment-subrogation is "inadequate" because of the absence of the tobacco companies' liability to smokers; judges and juries have rejected smokers' products liability claims.¹¹⁵ The State's solution of subrogation-assignment, however, is exclusive. The State's Medicaid subrogation is to a smoker's products liability case; it is not a restitution-indemnity case. The law of restitution-indemnity will not stretch far enough to include the State's claims.

An argument that plaintiff's remedy at law is inadequate because it would require a multiplicity of suits arises when the plaintiff has a successful substantive claim and the choice is between two possible remedies, a legal one, typically money damages, and an equitable one, typically an injunction. A plaintiff who is suffering a substantive injury which damages will not restore argues in

¹¹¹ Plaintiff's Motion to Strike Challenges at 15-16, *Moore* (No. 94-1429).

¹¹² MISS. CODE ANN. § 11-45-11 (1998).

¹¹³ Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 12, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429).

¹¹⁴ *Id.* at 6.

¹¹⁵ Defendants' Motion in Opposition at 10, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429).

support of an injunction that although her repeated suits for small amounts of damages will not deter the defendant, her cost of litigation will consume her resources. Her legal remedy would be successful, but ultimately ineffectual. The plaintiff's legal remedy, therefore, exists, but it is inadequate because it will require a multiplicity of lawsuits.

The State of Mississippi argued that its legal remedy is inadequate although as plaintiff it would probably lack a successful substantive claim because the tobacco companies had not been shown to be liable to the smokers who received Medicaid.¹¹⁶ The State argues its nonexistent legal remedy is inadequate.

An Iowa precedent supports the tobacco companies' contention. In the State of Iowa's lawsuit to recover Medicaid payments from the tobacco companies under common law indemnity, the Iowa Supreme Court accepted the argument that the state's recovery statute was "the State's exclusive remedy to recoup Medicaid costs."¹¹⁷ Furthermore, the court stated that "[a]lthough the statutory provisions to enforce the remedy may be impractical, it is the only remedy provided."¹¹⁸

There are differences between the Iowa and Mississippi cases. The Iowa statute grants the State a lien instead of providing for an assignment; the tobacco companies cited the Iowa statute as a defense to indemnity and not to show the State's remedy at law was inadequate; and the state of Iowa lacked a common law right to recover Medicaid payments from third parties. The Iowa decision failed to address the State's own insurance payments and independent indigent care programs. Nevertheless, the Iowa court's basic holding, although not binding precedent, would have supported a Mississippi court's decision to limit the state government to the statutory remedy for Medicaid recovery.

So far the State seemed to lead. The tobacco companies' petrified approach to common law change is inconsistent with the Mississippi Supreme Court's and the leading commentators' approaches. The

¹¹⁶ See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE 73-75* (1991) (discussing when legal remedies are inadequate solutions).

¹¹⁷ *Iowa ex rel. Miller v. Philip Morris Inc.*, 577 N.W.2d 401, 404 (Iowa 1998).

¹¹⁸ *Id.* at 406.

State's maxim expresses an aspiration for a better society instead of a defensive resistance to change. The tobacco companies' argument that the State has an adequate remedy at law has more support, but whether the law-equity issue is really tilting with windmills will emerge below.

VI. STATE: THIS IS A RESTITUTION CASE

The State's second characterization is: this Chancery case is a restitution-indemnity case. The State's anti-characterization persists: this is not a products liability tort case.

A plaintiff will endeavor to recover restitution to prevent or reverse the defendant's unjust enrichment. Tort-products liability and restitution are discrete areas of substantive law almost always with differing remedies. The law of torts—products liability branch—defines when a manufacturer or seller is liable for harm a product inflicts; it measures what a defendant pays by what it takes to compensate injured plaintiffs. Restitution defines a defendant's liability to repay a benefit it received unjustly; it measures what a defendant pays by the defendant's unjust enrichment.

Restitution is a branch of legal liability separate and distinct from tort and contract. Defendant's tort liability is not a prerequisite for restitution.¹¹⁹ The State's restitution-indemnity theory is not grounded on the tobacco companies' fault. Courts order restitution to prevent defendants' unjust enrichment; a plaintiff often recovers restitution to prevent or reverse defendant's unjust enrichment with no other substantive breach.

This, the tobacco companies argue, is not a restitution case. The State's "highly imaginative complaint"¹²⁰ is based on "an entirely new theory."¹²¹ This is a tort case, a product liability case for

¹¹⁹ Plaintiff's Memorandum Brief and Response to Defendants' Motion for Judgment on the Pleadings at 2-3, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Nov. 28, 1994) (No. 94-1429); Plaintiff's Motion to Strike Challenges at 6-7, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

¹²⁰ Defendants' Motion for Judgment on the Pleadings at 1, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

¹²¹ Defendants' Motion in Opposition at 1, *Moore* (No. 94-1429).

damages.¹²² It is a products liability case because "plaintiff seeks to recover for injuries caused by a product."¹²³

The tobacco companies argue that the consequences of accepting the State's restitution characterization would be inauspicious.¹²⁴ They make several points. First, the State cannot recover restitution as that subject is defined; accepting the State's ideas of restitution would rewrite and distort the doctrine of restitution-indemnity.¹²⁵ This issue will be developed below. Second, the State bases its restitution-indemnity recovery on its payment of the tobacco companies' obligation to the smokers.¹²⁶ But the tobacco companies' obligation to the smokers has not been established. The State has not shown any tobacco companies' legal liability.¹²⁷

Products liability, the State's anti-characterization, is the tobacco companies' characterization. That doctrine represents the struggle of courts and legislatures to balance the competing interests of consumers and manufacturers.¹²⁸ The State's restitution characterization would absorb all of the balanced law of products liability. It would impose damages on the tobacco companies although they have consistently prevailed in products liability lawsuits. It would be extended to create similar liability for other risky but nondefective products.

Furthermore, the tobacco companies assert, this is a products liability case with subrogation. The State is subrogated to each smoker's "assigned" products liability cause of action against the tobacco companies. The State must prove the elements of each smokers' products liability tort and refute any affirmative defenses.

The tobacco companies adduce a "flood of litigation" argument. If the State's restitution-indemnity theories succeed against the

¹²² Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 1-5, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429).

¹²³ Defendants' Motion in Opposition at 5, *Moore* (No. 94-1429).

¹²⁴ *Id.* at 5-10.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 1, *Moore* (No. 94-1429).

¹²⁸ Defendants' Motion in Opposition at 5, *Moore ex rel. State v. American Tobacco Co.* (Miss Ch. Filed Nov. 28, 1994) (No. 94-1429).

tobacco companies, plaintiffs will seek restitution-indemnity for asbestos, alcohol, and automobiles.¹²⁹ The State, finally, must take its contentions to the legislature—for only the legislature “creates” law. Legislatures are better than courts at making policy and fiscal decisions.¹³⁰

VII. CHARACTERIZATION: THE JUDGE’S ROLE

The tobacco companies argued for a products liability characterization because products liability is the playing field on which they are accustomed to winning. The State argued for restitution because the alternative is worse. It preferred a chance of success over the likelihood of failure. So the State’s explicit Chancery-restitution characterizations contain their implicit anti-characterization: this is not a products liability case. What are the State’s Chancery and restitution characterizations’ prospects? How likely was it for the court to have accepted them?

Many of the writers who discuss characterization, particularly those who study choice of law, view characterization as a symptom of a sick and incoherent system of choice of law.¹³¹ They object to characterization because it is a judicial escape device via intellectual dishonesty from a stupid result based on the discredited vested rights system.¹³² They perceive characterization as a court decision to assign a dispute to a legal category made intuitively without articulating principled reasons.¹³³

In a dispute with attributes of two common law categories which, to be decided, must be assigned to one, how does the judge ascertain the “correct” category? The categories do not define themselves.

¹²⁹ *Id.* at 4; see Robert Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601, 648 (1998) (“What comes next—coffee, soft drinks, red meat, dairy products, sugar, fast foods, automobiles, sporting goods?”). These arguments missed the product that would follow tobacco—guns.

¹³⁰ Defendants’ Motion in Opposition at 4, 17, *Moore* (No. 94-1429); Reply Memorandum in Support of Defendants’ Motion for Judgment on the Pleadings at 19, *Moore* (No. 94-1429).

¹³¹ ROGER CRAMPTON ET AL., *CONFLICT OF LAWS* 43-48 (5th ed. 1993).

¹³² *Id.*

¹³³ *Id.*; see Earl Maltz, *The Full Fourth and Credit Clause and the First Restatement: The Place of Baker v. General Motors Corp. in Choice of Law Theory*, 73 TUL. L. REV. 305, 318-19 (1998) (summarizing critics of characterization).

Several pitfalls and faulty characterizations techniques await the unwary. First, the court may state a characterization as a conclusion without articulating reasons.¹³⁴ The court may buttress its conclusion by emphasizing the aspects of the dispute which support the favored characterization.¹³⁵ In another technique resembling "contact counting," the court will identify and list similar and dissimilar features and total each list.¹³⁶ A third technique is to overlook the idea that legal words have different meanings in different contexts and to recycle a classification from another context, for example to recycle a domestic law characterization for choice of law purposes.¹³⁷ There are better ways. A rehabilitated characterization will emerge below.

Professor Schauer, in one of the leading books on courts' techniques with common law rules, suggests a metaphor of "local" and "distant" rules¹³⁸ for making the decisions I have called characterization. The court, he writes, should favor the more "local" rule.¹³⁹ "The rule that is less general, and more applicable to a smaller number of events, seems to be more applicable to the events to which it does apply."¹⁴⁰ But this is not always the case. While "at least presumptive priority is commonly granted to the most locally applicable rule,"¹⁴¹ local priority is not absolute, for otherwise courts would base few decisions on general and "distant" principles like unjust enrichment and equal protection of the law. A court, Professor Schauer says, may select "the more distant rule" for, just as a court can prefer a rule's justification instead of the rule itself, a court may also favor justifications from other parts of the system

¹³⁴ See *Levy v. Steiger*, 124 N.E. 477, 477 (Mass. 1919) (characterizing case as falling under tort law of Massachusetts).

¹³⁵ See *Haumschild v. Continental Casualty Co.*, 95 N.W.2d 814, 818 (Wis. 1959) (setting forth concerns supporting family characterization).

¹³⁶ See *Haag v. Barnes*, 175 N.E.2d 441 (N.Y. 1961) (comparing "weight and significance" of contacts of different states in determining which law to apply).

¹³⁷ See *Levy v. Daniels U-Drive Auto Renting Co.*, 143 A. 163, 164-65 (Conn. 1928) (allowing plaintiff injured in Massachusetts to sue under Connecticut law); *Cutts v. Najdrowski*, 198 A. 885, 886 (N.J. 1938) (applying law of state where transaction occurs to govern validity of trust).

¹³⁸ SCHAUER, *supra* note 53, at 189.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 191.

over a rule.¹⁴² This simultaneously increases the courts' ability to decide disputes correctly and reduces rules' stability and predictability.¹⁴³

Is the "traditional" law of products liability, in Professor Schauer's terms, "local"? If so, should the justification from the more "distant" category of restitution overcome the presumption for local rules? If, as seems likely, products liability is "local" for tobacco, then the State's restitution characterization initially encounters the "presumptive priority" of products liability.

Even though Professor Schauer's positivism is presumptive and subject to being surmounted in an appropriate dispute, many courts would not accept as much abrupt change as the State suggests. If the court was wooden and literal in following presumptive positivism, then it might find the State's suggestions too sweeping and, as the tobacco companies suggest, remand the controversy to the legislature. Although Schauer's metaphors of local and distant rules may militate against a decision that the State's Medicaid recovery lawsuit falls within restitution, they do not assure that result; the court could conclude that the State's arguments for unjust enrichment leading to restitution overcome the presumption.

If the court was to depend on Professor Eisenberg's generative approach, common law rules might be somewhat less certain. A court, he maintains, should decide disputes by applying the institutional principles of adjudication.¹⁴⁴ These principles promote substantial stability in common law rules. They require a court to apply existing social standards, not what the individual judges think the rule ought to be. People have a right to turn to courts to resolve past disputes based on established and existing claims of duty. Courts should base decisions on those duties, not on what the judges think is best at the time. A legislator, in contrast, may establish by statute the "best" rule drawn from the moral and legal views he holds.

¹⁴² *Id.* at 188-91.

¹⁴³ *Id.*

¹⁴⁴ EISENBERG, *supra* note 59, at 3.

Common law courts should, Professor Eisenberg says, look to three goals.¹⁴⁵ First, the doctrine should be consistent with social propositions and goals—social congruence.¹⁴⁶ Second, it should be consistent internally—systemic congruency.¹⁴⁷ Third, it should be satisfactorily stable.¹⁴⁸

Although Professor Eisenberg does not discuss characterization by name, his helpful discussion takes up related techniques to effect change like overruling, distinguishing, and creating exceptions.¹⁴⁹ “Objective” signals that a rule or practice is ripe for overruling are jaggedness, incoherent exceptions, and “significant criticism in the professional literature.”¹⁵⁰ Treatises, law reviews, as well as statutes and decisions from other jurisdictions will tell a court that a doctrine has garnered significant professional criticism and lacks “social congruence or systemic consistency.”¹⁵¹

Characterization begins with two principles, each with a sphere of application, which point to different results where the spheres overlap. Litigants ask the court to characterize, to decide which principle governs, and to articulate a new rule to reflect both old principles. Courts, Professor Eisenberg maintains, “determine what kinds of transactions are sufficiently special, under applicable social propositions, to justify their exemption from the full force of an otherwise relevant principle.”¹⁵² Courts develop the common law “by hiving off certain types of activity from treatment under an established rule, in a manner that is consistent with the social propositions that support the rule.”¹⁵³ “Major gains in social congruence and systemic consistency outweigh losses in the stability of doctrine over time.”¹⁵⁴

For tobacco, the conditions for a new legal regime may be satisfied. The question is the form it will take. Critics in profes-

¹⁴⁵ *Id.* at 50.

¹⁴⁶ *Id.* at 44.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 4.

¹⁴⁹ *Id.* at 104-140.

¹⁵⁰ *Id.* at 118.

¹⁵¹ *Id.* at 119.

¹⁵² *Id.* at 83.

¹⁵³ *Id.* at 68.

¹⁵⁴ *Id.* at 71.

sional literature argue that the paradigm "tobacco companies win" lacks social congruence, because it is contrary to policy and lacks systemic consistency, and because it is inconsistent with related rules.

Jagged change occurs when a court distinguishes or creates plausible exceptions which may really be inconsistent or impossible to administer, leading to anomalies as well as to "disintegration and decay." Courts formulate and establish new rules to explain anomalies and to articulate doctrine consistent with policy.¹⁵⁵

Tobacco's current legal jaggedness is expressed in the recent products liability *Restatement* and the articles attacking it. Tobacco companies' liability came up repeatedly in the recent products liability *Restatement*. A tentative draft observed, "Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design."¹⁵⁶ Called "product category defectiveness," this form of liability would usually constitute a judicial decision that the product "should be removed from the market rather than be redesigned."¹⁵⁷ Discussing tobacco, in addition to alcohol, guns, and above-ground swimming pools, the *Restatement* reporters' tentative draft commentary observed, however, that

courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm. Instead, courts have concluded that legislatures and administrative agencies can, more appropriately than courts, consider the desirability of commercial distribution of some categories of widely used and consumed, but nevertheless dangerous, products.¹⁵⁸

¹⁵⁵ *Id.* at 79-80.

¹⁵⁶ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (Proposed Final Draft 1997).

¹⁵⁷ *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 97 n.8 (Minn. 1987).

¹⁵⁸ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (Proposed Final Draft 1997).

A vote on an amendment at the ALI Annual Meeting session in 1997 deleted tobacco from the list,¹⁵⁹ leaving it possible for a creative lawyer to point to tobacco as defective even though there is no reasonable alternative design.¹⁶⁰

Accepting the State's restitution characterization may also resemble what Professor Eisenberg names "transformation."¹⁶¹ The court, without admitting an earlier error, departs from it and rejects an established rule without announcing what it has done.¹⁶² The transforming court maintains "the impression that the standard of doctrinal stability is an extremely powerful constraint on judicial decisionmaking."¹⁶³ This pretext, however, is disingenuous, opaque, and sends mixed signals.

Expanding a category like restitution to encompass subjects formerly not included in its ambit often involves explicitly or implicitly overruling older, more narrow rules. Overruling promotes coherent future decisions. The overruling court says, in effect, the earlier decisions were wrong, the old way is discredited, and we are substituting a new rule. Most trial judges and lawyers catch on right away or promptly. Transformation, Professor Eisenberg insists, is rarely preferable to overruling because the "transforming" court, in the service of bringing the law into line with social aspirations, neglects reasoned articulation.¹⁶⁴

Professor Eisenberg outlines other judicial techniques courts employ to change the common law. A court may limit unwelcome precedent with "inconsistent distinctions" and "overriding."¹⁶⁵ An inconsistent distinction occurs when the court distinguishes or creates an exception, but in light of the rule and the policy, the distinction or exception is incongruous as it leaves some cases under the sway of the rule.¹⁶⁶ Perhaps the original rule and the

¹⁵⁹ Frank Vandall, *The American Law Institute is Dead in the Water*, 26 HOFSTRA L. REV. 801, 805 (1998).

¹⁶⁰ The final version is RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

¹⁶¹ EISENBERG, *supra* note 59, at 56.

¹⁶² *Id.* at 132.

¹⁶³ *Id.* at 134.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 135.

¹⁶⁶ *Id.* at 136.

distinction-exception cannot be administered coherently. Courts also limit precedent by "overriding."¹⁶⁷ The court deals with an issue within the precedent's stated rule but in a dispute where policy does not support the application of the rule, and the court does not apply the precedent. Overriding is something between implied overruling and distinguishing.¹⁶⁸ Either of these techniques is available to a court to uphold the State's characterizations. The State, a court might hold, for example, could sue the tobacco companies in chancery for restitution even though a private litigant is limited to the products liability tort for damages.

The court may characterize with what I call the purpose technique. The court would examine the purposes of the competing categories, the justifications for the rules in conflict, and the moral, economic, and administrative factors that bear on the decision. Then it would determine how each classification will advance and retard those purposes, justifications, and factors. The final stage is for the decisionmaker, informed by the foregoing inquiry, to exercise professional judgment.

The "purpose" method of characterization is debatable at every stage and missteps occur. For example, one court, reaching for a "contract" characterization of a vicarious liability statute, said the statute's purpose was not the tort purpose of victims' compensation but another purpose, encouraging highway safety.¹⁶⁹ The legislature, it is likely, had considered both compensation and deterrence when passing the statute, even if it is possible to accept encouraging safety as a contract purpose. Although the purpose method may not always lead the court to a "correct" result, it has the virtue of focusing the judges' critical professional judgment on the important issues, which rule, policy, and interest to prefer and which to subordinate.

How likely would it have been for a court to accept the characterization of the State's Medicaid recovery action as restitution? A novel characterization, this is A, not B, is less apparently disruptive

¹⁶⁷ *Id.* at 135.

¹⁶⁸ *Id.* at 136.

¹⁶⁹ *Levy v. Daniels U-Drive Auto Renting Co.*, 143 A. 163, 164 (Conn. 1928).

than overruling; but, it may change the precedent system in ways that are difficult to predict.

The State characterizes as Chancery and as restitution to achieve the benefits of the new regime and to avoid the drawbacks of the old regime. The tobacco companies' position of opposition to common law change generally is contrary to centuries of the common law process, the Mississippi Supreme Court's statements, and the wise commentators, Professor Schauer and Professor Eisenberg.

Could a court refuse to accept the State's particular characterizations? Yes. Characterization has pitfalls and maladies which perceptive judges may seek to avoid. The court could choose from several pegs to hang a decision for the tobacco company on: we prefer stability to change this time. This is not a Chancery case. If it is, the State's remedy at law is adequate. This is a products liability tort, not a restitution, case. This observer cannot be sure a court would have accepted the State's Chancery-restitution characterizations.

Finally, the "tobacco companies win" paradigm is unlike the court-made rules of common law that Professors Schauer and Eisenberg examine. Tobacco companies have developed the paradigm by convincing juries, not appellate courts. Recent events may have altered jurors' readiness to accept the companies' arguments that the smokers knew of the risks and assumed them. In early 1999, a San Francisco jury returned a verdict for \$1.5 million in compensatory damages and \$50 million in punitive damages in favor of a former smoker with lung cancer.¹⁷⁰ The third jury verdict for a typical smoker and the second for punitive damages, this one may be the first to survive post-verdict judicial review.¹⁷¹ The next month, an Oregon jury award \$81,000,000, including \$79,500,000 in punitive damages, to the family of a lung cancer victim.¹⁷² These two verdicts may be analogous to what

¹⁷⁰ John Schwartz, *Jury Awards Ex-Smoker \$51.5 Million*, WASH. POST, Feb. 11, 1999, at A3.

¹⁷¹ *Id.*

¹⁷² Sandra Torry, *Record \$81 Million Award in Tobacco Case*, WASH. POST, Mar. 31, 1999, at A6.

Professor Eisenberg calls an inconsistent exception,¹⁷³ a decision or line of decisions inconsistent with parallel lines of decisions and, since the two juries rejected the defense that smokers bear the responsibility for their choice to smoke, a harbinger of lawsuits and tort verdicts for smokers yet to come.

VIII. STATE: OUR RESTITUTION CLAIM WILL SUCCEED

The State's first two stages were explicit characterizations, this is (1) a Chancery case and (2) a restitution case, plus its implicit anti-characterization that it is not a products liability case. Although major hurdles for the State, chancery-restitution characterizations do not spell success. The State's next proposition was not a characterization, but an argument to extend or expand liability under existing law: the tobacco companies are liable under restitution principles for the State's tobacco-related Medicaid payments.

"Plaintiff," the tobacco companies protested, "apparently believes that the *more confusing* he makes the law of restitution and indemnity appear, the higher his likelihood of success."¹⁷⁴ One litigant's confusion is another's creativity. For as Professor Milsom reminded us, "it is only by confusing the issues that legal development becomes possible."¹⁷⁵

Many find restitution confusing. "Restitution" warned Professor Dobbs, "is a simple word but a difficult subject."¹⁷⁶ Unjust enrichment-restitution is a discrete source of liability or obligation like contract or tort. As Professor Kull put it in his preliminary draft for the *Third Restatement of Restitution*, restitution "is a coordinate basis of liability that, taken together with principles of contract and torts, completes the account of civil obligations in our legal system."¹⁷⁷

¹⁷³ See EISENBERG, *supra* note 59, at 138-139 ("When a court draws an inconsistent distinction there are two inconsistent legal standards on the books at the same time—the underlying rule and the inconsistent exception.").

¹⁷⁴ Defendants' Motion in Opposition at 19, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429).

¹⁷⁵ MILSOM, *supra* note 74, at 335.

¹⁷⁶ 1 DAN DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 551 (2d ed. 1993).

¹⁷⁷ RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. a (Preliminary Draft No. 1 1998).

Restitution originated in England separately on the law side in general assumpsit plus the common counts and on the equity-chancery side in the constructive trust. The first *Restatement* of Restitution in 1937 identified defendant's unjust enrichment as a freestanding substantive basis for plaintiff to recover restitution, and it expressed its unified insight in its section 1, which became the State's first restitution theory: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."¹⁷⁸

The State's argument runs as follows. Pursuant to its duty to assuage the plight of its infirm citizens, the State has established Medicaid to pay their medical costs, many of them caused by smoking. The tobacco companies created many of these medical costs by selling their addictive and harmful product to smokers. The costs "rightfully should have been borne by the tobacco companies."¹⁷⁹

The State, in other words, asked the court to base restitution-indemnity on State Medicaid payments to Infirm Citizen of an amount for which the tobacco companies have not been held liable to Infirm Citizen, but for which the tobacco companies *ought* to be liable to Infirm Citizen. The State may recover restitution from tobacco companies because the tobacco companies are unjustly enriched when the product they sell causes medical expenses that they are not paying. The amount the tobacco companies are unjustly enriched is the amount they "save" by not paying for the medical expenses tobacco causes. The amount the State should recover is the amount it pays to deal with the insalubrious consequences of tobacco.

Section 1 of the first *Restatement* expresses an open-textured approach to restitution. Defendant's unjust enrichment is a broad standard of justice. The principle is attractive because it is versatile and adaptable to new situations.

That a set of fixed rules cannot resolve all disputes is the lesson of the common law. Courts must, on occasion, refer to first princi-

¹⁷⁸ RESTATEMENT OF RESTITUTION § 1 (1937).

¹⁷⁹ Plaintiff's Motion to Strike Challenges at 40, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994 (No. 94-1429)).

ples. "The law of restitution is characterized by a heavy dependence on general principles."¹⁸⁰

There are two functional types of restitution: freestanding restitution and restitution as an alternative remedy in tort, contract or property.¹⁸¹ Not involved here is the latter, restitution as an alternate remedy for a breach of contract or tort. The absence of tobacco company product liability or tort liability is the reason the State sought restitution.

Freestanding restitution, the subject here, occurs where plaintiff can show no other ground of substantive liability, except that the defendant was unjustly enriched. Plaintiff claims defendant has been unjustly enriched and asks restitution, recovery measured by the defendant's unjust enrichment. It might be more accurate to describe freestanding restitution as follows: the substantive law is unjust enrichment and the remedy is restitution.

When a plaintiff asks for freestanding restitution, although he or she would not prevail in tort, the court must ask a difficult question: If the court finds defendant unjustly enriched and grants plaintiff restitution, would that undermine the reason to deny tort recovery? This Article will develop two approaches to freestanding restitution, broad and narrow. Broad freestanding restitution began in the late eighteenth century when Lord Mansfield let restitution's genie out of the bottle in *Moses v. Macferlan*.¹⁸² "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract (quasi ex contractu, as the Roman law expresses it)."¹⁸³ Lord Mansfield, Professor Baker explained, freed the principle of unjust enrichment from procedural technicality.¹⁸⁴

¹⁸⁰ DOBBS, *supra* note 176, at 551.

¹⁸¹ Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1276, 1277 (1989).

¹⁸² *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

¹⁸³ *Id.* at 1012. The Preliminary Draft for the *Restatement Third of Restitution* relies on a slightly different statement. "[T]he gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." *Id.*

¹⁸⁴ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 424 (1990).

But just as the relationship between substantive principle and procedure will never be settled definitively, so also within substantive principle, "the discussion about the relative importance in a legal system of certainty and abstract justice is unending."¹⁸⁵ We turn to the tension between, on the one hand, the principle of freestanding unjust enrichment as a "broad" or independent ground for restitution and, on the other, "narrow" restitution bounded by rules.

Aristotle's explanation of "equity," from the *Nicomachean Ethics*, underlies the spirit of broad freestanding restitution.¹⁸⁶ A court employs a sense of "equity" to correct "law where law is defective because of its generality."¹⁸⁷

When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question.¹⁸⁸

Although Aristotle's translator's nontechnical use of the word "equity" differs from the technical sense of distinguishing the courts of common law from courts of chancery, its roots are also in the dual system of common law courts and chancery. In contrast to the professional perception that common law courts applied fixed rules to facts, chancellors are thought to have adjudicated disputes with flexibility, emphasizing context. So the unending debate between certain rules and individualized justice "was at once institutionalized; certainty resided in the common law courts, justice in the chancellor's equity."¹⁸⁹ Even after the courts of the common law and

¹⁸⁵ MILSOM, *supra* note 74, at 94.

¹⁸⁶ ARISTOTLE, *NICOMACHEAN ETHICS*, BOOK V 315-317 (H. Rackham Trans. Loeb Classical Library, 1982).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ MILSOM, *supra* note 74, at 94.

chancery were merged, many observers continue to associate equity in Aristotle's discretion-dispensation sense with equity in the chancery sense. This association may account for the State's quest for a Chancery characterization where it hopes a Chancellor will observe a wrong in search of a remedy and dispense with the technical rules which have prevented smokers from recovering from tobacco companies.

Broad Restitution: Courts and commentators have articulated the *Restatement* section 1's independent unjust enrichment as a basis for restitution. Restitution, the Utah Supreme Court said, is "equitable relief."¹⁹⁰ "Courts have broad authority to grant equitable relief as needed."¹⁹¹ The Supreme Court, discussing the scope of its appellate review, observed:

[T]he facts underlying an unjust enrichment claim are often complex and vary greatly from case to case. Indeed, by its very nature, the unjust enrichment doctrine developed to handle fact situations that did not fit within a particular legal standard but which nonetheless merited judicial intervention The court's ability to state clearly the outcome-determinative factors remains elusive Unjust enrichment law developed to remedy injustice when other areas of the law could not. Unjust enrichment must remain a flexible and workable doctrine.¹⁹²

Courts have used broad freestanding unjust enrichment as a statement of positive law and a guide to decisions.¹⁹³ The Virginia decision in *Raven Red Ash Coal Co. v. Ball*, where the court, admittedly without supporting precedent, but because "natural justice plainly requires," allowed restitution for defendant's over-use of an easement, is a notable unjust enrichment decision, particularly

¹⁹⁰ *Jeffer v. Stubbs*, 970 P.2d 1234, 1245 (Utah 1998).

¹⁹¹ *Id.* at 1243.

¹⁹² *Id.* at 1244-45.

¹⁹³ *Kistler v. Stoddard*, 688 S.W.2d 746 (Ark. App. 1985) (validating lower court's use of unjust enrichment); *Kossian v. American Nat'l Ins. Co.*, 62 Cal. Rptr. 225 (Cal. Ct. App. 1967) (using unjust enrichment).

because that court is known more for its dogged conservatism than for its willingness to innovate.¹⁹⁴ Professor George Palmer writes:

Unjust enrichment is an indefinable idea in the same way that justice is indefinable. But many of the meanings of justice are derived from a sense of injustice. [Professor Palmer cites E. Cahn, *The Sense of Injustice* here.] This is true of restitution since attention is centered on the prevention of injustice. Not all injustice but rather one special variety: the unjust enrichment of one person at the expense of another. This wide and imprecise idea has played a creative role in the development of an important branch of modern law.¹⁹⁵

Broad restitution based on freestanding unjust enrichment as a default for courts to employ when other principles fail has both virtues and vices, for as then-Professor Sullivan reminded us, "The perception of what is just is by no means an objective vision and varies from generation to generation, from case to case, and from court to court."¹⁹⁶ It "has presented extraordinary difficulties to those who have sought to systematize and reconcile the distinctly unsystematic and conflicting cases."¹⁹⁷

Imprecision in the pursuit of justice is, in this view, a virtue. "Unjust enrichment," Professor Dobbs said, "cannot be precisely defined, and for that very reason has potential for resolving new problems in striking ways."¹⁹⁸ Law, at this level of abstraction, is a question-asking process. We can expect legal rules or standards like section 1 unjust enrichment to focus the decisionmaker's judgment on the critical issues, not to compel predictable results. If a court were to accept a broad, or section 1, view of unjust enrichment and

¹⁹⁴ *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946).

¹⁹⁵ 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.1 (1978).

¹⁹⁶ Timothy J. Sullivan, *The Concept of Benefit in the Law of Quasi-Contract*, 64 GEO. L.J. 1, 26 (1975).

¹⁹⁷ *Id.*

¹⁹⁸ DOBBS, *supra* note 176, at 562-63. Professor Dobbs articulates a broad section 1 theory of restitution.

freestanding restitution and perhaps stretch it, then the State's Medicaid restitution might have prevailed.

Narrow Restitution: But as the quotation from Professor Timothy Sullivan's article hinted, many courts and scholars, uncomfortable with the broad view of restitution, seek principles of containment. The reasons for professional discomfort are palpable. Positivistic people seek more precision in determining what type and level of unconscientious conduct will create legal liability. From the words "unjust enrichment," a lawyer cannot determine what standard a court will apply to conduct. "Unjust enrichment" may be open-ended, lacking in principle, and conclusory; "natural justice" and "equity" cannot explain what is meant by "unjust enrichment." Which transfers to a defendant will constitute enrichment? What qualities of benefit will create unjustness? Answers to these questions are delayed. Principles of confinement are lacking.

The author's experience in teaching the decisions cited above¹⁹⁹ in law school classrooms bears out the preceding remarks. The decisions were selected for the casebook and the classroom because they are difficult and lead to class discussion and differences of opinion. Many law students, certainly at conservative Washington & Lee, become uncomfortable with broad and capacious restitution. After the initial sense that the decisions are "fair" wears off or is worn down by their instructor's skeptical questioning, many law students decide that unjust enrichment as a broad principle of freestanding restitution may lead a court to indeterminacy, confusion, complex disputes, erroneous application, reduced deterrent effect, and unpredictability. Where the defendant will escape liability or damages under contract, property, or tort doctrines, many students conclude that granting plaintiff restitution based solely on defendant's "unjust enrichment" will erode the related contract, property, or tort doctrines too seriously to countenance. The classroom experience leads the author to expect the same perplexity and differing opinions in professional circles and on collegial courts.

¹⁹⁹ *Raven Red Ash Coal Co.*, 39 S.E.2d at 231; *Kistler v. Stoddard*, 688 S.W.2d 746 (Ark. App. 1985); *Kossian v. American Nat'l Ins. Co.*, 62 Cal. Rptr. 225 (Cal. Ct. App. 1967).

Professor Kull's introduction to the new restitution *Restatement* stated this uncertainty articulately. "Unless a definition of restitution can provide a more informative generalization about the nature of the transactions leading to liability," he wrote, "it is difficult to refute the objection that sees in 'unjust enrichment' either an open-ended and potentially unprincipled charter of liability or, what may be worse, a conclusion masquerading as analysis, employed to justify a liability its proponents are unwilling or unable to explain."²⁰⁰ Restitution, says Kull, "is narrower, more predictable, and more objectively determined than the implications of the words 'unjust enrichment' might lead us to suppose."²⁰¹ The reason is "the justification in question is not moral but legal."²⁰² Unjust or unjustified enrichment identifies "the circumstances in which the law imposes a liability in restitution."²⁰³

Professor Birks's influential work on restitution in the United Kingdom appears to take a similar view. The "unjust" part of unjust enrichment means, according to Birks, that the defendant was benefitted "in circumstances in which the law provides for restitution."²⁰⁴

The narrow view of restitution is easy to criticize as static, external, and positivistic: static because it looks to the past for precedent, external because it looks outside the particular dispute for standards, and positivistic because it is based on positive law, a legal system of fixed rules. In other words, the plaintiff ought to locate a specific precedent to support restitution recovery. When patterns of events recur, consistent applications of generalizations develop corollaries or a system of precedent.²⁰⁵

A court uncomfortable with expansive statements basing restitution on unjust enrichment without any more precise confinement might subscribe to an approach to restitution which requires a plaintiff to locate a specific precedent or principle. If so, the

²⁰⁰ RESTATEMENT (THIRD) OF RESTITUTION §§ 1-4 to 1-5 (Preliminary Draft No. 1 1998).

²⁰¹ *Id.* § 1-5.

²⁰² *Id.*

²⁰³ *Id.* § 1-7.

²⁰⁴ PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 19 (1989).

²⁰⁵ See RESTATEMENT (SECOND) OF RESTITUTION § 1 cmt. d (Tentative Draft No. 1 1983) (stating that repeated, consistent application of unjust enrichment results in its further application in the cases).

State's request for restitution of its Medicare payments to ailing smokers would lose.

IX. THE PARTIES' RESTITUTION ARGUMENTS: EVALUATION

Does the State make acceptance of its argument for broad freestanding restitution easier by showing a mastery of the subject and the sources to establish its credibility? In other words, if this were a tenure evaluation of the hypothetical law professor's restitution articles instead of a discussion of the State's restitution theory and the tobacco companies' response, several of the following points would come up.

Dobbs's Disclaimer: "The terminology of restitution is abstruse and confusing and is no matter for amateurs."²⁰⁶

Restitution is becoming a lost art, observes Professor Kull: "Confusion over the content of restitution carries significant adverse consequences. To put it bluntly, American lawyers today (judges and law professors included) do not know what restitution is The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even when they know where to find it."²⁰⁷

If restitution is a lost art, the State's legal researchers did not look far to find it. The State's documents do not reveal in-depth research in standard restitution sources. The State did not cite the late Professor George Palmer's four-volume treatise, *Law of Restitution*, published in 1978 and later supplemented; the restitution chapter, Chapter 4, of Professor Dan Dobbs's 1993 three-volume treatise, *Law of Remedies: Damages-Equity-Restitution*; or the two tentative drafts for the proposed second *Restatement of Restitution*, published in 1983 and 1984.

The State does cite the 1956 edition of Harper and James's torts treatise, which is now in a 1986 second edition.²⁰⁸ Moreover, it also

²⁰⁶ DOBBS, *supra* note 176, at 556.

²⁰⁷ Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195 (1995).

²⁰⁸ Plaintiff's Motion to Strike Challenges at xii, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

cites the 1973 first edition of Dobbs's Remedies treatise, which now exists as a 1993, three-volume second edition.²⁰⁹ Furthermore, the State cites Dobbs's treatise, not from the original but from a quotation in a 1989 law school casebook by Robert Thompson and John Sebert, *Remedies* (Second edition 1989).²¹⁰ Citing an earlier or superseded edition undermines the credibility of research and scholarship.

The State's analysis reflects the research base. One example is the use of the word "damages." Plaintiff's complaint seeks "damages in an amount which is sufficient to provide restitution and re-pay the State for the sums the State has expended on account of the defendants' wrongful conduct."²¹¹

In the technical language of remedies, "damages" means money a claimant recovers to compensate loss, while "restitution" means claimant's recovery, taken from the defendant to prevent its unjust enrichment. Damages sufficient to provide restitution is technically an oxymoron because courts measure "damages" to compensate plaintiffs and "restitution" to strip defendants of unjust enrichment. Because the restitution the State sought had an "indemnity" quality, the amount necessary to compensate the State was nearly identical to the amount the defendants were unjustly enriched. The tobacco companies who refer to "the measure of damages in a restitution case" apparently do not understand restitution's technical language any better.²¹² The parties' error may stem from courts, probably using the word "damages" nontechnically to describe all money recovery, which refer to money recovery for restitution as "damages."²¹³

The State's research and technical analysis reflect shallow understanding of the basics. Let us examine the State's Chancery

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Complaint at 33-35, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed May 23, 1994) (No. 94-1429).

²¹² Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 3 n.2, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

²¹³ See *United States v. Consolidated Edison Co.*, 580 F.2d 1122 (2d Cir. 1978) (using "damages" to refer to money recovery under legal and equitable remedies); *Estate of Johnson v. Adkins*, 513 So.2d 922 (Miss. 1987) (using "damages" to refer to all recovery).

or "Equity" characterization in light of its request for restitution. Litigants, in general, are entitled to a jury trial in legal or common law matters, but not in equitable or chancery matters. Usually the plaintiff or claimant seeks a jury because of the "deep pocket" effect—juries are considered to be sympathetic to victims and generous with large corporations' money. The reverse happened in the Mississippi lawsuit; after polls of potential jurors showed them 2 to 1 against the proposed lawsuit, the State's lawyers filed in Chancery where the case would be heard by a judge without a jury.²¹⁴

Restitution has two branches, legal and equitable. The first *Restatement of Restitution* was organized into a mostly legal restitution first half, Part I, and a mostly equitable restitution second half, Part II.²¹⁵ Dobbs preserves the legal-equitable division of restitution in chapter 4 of his 1993 edition of *Law of Remedies: Damages-Equity-Restitution*.²¹⁶

The vocabulary of legal restitution when the claimant seeks money recovery comes from the law of contracts. It begins with "general assumpsit" or "indebitatus assumpsit" and may be stated as "quasi-contract," the best known term today, and as being based on a "contract implied-in-law." Legal restitution is further subdivided into "money had and received" and "quantum meruit." Equitable restitution employs the language of trusts; its major forms are constructive trusts, equitable liens, and subrogation.

The distinction between legal restitution and equitable restitution is confusing and not functional. A major source of confusion is the use in legal restitution of the word "equitable" in a nontechnical sense meaning fairness. "Equity," says Professor Dobbs, "is not a jurisdictional statement but a standard about the goal or a standard for judging what counts as unjust enrichment."²¹⁷

²¹⁴ See John Mintz & Ceci Connolly, *Smoked/Two Lawyers Light a Match: Wounding the Giant*, WASH. POST, Mar. 30, 1998, at A1 (describing Mississippi lawsuit where jury trial was avoided by State's lawyers due to jury disfavor of lawsuit).

²¹⁵ RESTATEMENT OF RESTITUTION (1937).

²¹⁶ DOBBS, *supra* note 176, §§ 4.2, 4.3 at 252-258.

²¹⁷ *Id.* at 558 n.1. The description of legal restitution as "equitable," Professor Palmer said, "refers merely to the way in which a case should be approached, since it is clear that the action is at law and the relief given is a simple money judgment." PALMER, *supra* note 196, § 1.2 at 9.

Nevertheless the legal restitution—equitable restitution distinction is real in the way lawyers know reality. Litigants are entitled to a jury trial in legal restitution leading to a money judgment; several leading restitution decisions were tried to juries.²¹⁸ Equitable restitution, usually seeking a constructive trust, is tried in Chancery without the participation of a jury.²¹⁹

The State's "claims," it says, "are equitable, not legal."²²⁰ The State argument that its cause of action and remedies are "clearly restitutionary and equitable in nature"²²¹ seems to be based on the mistaken notion that all restitution is equitable. The State cites two cases for the idea that restitution is equitable.²²²

Although the State's lawsuit was filed in Chancery, its restitution-indemnity theory seems to me not equitable restitution. Instead, because it seeks a money judgment, without any attribute of equitable restitution—tracing, specific restitution, or personal relief—the State's complaint seems to me to seek legal restitution, quasi-contract variety, particularly when restitution relief is stated to parallel compensatory damages.²²³ If so, the defendants should be entitled to a jury trial on the plaintiff's requests for a money judgment for restitution and indemnity.

Although a jury trial was demanded by one of the tobacco companies,²²⁴ their analysis of the jury trial issue is muddled. At one point they assert the remedy the State is seeking is ordinary

²¹⁸ *Campbell v. Tennessee Valley Auth.*, 421 F.2d 293 (5th Cir. 1969); *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946); *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946).

²¹⁹ *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028 (Ky. 1936); *Simonds v. Simonds*, 380 N.E.2d 189 (N.Y. 1978).

²²⁰ Plaintiff's Reply Memorandum at 1, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

²²¹ Plaintiff's Motion to Strike Challenges at 37, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

²²² *Id.* at 9 n.5.

²²³ PALMER, *supra* note 196, § 1.5(d); *see Miller v. International Union of United Brewery Workers*, 48 S.E.2d 252, 256 (Va. 1948) (distinguishing legal restitution and quasi-contract from equitable restitution and constructive trust on the ground that successful quasi-contract claimants receive money judgments for restitution while successful constructive trust plaintiffs recover specific property).

²²⁴ Answer, Affirmative Defenses, and Demand for Jury of Defendant, *The American Tobacco Company* at 12, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Aug. 29, 1994) (No. 94-1429).

money damages, "the classic remedy at law."²²⁵ At other points, however, the tobacco companies seem to accept the State's chancery characterization of restitution-unjust enrichment.²²⁶

The tobacco companies' missing contention is: The type of restitution the State seeks is legal restitution, quasi-contract variety, and the defendant is entitled to a jury trial.²²⁷ The tobacco companies stick to the tort-personal injury-products liability characterization, however, and do not make this argument.

The State's request for an injunction is in Chancery, or is equitable.²²⁸ The State asserts equitable cleanup jurisdiction,²²⁹ and following Mississippi state practice, it refers to cleanup jurisdiction as "pendant." Equitable cleanup worked as follows. If, prior to the merger of chancery and law courts, a plaintiff in chancery sought both a chancery remedy, an injunction, and legal damages, then the chancellor could determine the facts and issue the injunction and also "incidentally" award legal damages to "clean the case up." However, the efficiency of a single chancery trial undermines the litigants' right to a jury trial. After merger of law and equity, under a leading federal Supreme Court jury trial decision, a claimant seeking money recovery cannot plead a money damages claim as equitable to defeat its opponent's right to a jury trial.²³⁰

Building on the classification of the State's basic restitution-indemnity as legal restitution, I think defendant would be entitled to a jury trial on the factual issues leading to legal restitution; the judge-chancellor could then enter equitable relief, an injunction, which is consistent with the jury's findings of fact on the legal issues.²³¹

²²⁵ Defendants' Memorandum in Opposition at 11, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429).

²²⁶ Defendants' Motion for Judgment on the Pleadings at 6, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

²²⁷ DOBBS, *supra* note 176, at 557.

²²⁸ Plaintiffs' Motion to Strike Challenges at 8, 10, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

²²⁹ *Id.* at 11.

²³⁰ Dairy Queen v. Wood, 369 U.S. 469 (1962).

²³¹ See DOBBS, *supra* note 176, at 170-72 ("stating that inquiry would not proceed until the right was established in the law courts, and then would act in accord with the legal ruling").

Mississippi case law recognizes chancellors' decisions on "legal issues," equitable cleanup, as "pendant," as well as the reverse, decisions by the circuit court on chancery issues. In an important decision, the Mississippi court forbade a party from avoiding a jury trial by hiding a money claim in equitable "camouflage," an accounting. The court discussed the primacy of the litigants right to a jury under the state constitution, cited the analysis in the United States Supreme Court's decision in *Dairy Queen v. Wood*,²³² and emphasized consideration of the substance, not the form, in adjudicating jury trial issues.²³³

Mississippi's restitution decisions, like many states', lack crisp distinctions between legal and equitable restitution. The author was unable to find Mississippi decisions holding that legal restitution required a jury trial on demand. Mississippi restitution decisions seem to include several chancery court decisions on "legal" restitution where the lawsuit or the issue was either under exclusive "equitable jurisdiction" or where the litigants had apparently waived the right to a jury trial by not requesting one. In two claims against a decedent's estate, the Mississippi court approved apparently legal restitution in chancery.²³⁴ In a chancery suit for an easement seeking an injunction, the Mississippi court approved apparently legal restitution.²³⁵ One anomalous chancery action for a realty commission ended with a remedy labeled "quasi contract," which may have been an implied-in-fact contract, not restitution at all.²³⁶ In Mississippi, restitution in equitable distribution after

²³² 369 U.S. 467 (1962).

²³³ *Thompson v. First Mississippi Nat'l Bank & Mut. Sav. Life Ins. Co.*, 427 So.2d 973, 976 (Miss. 1983); see *Tillotson v. Anders*, 551 So.2d 212 (Miss. 1989) (noting that court rebuffed claimant's characterization of defamation action as chancery action for accounting).

²³⁴ See *Estate of Johnson v. Adkins*, 513 So.2d 922 (Miss. 1987) (recognizing case tried before Chancellor as quantum meruit, legal restitution); *Old Men's Home, Inc. v. Lee's Estate*, 4 So.2d 235 (Miss. 1941) (recognizing as quasi contract, legal restitution, and citing legal restitution).

²³⁵ *Fourth Davis Island Land Co. v. Parker*, 469 So.2d 516 (Miss. 1985).

²³⁶ See *Magnolia Fed. Sav. & Loan Ass'n v. Randal Craft Realty Co.*, 342 So.2d 1308, 1311-12 (Miss. 1977) (relying on theory of quasi contract).

divorce as well as suits for quiet title and ownership have been deemed equitable restitution.²³⁷

Although the tobacco companies may have inadvertently waived the argument that they were entitled to a jury trial, the issue is worth examining if only to test the quality of their research and thought. The Mississippi Supreme Court, if properly presented with the issue, might have followed its strong tradition of jury trial and pierced the State's position that restitution is equitable. If there had been a jury, the State's survey research indicated the State would have encountered difficulty empaneling a jury that favored its contentions.

X. EVALUATION CONTINUED: ENRICHMENT? UNJUST? REALLY?

Even in a bench trial, the State would have to convince the chancellor to accept its contentions. Orderly analysis of unjust enrichment usually begins by first locating the defendant's enrichment or benefit and then moving to whether it was unjust.

The plaintiff's first step in an unjust enrichment action is to establish defendants' enrichment or benefit. Benefit in the State's restitution theory, based on the *Restatement of Restitution* section 1, is a broad concept. The court may find that the defendant has been benefited or enriched through the plaintiff's actions where the plaintiff has satisfied defendant's debt or duty, has in any way added to defendant's security or advantage, has added to defendant's property, has saved the defendant an expense, or has conferred any form of advantage on the defendant.²³⁸

A plaintiff who has paid "the defendant's debt or other enforceable liability to a third person" may, under some circumstances, recover restitution from the defendant.²³⁹ If, however, the plaintiff "knowingly and without the defendant's request" pays defendant's

²³⁷ See *Dudley v. Light*, 586 So.2d 155, 159-60 (Miss. 1991) (granting equitable lien, equitable restitution to parent in divorce case, and citing equitable restitution parts of *Restatement*); *Koval v. Koval*, 576 So.2d 134, 137-38 (Miss. 1991) (enforcing oral contract to convey property and finding equitable lien); *Hans v. Hans*, 482 So.2d 1117, 1122-23 (Miss. 1986) (finding constructive trust and equitable restitution in quiet title action).

²³⁸ See RESTATEMENT OF RESTITUTION § 1 cmt. b (1937) (defining plaintiff's cause of action for unjust enrichment).

²³⁹ *Id.*

unliquidated obligation to Sam,²⁴⁰ plaintiff cannot recover restitution from the defendant unless there is "something more." For example, if the plaintiff pays Sam by mistake, thinking he owed the debt, that is "something more."²⁴¹ The defendant's benefit is clear, for the plaintiff has discharged its debt, obligation or liability. The issue of the defendant's benefit arises when the defendant requested the plaintiff's payment to Sam, but when the defendant had no obligation to Sam.²⁴²

The plaintiff's first step in unjust enrichment is showing defendant's enrichment as a benefit. The tobacco companies argue they were not enriched.²⁴³ A defendant must have "economic benefit" as a prerequisite to restitution.²⁴⁴ Under restitution, tobacco companies were not enriched; they had no economic benefit. Only if the tobacco companies were liable to the smokers for damages would the State's Medicaid payments to the smokers be an "economic benefit" to the tobacco companies.²⁴⁵ The tobacco companies would have been enriched if the State had paid an obligation the tobacco companies really owed. A restitution-indemnity plaintiff who discharges a duty to the defendant owed may recover from the defendant. But the tobacco companies had no duty to the smokers. The State cannot recover its payments for the smokers' health care costs from the tobacco companies as restitution-indemnity unless the tobacco companies were liable to the smokers.

Recent precedent supports the tobacco companies' contention about the absence of any benefit. The first is *Kentucky Laborers District Council Health & Welfare Trust Fund v. Hill & Knowlton*,

²⁴⁰ *Id.*

²⁴¹ PALMER, *supra* note 196, § 22.2 (addressing plaintiff's performance of unliquidated obligation of defendant).

²⁴² *See id.* ch. 33 (discussing restitution based on payment or transfer to third parties).

²⁴³ *See Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 1, Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429) (arguing that "plaintiff's damage claims fail to satisfy essential prerequisites of equity").

²⁴⁴ *Id.* This statement is narrower than the quoted decision, *Omnibank of Mantee v. United S. Bank*, 607 So.2d 76, 92 (Miss. 1992). As the quoted court explained, an economic benefit "includes positive profits, a loss avoided, as well as discharge of debts."

²⁴⁵ *See Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 2, Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429) (arguing that "plaintiff's damage claims fail to satisfy essential prerequisites of equity").

*Inc.*²⁴⁶ The Fund, having paid smoker-participants' medical claims for maladies caused by tobacco, claimed that its medical payments unjustly enriched tobacco companies.²⁴⁷ The Fund's restitution theory is the same as the State's: we paid claims the tobacco companies ought to have paid.²⁴⁸ The argument assumes that the tobacco companies were obligated to pay the smokers' medical expenses.²⁴⁹ The court, however, did not think the Fund's payment to the smokers conferred a benefit on the tobacco companies because the payment did not discharge any obligation or debt the tobacco companies owed the smokers.²⁵⁰ "A perceived [tobacco companies'] moral duty [to pay the smokers' tobacco-caused medical expenses] is no substitute for a substantive legal requirement."²⁵¹ The Fund had a contractual or legal obligation to pay the smokers' medical expenses, but the tobacco companies did not.²⁵² The Fund's payment did not confer a benefit on the tobacco companies; and, since the tobacco companies were not enriched, they could not have been unjustly enriched.²⁵³

The second recent precedent is *Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc.*²⁵⁴ The court responded to the Union fund's argument (we paid claims the tobacco companies ought to have paid) by observing that the fund incurred expenses "at the behest" of recipients.²⁵⁵ The court concurred by stating that the fund "did not confer a benefit" on the tobacco companies.²⁵⁶ The court concluded that the tobacco companies' liability, absent Medicaid, "is too speculative to constitute a benefit."²⁵⁷

²⁴⁶ 24 F. Supp. 2d 755 (W.D. Ky. 1998).

²⁴⁷ *Id.* at 775.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* See also *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 970-72 (E.D. Tex. 1997).

²⁵⁴ 7 F. Supp. 2d 277 (S.D.N.Y. 1998), *rev'd on other grounds*, 1999 WL 639865 (2d Cir. 1999).

²⁵⁵ *Id.* at 293-94.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

The State's externality theory of benefit is its most creative argument. The State argues that the tobacco companies "have been unjustly enriched by not having to bear the intended by-products of their enterprise—the enormous health care costs."²⁵⁸ Such costs the State paid, in part, conferred a benefit on the tobacco companies "and saved them from great expense."²⁵⁹ Furthermore, the State contends that the "defendants have so unfairly exploited the State's mandate to provide public health care that equity demands they make restitution by bearing the costs which have been borne by the State."²⁶⁰ In plain, ordinary English, the tobacco companies were freeloaders.

"The most dramatic economic function of the common law," Judge Posner wrote, "is to correct externalities."²⁶¹ Everyone is exposed to some negative consequences from others' economic activity; this exposure is one consequence of life in a complex economy. An externality is an economic cost to others that the creator is not legally responsible for and is not required to take into account. It is a complex combination of economic theory and legal doctrine. The economic theory part is "cost"; the legal doctrine part is responsibility.

The government will not repress all of a person's economic activity that affects others, not even all that harms others. When should the government make the person pay those its activity harmed? The issue for policymakers' judgment is how much of an enterprise's activity's cost to others is too much for them to bear. Economists say that policymakers should suppress an "inefficient" externality.²⁶² In the end the question of when to internalize the externality is a legal-political judgment made by government officials, usually judges and legislatures.

²⁵⁸ See Plaintiff's Reply Memorandum at 23, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed Dec. 9, 1994) (No. 94-1429) (arguing that State's actions enriched defendants).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ POSNER, *supra* note 45, at 274 (noting that common law also functions to reduce transaction costs by creating property rights).

²⁶² See Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73, 77 (1997) ("Liability for perfectly compensatory damages provides incentives for efficient precaution by injurers in many economic models.").

An externality is suppressed by internalizing it. Common law courts define property rights and create liability rules to internalize an activity's cost to others by requiring the producer responsible for the activity to pay what the court deems to be its rightful expenses. The government's rules of legal liability force the creator to pay for the consequences of its activity. The reasoning is that if the creator must pay the consequences, it will, in the future, consider the cost. "The threat of liability is a kind of price charged in advance that leads the potential injurer (in most instances) to take steps to prevent injury from occurring."²⁶³

Returning to the State's externality theory of benefit, the tobacco companies decide to use a resource, to sell tobacco, without taking into account the way tobacco adversely affects buyers' health. Essentially, the tobacco companies may ignore the smokers' illnesses because jury verdicts against smokers mean the tort system has allowed those effects to fall on the smokers and others. Tobacco's bad health consequences have been an externality for the tobacco companies. Holding the tobacco companies liable for tobacco's health consequences to smokers would internalize the externality.

The idea that the health costs of tobacco are a tobacco company externality which courts ought to develop liability rules to internalize has been expressed under at least two other legal subject headings, equal protection and tort-products liability. Under the Equal Protection Clause "there is no barrier . . . to an action for reimbursement of Medicaid funds from a specific industry which reaps considerable financial benefit from the sale of its products, but which causes significant state funds to be expended to treat the harms its products cause."²⁶⁴

Under tort, "[c]igarette manufacturers thus receive a windfall because they collect profits on sales of their product, but do not pay its true costs."²⁶⁵ Similarly, "Why should not the price of a pack of cigarettes or a can of beer reflect the enormous costs of lung cancer

²⁶³ See POSNER, *supra* note 45, at 289 (noting that contributory negligence system provides incentive to ban injuries and victims).

²⁶⁴ Jana Schrink Strain, Note, *Medicaid vs. The Tobacco Industry: A Reasonable Legislative Solution to a State's Financial Woes?*, 30 IND. L. REV. 851, 879 (1997).

²⁶⁵ Wertheimer, *supra* note 73, at 1447.

and drunk driving injuries that are very often borne by innocent third parties and by the public at large through private and public health care insurance mechanisms?"²⁶⁶ "[I]f product category defectiveness is not allowed, [the price of cigarettes] will artificially exclude . . . arguably excessive [health] costs which are instead externalized to a large extent on other persons."²⁶⁷

The State's use of the economic theory of externality to establish the "defendants' benefit" prerequisite for *Restatement* section 1 restitution is a creative application of legal reasoning. The externality theory's absence of success in establishing the companies' responsibility under equal protection or products liability, however, ought to cause the observer to wonder whether a court would accept it under the heading of restitution.

The State puts forward other theories of the tobacco companies' benefit. Specifically, the State's Medicaid payments to the smokers reduced or eliminated the smokers' incentive to sue the tobacco companies, which, by saving the tobacco companies' litigation expenses, unjustly enriched them.²⁶⁸ The State's Medicare payments provided indigent smokers, who might otherwise have gone without it, with medical care, and the State relieved the tobacco companies of the "public relations nightmare" of smokers lacking medical care which might have encouraged a "political backlash" against the tobacco companies.²⁶⁹ Finally, lack of tobacco companies' enrichment-benefit is "a mere technicality" because "the State has still performed a responsibility that equity and good policy dictate should have been performed by the defendants."²⁷⁰ The State's ideas are creative; but they either recycle the externality theory of benefit or extend benefit beyond the concept as expressed in the *Restatement*. Not being sued and not encountering public reactions and

²⁶⁶ Owen, *supra* note 73, at 1255-56.

²⁶⁷ Owen, *supra* note 73, at 1257 n.5.

²⁶⁸ See Plaintiff's Reply Memorandum at 23-23, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Dec. 9, 1994) (No. 94-1429) (arguing that state's actions enriched defendants); Plaintiff's Motion to Strike Challenges at 42-43, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429) (arguing that defendants have been enriched by state's actions).

²⁶⁹ Plaintiff's Reply Memorandum at 24, *Moore* (No. 94-1429).

²⁷⁰ *Id.* at 23-24.

political hassles are too speculative and too remote to count as benefits under section 1.

Precedent supports the tobacco companies' contention that creation of an alleged medical care externality does not benefit the creator and create liability for restitution. In *San Francisco v. Philip Morris, Inc.*,²⁷¹ the government plaintiffs sought restitution from tobacco companies, arguing that the tobacco companies were not paying the medical expenses of smoking.²⁷² The court rejected the claimants' externality theory of enrichment-benefit.²⁷³ If the tobacco companies were unjustly enriched because they saved on medical expense, this enrichment was, the court said, at the smokers' expense.²⁷⁴ The tobacco companies, however, lacked a duty "to individual smokers to cover the costs of their medical care."²⁷⁵ The court dismissed the Fund's unjust enrichment claim.²⁷⁶ Plaintiffs, the court concluded, have asked the court to stretch its broad "equitable" powers too far.²⁷⁷

If a firm's savings constituted enrichment or a benefit which triggered restitution in favor of someone affected by the activity, the law of restitution would be enlarged. Once a court finds a defendant liable for restitution, the court may measure plaintiff's recovery by the defendant's savings.²⁷⁸ The next step is to expand use of defendant's savings from measurement of restitution after liability is established and use it to create initial liability for restitution. This step would introduce restitution into spheres where it would be difficult to administer and where liability has traditionally been determined under other bodies of doctrine. Two examples follow.

First, although a polluter "saves" by not installing pollution control devices, courts have adjudicated polluters' liability to homeowners under nuisance, not restitution. "[R]estitution," Professor Palmer emphasized, "*would* come as a surprise No

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

²⁷² *Id.* at 1144.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 1145.

²⁷⁷ *Id.* at 1144.

²⁷⁸ See *Olwell v. Nye & Nissen Co.*, 173 P.2d 652, 654 (Wash. 1946) (measuring plaintiff's restitution recovery by defendant's savings).

one supposes, I believe, that the homeowners are entitled to recover this [polluter's] saving of expense on a theory of unjust enrichment."²⁷⁹

Second, under the familiar formula set out in *United States v. Carroll Towing Co.*,²⁸⁰ courts take a negligent defendant's savings into account in determining its liability for damages.²⁸¹ Suppose a tort defendant saved an expense by neglecting to take a safety precaution and, as a result, injury to the plaintiff occurred. If the probability of a casualty times the magnitude of the plaintiff's loss exceeds the defendant's saved precaution cost, then, under Judge Learned Hand's formula, the defendant was negligent.²⁸² But the defendant's liability is for damages to compensate plaintiff, not for restitution measured by defendant's savings. Indeed, the "savings" measure of a plaintiff's recovery would be unwise. In addition to reducing a victim's incentives to sue to enforce liability and being difficult to administer and measure, restitution calculated by defendant's savings would be too low to internalize efficient cost avoidance; this result would distort the *Carroll Towing* formula and terminate it as a way to set an efficient level of precaution.²⁸³

The material above supports my conjecture that it would be unlikely for a court to expand the concept of "benefit" to include a defendant's savings from not paying for injuries it "ought" to pay, but is not legally liable to pay. The prudent observer of restitution, however, will never say never. "No single comprehensive definition of benefit in quasi-contract[-restitution] is possible,"²⁸⁴ wrote then-Professor Timothy Sullivan. "The central function of quasi-contract[-restitution] in providing a remedy in extremis may explain

²⁷⁹ See PALMER, *supra* note 196, at 137 (noting that restitution would be denied in case of polluting industrial plant because of difficulty in measuring proper recovery); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 509 (1980) (explaining that property approach to restitution "provides no basis for a claim of restitution in cases which the defendant has benefited at the plaintiff's expense through conduct that was either not wrongful or was legally excused or justified").

²⁸⁰ 159 F.2d 169 (2d Cir. 1947).

²⁸¹ *Id.* at 173 (considering burden of adequate precautions to determine liability).

²⁸² *Id.*

²⁸³ POSNER, *supra* note 45, § 6.10.

²⁸⁴ Timothy J. Sullivan, *The Concept of Benefit in the Law of Quasi-Contract*, 64 GEO. L.J. 1, 25 (1975).

why no wholly consistent or comprehensive definition of benefit is possible or even desirable."²⁸⁵ Professor Palmer, who valued precise rules and promulgated them through four technical volumes, summarized his study of benefit generally. "The term 'benefit,' " he said, "has no single meaning in the law of restitution; instead, meaning will vary with the circumstances, especially with the ground for restitution."²⁸⁶

Two examples will illustrate the difficulty of predicting what a court might call a "benefit." First, discussing multiple damages for violations of antitrust, Mr. Douglas Melamed, Principal Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice, described an externality, "the full extent of the [tort victim's] loss," as a "transfer" from the plaintiff, or victim, to the tortfeasor.²⁸⁷ Perhaps, unless the court imposes liability on the tortfeasor requiring it to pay the victim's loss, that is internalizes the externality, Mr. Melamed would reason that the "transfer" will "benefit" the future defendant.

Second, when tortfeasor Alice pays the victim and seeks to recover the payment from tortfeasor Ben because Ben was "more" liable to the victim, a court will order indemnity. The comments to the second Torts *Restatement's* indemnity section adopt the *Restatement of Restitution's* idea that defendant-Ben's saved expense from not paying the victim is a benefit, and they use the benefit to explain the unjust enrichment basis for Alice's indemnity.²⁸⁸ A court could employ this savings-as-benefit approach in section 1 of the *Restatement of Restitution*.

Emergency is the State's next theory of defendants' unjust enrichment-restitution, which requires some background. In a market economy people have a right to choose freely how to spend their money. As the law school classroom hypothetical of Paula who, unsolicited, mows Dan's lawn and sends Dan a bill that remains unpaid teaches us, if someone confers an unsolicited benefit on another, the recipient may decline to pay. A court, moreover,

²⁸⁵ *Id.* at 1.

²⁸⁶ PALMER, *supra* note 196, § 1.8, at 44. (citing Sullivan, *supra* note 285).

²⁸⁷ A. Douglas Melamed, *Damages, Deterrence, and Antitrust—A Comment on Cooter*, 60 LAW & CONTEMP. PROBS. 93, 95 (1997).

²⁸⁸ RESTATEMENT (SECOND) OF TORTS § 886(B) cmt. c (1979).

ought to deny Paula restitution: Dan was benefitted, but his enrichment was not unjust. Courts are careful to protect Dan's autonomy and his right to bargain and form contracts.²⁸⁹ The court may even label Paula with the epithet of a "volunteer" or an "intermeddler," even an "officious intermeddler" to justify its denial of restitution.²⁹⁰

Bargaining, however, is not always possible. For example, when a medical professional treats an unconscious accident victim,²⁹¹ the *Restatement* allows restitution.²⁹² It is unlikely that requiring the victim to pay the professional interferes with the victim's autonomy or right to choose. While the unconscious victim lacked an opportunity to decide, because most people, if unconscious, would prefer to be treated, the professional's treatment is consistent with the bargain that would have been made.

The State's emergency restitution argument grew out of a variation on the medical professional. Plaintiff furnishes unsolicited emergency medical care to a child whose parent has a legal obligation to support and care for the child, then plaintiff seeks to recover restitution from the child's parent on the ground the parent had a duty to furnish the medical care. Plaintiff's care of the child benefitted the child's parent because it satisfied the parent's legal obligation to the child. After a parent fails to furnish something "essential" to her child, plaintiff may meet the child's need and qualify for restitution from the parent.²⁹³

The State sought restitution under the preceding branch of the emergency doctrine for its Medicare payments to smokers; it argued that in an emergency the State performed the tobacco companies' duty to pay for infirmities caused by tobacco.²⁹⁴

²⁸⁹ DOBBS, *supra* note 176, § 4.9(2) ("Where defendant has a right to choose for himself whether to receive a benefit, and where restitution would deprive him of this choice by requiring payment of a 'benefit' the defendant may not want, restitution is often denied.").

²⁹⁰ RESTATEMENT OF RESTITUTION § 2 (1937).

²⁹¹ *Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907) (finding "implied contract" when patient unconscious and treated by plaintiff).

²⁹² RESTATEMENT OF RESTITUTION §§ 114, 116 (1937).

²⁹³ 2 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 10.4(a) (1978); RESTATEMENT (SECOND) OF RESTITUTION § 3 (Tentative Draft No. 1, 1983).

²⁹⁴ See Plaintiff's Memorandum Brief and Response to Defendants' Motion for Judgment on the Pleadings at 23, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Nov. 28, 1994) (No. 94-1429) (citing *Restatement of Restitution* § 1 cmt. b defining "benefit").

The State's emergency restitution theory has two serious hurdles to surmount: (1) Did the tobacco companies have a "duty" to the smokers? (2) Was the smokers' situation dire enough to qualify as an emergency?

(1) *The tobacco companies' "duty"*: The tobacco companies argue they had no legal duty to the smokers which required them to pay the smokers' medical expenses. The tobacco companies have no relationship with the smokers established by law analogous to parent-child to create an obligation to furnish medical care. In smokers' products liability litigation, the tobacco companies had not been held liable to the smokers.

The State avoids the "legal duty" argument by assuming the tobacco companies had a duty or burden to the smokers; it argues that it performed the tobacco companies' "manifest duty" to care for the smokers.²⁹⁵ Does the State benefit the tobacco companies because it discharges their "manifest duty"?²⁹⁶

The idea that Pat, who may in an emergency perform Darlene's "manifest duty" to avert Vera's peril, may then recover restitution from Darlene comes from *Peninsular & Oriental Steam Navigation v. Overseas Oil Carriers*²⁹⁷ and *United States v. Consolidated Edison Company of New York (Con Ed)*.²⁹⁸ In *Peninsular*, Overseas provided medical care to Peninsular's seaman.²⁹⁹ In *Con Ed*, the United States furnished Con Ed electrical power for its customers.³⁰⁰ That neither defendant had a *legal* duty to do what the emergency plaintiff did led the courts to find defendants' *manifest* duties as foundations for granting plaintiffs restitution recovery.

²⁹⁵ Plaintiff's Reply Memorandum at 22, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Dec. 9, 1994) (No. 94-1429); See Plaintiff's Memorandum Brief and Response to Defendants' Motion for Judgment on the Pleadings at 22, *Moore* (No. 94-1429) (arguing state entitled to restitution because it performed defendants' manifest duty in caring for victims of smoking).

²⁹⁶ See Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 3, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429) (arguing that defendants have not by state payment of medical expenses). Holding "no" is *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 970-72 (E.D. Tex. 1997).

²⁹⁷ 553 F.2d 830 (2d Cir. 1977).

²⁹⁸ 580 F.2d 1122 (2d Cir. 1978).

²⁹⁹ *Peninsular*, 553 F.2d at 833.

³⁰⁰ *Consolidated Edison*, 580 F.2d at 1123.

Peninsular and *Con Ed* present straightforward situations to grant plaintiffs restitution but not for the reason the courts gave. Both plaintiffs, upon defendants' requests, rendered valuable services to defendants under circumstances which not only negated a gift but also communicated an expectation of payment. The plaintiffs might even have thought there was a contract. Defendants, knowing of the plaintiffs' services, the circumstances, and the plaintiffs' expectations of payment, freely accepted the benefits. In what commentators often call free-acceptance cases, restitution, often labeled quantum meruit, ought to be straightforward.³⁰¹ The court's difficult issue is how to measure free acceptance restitution once granted; when a contract between the parties fails for want of a technicality like a writing or formal authority, the difficult question is whether a court can measure claimant's restitution in a way that respects the reason to deny it contractual remedies.³⁰²

Restitution in *Con Ed* is particularly straightforward because there the plaintiff conferred benefits on defendant under an agreement which did not qualify plaintiff for contract remedies only because of the statute of frauds.³⁰³ The *Con Ed* court's "manifest duty" theory grows out of the court's unnecessary and inappropriate analysis of benefit.³⁰⁴ In *Con Ed*, the utility's "manifest duty" to supply electricity to customers is an alternative holding essential to plaintiff's restitution recovery only because of the court's manifestly incorrect understanding of the enrichment-benefit part of unjust enrichment. "Manifest duty" is not a solid foundation on which to build the State's emergency restitution theory.

(2) "*Immediate Necessity*": The tobacco companies further argue that the State's payments were not immediately necessary measures to protect the public health or safety. If the State had furnished medical care directly to infirm citizens in dire need, a court would be more likely to find an immediate necessity. Where the State

³⁰¹ LORD GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 19 (Gareth Jones ed., 4th ed. 1993) (noting that in free acceptance cases, defendant "cannot deny that he has been unjustly enriched"); PALMER, *supra* note 294, §§ 7.4, 14.5, 15.11.

³⁰² 2 & 3 GEORGE E. PALMER, *THE LAW OF RESTITUTION* §§ 7.4, 14.5, 15.11 (1978).

³⁰³ Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195 n.15 (1995) (concluding that *Con Ed* invited straightforward application of unjust enrichment).

³⁰⁴ The *Con Ed* court's incorrect analysis is in note 7. *Id.*; GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.8, at 47 & n.3 (Supp. 1999).

seeks reimbursement for medical care already furnished by others, a court would have to stretch the meaning of the words to find "immediate necessity."

Several lawsuits where plaintiffs who removed asbestos or contamination hazards sued manufacturers-suppliers for emergency restitution to recover for the cost of removal have survived defendants' pleading and summary judgment motions. These "abatement" decisions deal with both of the difficult emergency issues, duty and necessity.

The plaintiffs' emergency restitution argument in an abatement decision runs as follows. AsbesCon created a hazard by putting a lethal substance in Skule's property, and unless the risk of harm from the hazard is obviated, AsbesCon has at least a tort-products liability duty to pay damages for any loss the contamination causes. An emergency exists because of the health risk to the public and users; moreover, Skule is at risk because, as property owner, it may be liable. If Skule abates the hazard, ameliorating the risk, Skule has performed AsbesCon's "duty" to abate, and AsbesCon will be unjustly enriched unless it reimburses Skule.³⁰⁵

The Illinois Supreme Court's asbestos abatement decision rejects the foregoing approach to emergency restitution.³⁰⁶ In a plaintiff's restitution action for emergency asbestos abatement, that court held that the defendant must have had a duty established independently to act and must have failed to act. The asbestos suppliers, the court continued, had no duty to inspect, to repair, or to remove the asbestos.³⁰⁷

³⁰⁵ See, e.g., *Town of Oyster Bay v. Occidental Chem. Corp.*, 987 F. Supp. 182, 189, 209 (E.D.N.Y. 1997) (recognizing cause of action for unjust enrichment under similar facts); *City of Philadelphia v. Lead Indus. Ass'n*, 1992 WL 98482, at *11 (E.D. Pa. April 23, 1992) (recognizing emergency restitution for reimbursement of cost of lead paint removal); *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 302-04 (D. Minn. 1990) (applying emergency assistance doctrine to support plaintiff's restitution claim under similar facts); *City of New York v. Lead Indus. Ass'n*, 644 N.Y.S.2d 919 (N.Y. App. Div. 1996) (holding that where city performs defendant's duty in an "immediate necessity" to protect decency, health or safety, it may recover expense to abate and clean up and to treat and monitor children); *City of New York v. Keene Corp.*, 505 N.Y.S.2d 782, 784 (N.Y. Sup. Ct. 1986), *aff'd*, 513 N.Y.S.2d 1004 (App. Div. 1987) (finding cause of action for school board seeking to recover for asbestos removal under indemnity and emergency restitution).

³⁰⁶ *Board of Educ. of Chicago v. A, C, & S, Inc.*, 546 N.E. 2d 580 (Ill. 1989).

³⁰⁷ *Id.* at 596-98 (rejecting plaintiffs' reliance on state law placing such duty upon defendant).

Under contemporary "notice" pleading, judges routinely deny defendant's motions addressed to a plaintiff's complaint; this often prolongs litigation and may lead to settlement. The decisions allowing plaintiffs to proceed with emergency restitution after plaintiff abated or ameliorated an actively dangerous contamination provide some support for the State's emergency theory of restitution. The analogy between that situation and Medicaid recovery is imperfect, however; the contamination plaintiffs actually removed a danger, making it easier to argue an "immediate necessity" to act than the State which reimbursed medical professionals after they had treated the smokers. The Mississippi Supreme Court's restitution decisions have not shown any marked tendency to innovate. The Illinois court's less expansive reading of emergency provides an alternative more in keeping with traditional doctrine than the Mississippi court might have followed.

Indemnity is the last of the State's theories to support its restitution recovery. An alternative formulation of the State's restitution theory maintains that the State has paid "a burden which in all good conscience and equity the defendants should bear."³⁰⁸ This combines the Restatement's section 1 theory—broad freestanding restitution based only on defendant's unjust enrichment—with indemnity in a creative way that obviates the usual prerequisite for indemnity—the defendant must have had an obligation to the plaintiff's payee.

Some background is needed.³⁰⁹ Indemnity occurs between two tortfeasors, Alf and Bob, who are both liable to Van, an injured victim, for the same harm. Bob is "more" liable and Alf is "less" liable. Alf, the future indemnity claimant and the "less" liable tortfeasor, satisfies the two tortfeasors' dual liability to Van, the injured person, either by settling or by paying a judgment. Claimant-Alf then seeks to avoid being forced, because of his "lesser"

³⁰⁸ Plaintiff's Memorandum Brief and Response to Defendants' Motion for Judgment on the Pleadings at 3, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Nov. 28, 1994) (No. 94-1429).

³⁰⁹ See generally RESTATEMENT (SECOND) OF TORTS § 886B & cmts. (1979); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 32 cmts. & n. (Proposed Final Draft Revised 1999). The annual meeting of the American Law Institute in May 1999 approved the APPORTIONMENT OF LIABILITY draft.

liability to Van, to continue to bear the cost that the indemnity defendant, Bob, who is more at fault in causing Van's injury, should bear. The indemnity claimant, Alf, proves that although "less" liable to Van, the injured victim, he has nevertheless paid Van. Bob, the indemnity defendant, who has not paid, was "more" liable to the injured person. Because Claimant-Alf's payment to Van benefitted or enriched Bob, the indemnity defendant, the court ought to order Bob, the "more" responsible person, to pay restitution to or to indemnify Alf, the "less" liable payor, for if Bob does not pay Alf, Bob would continue to be unjustly enriched.³¹⁰

There are other, more precise, ways than "more" liable and "less" liable to phrase the relationship between Alf, the indemnity claimant, and Bob, the indemnity defendant. The claimant, if liable vicariously to the injured person, may recover indemnity from the directly liable tortfeasor, the indemnity defendant.³¹¹ A negligent indemnity claimant may recover indemnity from a defendant if the claimant's negligence was "passive" and the defendant's was "active." Sometimes a negligent indemnity claimant may recover indemnity from a defendant if the claimant's liability was "secondary" and the defendant's was "primary."³¹²

In the Mississippi Medicaid recovery, although according to the lawsuit the State was not a tortfeasor, it has state constitutional, statutory, and common law duties to infirm citizens. The State's indemnity-restitution theory begins with the State's duty to provide health care to Medicare patients. The tobacco companies, the State argues, have a "duty to the public not to distribute unreasonably dangerous and deadly products."³¹³ The State, because it pays for the smokers' tobacco-related health care costs, may recover the

³¹⁰ RESTATEMENT (SECOND) OF TORTS § 886B(1) (1979).

³¹¹ *Id.* § 886B(2).

³¹² The passive-active and secondary-primary phrasings of the tortfeasors' culpability are anachronisms from the all-or-nothing days of contributory negligence and incongruous with comparative negligence because the tortfeasors' degrees of responsibility can be factored into the comparative negligence calculation instead of creating an all-or-nothing indemnity. RESTATEMENT (THIRD) TORTS: APPORTIONMENT OF LIABILITY § 32, cmt. e & n. (Proposed Final Draft Revised 1999). Other examples of indemnity occur when the defendant has contracted to indemnify the claimant or the claimant was a product seller, not otherwise culpable, of a product the defendant supplied.

³¹³ Plaintiff's Motion to Strike Challenges at 56, Moore *ex rel.* State v. American Tobacco Co. (Miss. Ch. filed Oct. 14, 1994) (No. 94-1429).

payment in indemnity from the tobacco companies, the tortfeasors, even though the smokers may not have been able to recover from tobacco companies. The State has discharged a duty to infirm smokers which it owed them under its Medicaid statutes. Between the State and the tobacco companies, however, the tobacco companies should have discharged these expenses. Therefore, the State is entitled to indemnity from the tobacco companies.

The State's indemnity theory faces some formidable hurdles. The State's assumption that the tobacco companies "should" have discharged the smokers' medical expenses expresses an aspiration, not an established legal duty, and stretches the existing law. The tobacco companies argue that under existing law an indemnity claimant cannot recover indemnity unless the indemnity defendant owed an obligation to the claimant's payee.³¹⁴ The indemnity claimant must show the indemnity defendant's underlying legal liability.³¹⁵ The tobacco companies had escaped legal liability for smokers' medical care. The tobacco companies' subrogation argument requires the State to take the smokers' claims with all defenses the tobacco companies would have available against the smokers.

The State relies on the first *Restatement of Restitution's* indemnity provision.³¹⁶ "A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."³¹⁷ Like many legal rules, the first *Restatement's* black letter indemnity rule is too broadly stated.

The section's "should have been discharged by the other" language is overinclusive and excessively spacious because readers may understand "should" as "ought" in the sense of fairness and aspiration. "Should" seems to mean "under the existing positive

³¹⁴ Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 6-7, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996) (No. 94-1429); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 32 cmt. c (Proposed Final Draft Revised 1999).

³¹⁵ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 32 cmt. c (Proposed Final Draft Revised 1999).

³¹⁶ RESTATEMENT OF RESTITUTION § 76 (1937).

³¹⁷ *Id.*

law." But the definition is unclear because the commentary declines "to state the circumstances under which two persons are subject to a duty, one of them rather than the other should perform it."³¹⁸

More careful drafting in later restatements has sharpened the analysis and supplanted the *Restatement of Restitution's* indemnity provision. The indemnity sections' black letter rules in both the second Torts *Restatement* and the proposed final draft of the *Restatement* for apportionment of liability require both the indemnity claimant and the defendant to be tortfeasors. The Tort *Restatement* begins, "[I]f two or more persons are liable in tort."³¹⁹ The proposed final draft of the *Restatement for Apportionment of Liability* begins, "When two or more persons are or may be liable for the same harm."³²⁰ Each negates the State's argument based on the earlier "should have been discharged" phrasing from the 1937 *Restitution Restatement*.

Under almost all versions of indemnity, an indemnity defendant may compel the indemnity claimant to establish its liability to the victim in court; the indemnity claimant, Alf, must prove the indemnity defendant, Bob, would have been liable to Van, the injured person, under positive law.³²¹ As is usual in this research, however, language as general as the *Restatement of Restitution's* indemnity section affords a basis for the State's expansive and creative contentions. Certainly a court could accept it literally and establish liability where none existed before.

The Torts *Restatement's* indemnity provision, moreover, is explicitly based on defendant's unjust enrichment.³²² Language in the section's reporter's comments, recognizing "possible developments," mentions the courts' "unexpressed premise . . . that indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and fair that the

³¹⁸ *Id.* cmt. b.

³¹⁹ RESTATEMENT (SECOND) OF TORTS § 886B(1) (1979).

³²⁰ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 32(a) (Proposed Final Draft Revised 1999).

³²¹ *Id.* § 32 cmt. c.

³²² See RESTATEMENT (SECOND) OF TORTS § 886B(1) (1979) (stating claimant is entitled to indemnity if the defendant would otherwise "be unjustly enriched at his expense by the discharge of the liability").

indemnitor should bear the total responsibility.”³²³ Under the general “just and fair” approach, a court may have held the tobacco companies liable to the State for indemnity for the State’s Medicaid payments to infirm smokers.

How likely was that? Precedent from the Iowa Medicaid recovery lawsuit against tobacco companies supports the tobacco companies’ contrary contentions. “Indemnity was allowed [in earlier cases] because the law imposed liability on one person for the actionable conduct of another,” observed the Iowa Supreme Court, rejecting the state of Iowa’s indemnity claim.³²⁴ The defendant may prove the defenses it would have had if the injured person had sued the defendant.³²⁵

The State’s indemnity argument relies next on exceptions to the rule that the indemnity claimant must establish the defendant’s underlying tort liability to the injured person. There are defenses which Bob, the indemnity defendant, could have claimed against the victim but which are not available if Alf, the indemnity claimant, sues him.

If, when Alf seeks indemnity from Bob, the statute of limitations has run on the injured victim’s cause of action against Bob, Bob cannot successfully interpose the statute of limitations applicable to the injured victim’s claim against Bob as a defense to Alf’s demand. Bob must pay the claimant. Claimant Alf’s cause of action for indemnity from Bob accrues when Alf pays Van, the injured person; however, the statute of limitations on the indemnity cause of action protects Bob, the indemnity defendant, from Alf’s stale claims.³²⁶

Additionally, the court will let claimant Alf maintain a third-party action for indemnity against indemnity-defendant Bob when the victim’s first-party action against Bob is barred by an immunity or by workers compensation. Allowing the indemnity action should depend on the policy behind the defense. Letting the State recover indemnity from the tobacco companies means forbidding the tobacco

³²³ RESTATEMENT (SECOND) OF TORTS § 886(B) cmt. c. (1979).

³²⁴ State *ex rel.* Miller v. Philip Morris Inc., 577 N.W.2d 401, 406 (Iowa 1998).

³²⁵ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 32 (Proposed Final Draft Revised 1999).

³²⁶ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 32 cmt. d (Proposed Final Draft Revised 1999).

companies from using their assumption of risk and contributory negligence defenses. The policies of assumption of the risk and contributory negligence are to encourage care and to deter moral hazard. Indemnity for the State from the tobacco companies will not, the state maintains, thwart the policies of assumption of the risk and contributory negligence.

This is a creative argument, but it extends the existing law. In both the rule and the exceptions, Van, the tort victim, can prove the elements of a tort against Bob; but in the State's Medicaid recovery, smokers' products liability lawsuits against the tobacco companies had not succeeded. The exceptions, statute of limitations, immunity, and worker's compensation, where courts allow Alf to pay Van and recover indemnity from Bob when Van could not have recovered from Bob, arise when Van could have proved the "elements" of a cause of action against Bob. The valid reasons to bar Van's claim against Bob are inapplicable to Alf's claim against Bob, so Alf proceeds based on Bob's fault and the policies of loss spreading and fairness. The exceptions do not provide strong support for the State's arguments for indemnity.

XI. RESTITUTION, RESTITUTION, WHERE ARE YOU?

Innovators build their creative steps on a foundation of mastery of the prior art. "Genius," wrote historian Edward Gibbon more than two centuries ago, "may anticipate the season of maturity; but in the education of a people, as in that of an individual, memory must be exercised, before the powers of reason and fancy can be expanded; nor may the artist hope to equal or surpass, till he has learned to imitate, the works of his predecessors."³²⁷

Restitution is an arduous prior art to master. The basic principles, enrichment and unjustness, are abstract. The vocabulary of restitution recycles words from "related" parts of the common law without warnings of changed definitions. Few, if any, lawyers are restitution specialists the way other lawyers are estate planners or litigators; but restitution issues arise in every kind of dispute. The

³²⁷ EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 909 (David Womersley ed., 1994).

contemporary law school is not dissipating the fog around restitution, for only a few law schools have separate upper-level elective courses in Restitution; most Remedies courses include a chapter on restitution and scatter restitution decisions in other locations.³²⁸

Before commencing a serious effort to develop a particular topic, a lawyer ought to understand restitution's vocabulary and fundamentals. A researcher should begin by learning the basic distinctions.³²⁹ The task is formidable. For one thing the digest topics are diffuse.³³⁰ A researcher using numbered headnotes and digests may not have found two of the restitution decisions cited in this Article because inaccurate headnotes hide restitution under other subjects.³³¹

The restitution law of one state may not be thorough or sophisticated; for example the Mississippi court's restitution decisions exhibit common sense to reach sound and predictable results, but the author, preparing this Article, did not unearth distinctions between legal restitution and equitable restitution bearing on the right to a jury trial. Courts do not use consistent terminology, making computer word searches unproductive or even deceptive. Judges may not have enough restitution on their dockets to develop proficiency, and frequent judicial misunderstandings³³² impede researchers from achieving understanding through case analysis.

The sources for a restitution tyro's beginning of general understanding are treatises and restatements. Dobbs's introductory Chapter 4 is indispensable; the place to start to learn the vocabulary and basic distinctions, even it may be hard going in spots.³³³ The four-volume Palmer restitution treatise, bristling with technicality, is not for those who run to read. The 876-page Restitution *Restate-*

³²⁸ RENDLEMAN, *supra* note 98, ch. 4.

³²⁹ See DOBBS, *supra* note 176, § 4.1(3) (discussing procedures and terms of restitution).

³³⁰ See John Wade, *The Literature of the Law of Restitution*, 19 HAST. L.J. 1087, 1097 (1968) (outlining various sources for materials on restitution).

³³¹ See, e.g., *United States v. Consolidated Edison Co. of New York*, 580 F.2d 1122 (2d Cir. 1978) (including restitution issue under topic "Electricity"); *Board of Educ. v. A. C. & S, Inc.*, 546 N.E.2d 580 (Ill. 1989) (including restitution issue under "Products Liability").

³³² See, e.g., *Consolidated Edison*, 580 F.2d at 1126 n.7 (finding that defendant's loss or detriment is essential to a restitution case); see *supra* note 304 and accompanying text (discussing *Consolidated Edison*).

³³³ DOBBS, *supra* note 176, ch. 4; Peter Davis, Note, *Restitution: Concept and Terms*, 19 HAST. L.J. 1167 (1968).

ment, published in 1937,³³⁴ was written under a conception of law and equity many contemporary lawyers find baffling. Restatements are usually used one section at a time; few busy lawyers and judges will be willing to read the whole thing. Both the State's and the tobacco companies' arguments reveal apparent reading of statements out of context and reading single *Restatement* sections without a firm grasp of the whole.

Moving the common law to a place it has never been is a daunting task. Entrenched abuses are invisible to many and require effort to identify and eradicate. Change is difficult and always affects other values. The State's basic creative move was to articulate the concept that tobacco-caused medical expenses are a tobacco-companies' externality and to transmogrify the tobacco companies' "savings" to unjust enrichment. The State's characterizations and arguments for expansive restitution stretch the concept of precedent and enlarge the meanings of general legal terms at every stage, in particular the chancery characterization and the restitution characterization. The State's emergency and indemnity arguments require a court to accept large extensions to succeed. If the State's arguments displayed more thorough research and a deeper understanding of the vocabulary and distinctions of remedies, law-equity and restitution, they would command more credibility.

A litigant who asks a court to stand on existing law almost always has the easier time. The tobacco companies' documents do not, however, rise to the State's creativity and they sink below the State's understanding of the basics. The tobacco companies' documents, moreover, never show an understanding of legal restitution separate from equitable restitution.³³⁵ They never come to grips with *Restatement* section 1's freestanding restitution based on unjust enrichment.

One of the tobacco companies' misstatements is "restitution demands that the plaintiff be a volunteer."³³⁶ My first reading was

³³⁴ RESTATEMENT OF RESTITUTION (1937).

³³⁵ Defendants' Memorandum in Opposition at 20, *Moore ex rel. State v. American Tobacco Co.* (Miss. Ch. filed Feb. 22, 1996).

³³⁶ Defendants' Memorandum in Opposition at 27, *Moore* (No. 94-1429).

that the typo-gremlin had dropped a "not" after "plaintiff." Basic restitution doctrine is exactly the opposite: no restitution to a volunteer.³³⁷ Credibility lost because of a burden like this is hard to recover. The tobacco companies' miscue, it seems to me, may have occurred because their documents never really analyze the State's restitution arguments beyond restitution-indemnity; to succeed, an indemnity claimant must have paid the injured person under "compulsion," or legal liability; an indemnity plaintiff cannot be a "volunteer" who paid the injured person without compulsion. This is part of the idea that an indemnity defendant may insist on proof of its liability to the injured person.³³⁸ But this narrow usage cannot be generalized to the entire field of restitution where the volunteer is explicitly disqualified.

Courts even at the highest level deal with unsound contentions based on language wrenched out of context, incorrect arguments, and positions unsupported by any precedent.³³⁹ Distinguishing a bad argument from a good one whose time has not yet come requires study and perspicuity; determining whether a good argument's time has come takes discernment and professional judgment. Requests like the State's for new distinctions, novel characterizations, and enlarged restitution based on expanding general language and stretching precedent may simply startle judges accustomed to the established legal categories. Other judges may recognize lawyers' creative arguments for new directions and either reject them after considering the pros and cons or adopt them as based in sound public policy.³⁴⁰

XII. A MODEST PREDICTION

The usual test of a lawyer's creative argument is whether a court accepts it. For, as Holmes wrote, "the prophecies of what the courts

³³⁷ PALMER, *supra* note 196, ch. 9.

³³⁸ *Keys v. Rehabilitation Ctrs., Inc.*, 574 So.2d 579, 585-86 (Miss. 1990).

³³⁹ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422, 428-29 (1994).

³⁴⁰ See *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985) (declining to abolish common law punitive damages, but accepting defendant's argument to raise defendant's misconduct threshold for punitive damages to express or implied malice and to require clear and convincing evidence before imposing them).

will do in fact, and nothing more pretentious, are what I mean by the law.”³⁴¹ To get some idea of how the State’s approach of characterization and expanded or broad section 1 restitution based on defendant’s savings as a benefit might have fared, let us examine two recent inventive efforts to convince courts to characterize something else as “restitution.”

The issue in the first, *Boeing v. Aetna Casualty & Surety Co.*,³⁴² was whether an insured’s environmental “response costs” are “damages” covered under standard insurance policies. The environmental authorities found that the insured generated and transported hazardous substances at its site.³⁴³ These substances caused contamination.³⁴⁴ The authorities incurred “response costs,” as defined by statute, in cleaning the substances up.³⁴⁵ The statute defines the costs of “response” to include costs of removal of hazardous substances from the environment and the costs of other remedial work.³⁴⁶ It provides that any person or business entity responsible for a release or threatened release of hazardous substances “shall be liable for all costs of removal or remedial action incurred by the State.”³⁴⁷ The insured expected to be indemnified under its policy for these “response costs.”³⁴⁸

The operative coverage provision of the insured’s insurance policy provided that its insurer will pay on behalf of the insured “all sums which the insured shall become obligated to pay . . . for damages . . .” because of bodily injury or property damage to which this policy applies, caused by an occurrence.³⁴⁹ The policy did not define “damages.”

The insurance company developed a novel argument for restitution. Maintaining that response costs are not “damages,” it argued as follows. The legal technical meaning of “damages” includes monetary compensation for injury but not monetary equitable

³⁴¹ Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

³⁴² 784 P.2d 507 (Wash. 1990).

³⁴³ *Id.* at 509-10.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ 42 U.S.C. § 9601(25) (1997).

³⁴⁷ *Id.* § 9607(a)(4)(A).

³⁴⁸ 784 P.2d at 510.

³⁴⁹ *Id.*

remedies such as sums paid for restitution. Response cost liability is restitution because a plaintiff seeking response costs is asking for the return of money it spent on behalf of the responsible party to safeguard public health.

Response cost recovery restores the status quo by returning to the plaintiff what rightfully belongs to it. A response cost defendant like the insured has been "unjustly enriched" because it saved the cost of preventing contamination. The legislature recognized that corporate polluters like the insured have reaped enormous benefits from their past inadequate waste disposal practices. These practices created significant short-term savings for polluters, resulting in higher profits for them, but they caused enormous long-term harm in the form of environmental degradation. Response cost liability is restitution which forces these polluters to disgorge these profits.

The court rejected the insurance company's argument for restitution.³⁵⁰ The insured's contamination has been an externality, for, so long as the insured was not liable, it did not need to consider the contamination. Response costs require the insured to pay for the cost to clean up the externality, which internalizes it. The insured has an incentive to spend on prevention to prevent pollution in the future and to avoid paying for future response costs.

Response costs, however, fit the ordinary definition of compensatory damages, not restitution. Response costs are retrospective, measured by cost to restore or repair. Under present damages law, a plaintiff can clean up and recover the expense from the tortfeasor. Response costs are identical except the government cleans up, perhaps the defendant-insured's own property, and recovers from the defendant.

The insurance company had argued that the insured-polluter's savings unjustly enriched it. Are the insured's savings related to the cost to clean up? In the *Carroll Twing* sense, a negligent defendant has saved prevention costs; and in that sense negligence liability calls the defendant's savings improper and requires the saver to pay the losses its savings caused to others. If that form of liability is restitution for unjust enrichment, then much of what the

³⁵⁰ *Id.* at 576.

law now labels negligence liability for compensatory damages collapses into restitution.

There are policy arguments in support of either insurance coverage or noncoverage of response costs. Insurance coverage for pollution spreads the cost of pollution around the insurance pool or industry and distributes it among the firms which can prevent future pollution as a cost of doing business. On the other hand, large unpredicted response cost liabilities will threaten insurance companies' reserves. And if a polluter can pass losses on to an insurance company, that dilutes response costs' deterrence features.³⁵¹

The second request to expand restitution concerned whether a truck driver was an employee covered by workers' compensation.³⁵² Forest's contract with Walters, a logging contractor, called for Forest to transport logs.³⁵³ Forest requested his employee Kinzer to begin.³⁵⁴ Unbeknownst to Forest, Kinzer instead agreed to pay Kennedy to haul Walters's logs in Forest's truck.³⁵⁵ Kennedy, who had an accident on a return trip, filed a workers' compensation claim to recover for his injuries. Kennedy alleged he was Forest's employee.³⁵⁶

The Industrial Commission had accepted Kennedy's argument for an "employment relationship" because of a contract implied in law.³⁵⁷ According to the Commission, an "implied employment contract existed between Forest and Kennedy based upon the theory of unjust enrichment."³⁵⁸ "Forest had accepted the 'benefit' of Kennedy's transportation of the three loads of logs . . . [and] would be unjustly enriched by retaining the benefit of Kennedy's services 'without liability for those services.'"³⁵⁹

³⁵¹ See *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507 (Wash. 1990) (holding environmental responses to be paid by insured were "damages" covered by comprehensive general liability policies issued by insurers).

³⁵² *Kennedy v. Forest*, 930 P.2d 1026 (Idaho 1997).

³⁵³ *Id.* at 1028.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 1029.

The Idaho Supreme Court disagreed:

We employ the phrase “implied-in-law contract” synonymously with quasi-contract, unjust enrichment, and restitution. . . .

In the worker’s compensation context, an implied-in-law contract cannot form the basis for an employment relationship. First of all, an implied-in-law contract is not a contract or agreement at all and is simply a method by which the courts fashion a remedy in cases where there is no binding relationship between the parties. The definition of “employer” in the worker’s compensation statutes clearly contemplates a situation where one person employs another person or contracts to do so--as opposed to a relationship implied by the courts to do equity. Secondly, quasi-contract originates in the theory of unjust enrichment. The measure of recovery in such an action is limited to the “value of the benefit bestowed upon the defendant which, in equity, would be unjust to retain without recompense to the plaintiff.” *Gillette v. Storm Circle Ranch*, 101 Idaho 663, 666, 619 P.2d 1116, 1119 (1980). . . . A search of the case law has revealed no instance of a court awarding damages other than these in a quasi-contractual action, and no case in which a court treated a contract implied-in-law as a true contract and sought to imply terms based upon it. Thus, an implied-in-law contract cannot create an employment relationship and cannot expose Forest, as an employer, to worker’s compensation liability or any other liabilities stemming from a true employment contract or agreement to hire.

The Commission’s conclusion that an implied-in-law contract exists in this instance is also incorrect. For a quasi-contractual obligation to arise, Forest would have to have been unjustly enriched by his retention of the benefits of Kennedy’s services. In this case, however, Forest was not unjustly enriched. Even if Forest received a “benefit” from Kennedy’s services upon receipt

of Walters' payment, Forest indirectly compensated Kennedy for his services. Upon receiving payment from Walters, Forest paid Kinzer the amount upon which they had agreed. Kinzer, in turn, paid Kennedy the amount that they had negotiated when Kennedy agreed to substitute for Kinzer. Thus, Forest already compensated Kennedy for his services and, consequently, for the value of any "benefit" that Forest received.³⁶⁰

Kennedy may have an argument for workers' compensation coverage. The policies of workers' compensation are to compensate employees' injury, to spread the cost of accidents through insurance, and to create incentives for employers' safety. Each business ought to bear its own costs. Perhaps the timber industry operates with informal "non-employees" whose accidents are not compensated, and perhaps the Industrial Commission resorted to the overlapping grey areas to require the industry to internalize the costly accidents. Kennedy was hauling Forest's logs and Forest had avoided paying insurance on Kennedy; in this sense, Forest was underpaying for Kennedy's service, creating an externality, Kennedy's injuries. Not paying for the injuries leads to Forest's arguable unjust enrichment.

The Idaho court remanded to provide Kennedy an opportunity to prove "an employment relationship based upon an implied-in-fact contract of hire."³⁶¹ Kennedy gets another chance to show "implied-in-fact" contract of employment on remand where he may raise the policy issues.

A shadowy legal area which countenanced "implied" employment contracts created the opening for Kennedy's restitution characterization; it overlapped the grey area between contract and restitution where legal restitution is inaccurately designated a contract "implied" in law. Kennedy attempted to achieve the statutory benefits the legislature accords to injured employees by characterizing his log hauling as a contract implied-in-law to transform it legally into a contract with Forest. This creative argument is also

³⁶⁰ *Id.* at 1029-30 (citations omitted).

³⁶¹ *Id.* at 1030.

a novel one. The Idaho court, however, declined to approve restitution except to reverse a defendant's unjust enrichment.³⁶²

What lessons do *Boeing* and *Kennedy* contain for the State of Mississippi's restitution claim? Restitution, although too little known, opens creative possibilities to the bold lawyer. Restitution has a surplus of vocabulary, and a creative lawyer can appropriate some of these words to import meanings from other contexts. Restitution's core concepts, enrichment-benefit and unjustness, are open and difficult to confine. The two courts, however, rejected the lawyers' arguments that someone who has saved expenses is unjustly enriched in a way that would lead to a restitution characterization.³⁶³ What does this augur for the State's Medicaid restitution theory? Would it have encountered the same fate?

XIII. WHY SETTLE?

A long time passed from the Surgeon General's report in 1963 to tobacco companies' executives' statement under oath in 1994 that tobacco is not addictive. Legal instability for tobacco primarily results from tobacco's expensive health consequences. Beginning in the 1960s two parallel trends developed: the government became increasingly responsible for citizens' health care and the evidence of tobacco's insalubrious effects became inescapable. Any lingering doubts about the question of whether tobacco's health costs were an externality ceased.

Both the judicial and the legislative channels for legal change to internalize tobacco's medical expenses were apparently impeded or obstructed. The way common law courts developed products liability involved creating liability for harm the product caused; this in turn led sellers and manufacturers to create safer products, to internalize externalities. But the common law process had not worked for tobacco. Tobacco companies' impunity from products liability is incongruous both with common law courts' general tendency to internalize externalities and their more specific tendency to impose liability on purveyors of dangerous products.

³⁶² *Id.*

³⁶³ *Id.*

Why had the smokers' effort to recover from the tobacco companies in tort for products liability failed? The smokers had proved tobacco to be an addictive and harmful substance. But, by proving that, the smokers were hoisted on their own petard; the tobacco companies had argued successfully that the smokers were responsible for their own "personal choice" to use the addictive, harmful substance. Jurors had been predisposed to ascribe responsibility to the smokers who persisted in the face of warning labels and other clear signals on the ground the smokers contributed to their own injury and knowingly assumed the risks of their conduct. The tobacco companies have never paid a products liability judgment. The tobacco companies' practical impunity from liability to smokers has not been a doctrinal rule, but a pattern of jury verdicts and vigorous defenses. If jury verdicts for smokers continue, the tobacco companies' "impunity" may disappear. For smokers to litigate against the tobacco companies has been daunting, both because of their vigorous defenses and their successes in jury trials.

The State's Medicaid recovery suit surmounted two of the major obstacles which had impeded smokers' quest for tort recovery. It evaded the tobacco companies' argument that the people who had chosen to smoke were responsible for their own plight; the State plaintiff never smoked, instead the State was required to pay the medical expenses for those who did.

Vigorous defenses taking advantage of disparities in resources were other ways the tobacco companies prevented smokers from winning. The tobacco companies' "scorched earth" litigation tactics wore the smoker-plaintiffs down and exhausted their resources. The tobacco companies' claims of privilege prevented plaintiffs from learning the facts. Although earlier individual smoker-plaintiffs were crushed by the tobacco companies' tactics, the resources available in the attorney general suits confront the tobacco companies with an opponent who possesses more equal resources. The attorney general's lawsuit is a mixed public-private venture; the name on the pleading is the official, but the moving forces are private trial lawyers. One lawsuit for a state's accumulated Medicaid losses puts together a package worth investing in and the investments obviate some of the resource imbalance.

The anti-tobacco legislative effort has fallen short of success because of the tobacco companies' marketing, public relations, and lobbying efforts. In 1998, Congress, apparently because of a massive tobacco company advertising and lobbying campaign, failed to pass legislation to implement the 1997 settlement of the attorneys general's Medicaid recovery lawsuits.³⁶⁴ Although legisclerosis had killed the 1997 settlement in mid-1998, the 1998 settlement of the States' attorneys general's lawsuits did not require any legislation from Congress. While the legal theories in the State's lawsuit called for major innovations in analysis and expansion of existing rules, the 1998 settlement was implemented without adjudication or legislation.

The social and political environment for the tobacco companies changed and events combined to shake the tobacco companies' faith in their legal prowess. A well-researched series of newspaper articles, written between the 1997 settlement and Congress's failure in mid-1998 to enact legislation to implement it, outlines the changes.³⁶⁵ While the authors' analysis of the recent past is perceptive, the implicit prediction that Congress would effectuate the 1997 settlement means the articles read a little like a museum piece, which alone should give prognosticators pause.

Despite several hundred smokers' products liability lawsuits where juries almost always found the smokers responsible for lighting up, tobacco companies' internal polling revealed that nearly 80% of Americans mistrusted them. What forces had combined to change public opinion? Six-year-olds in a study had, the public learned, recognized advertising figure Joe Camel almost as often as they did Mickey Mouse. The tobacco companies, knowing their product was both addictive and deadly, denied these facts and developed sales campaigns designed for children. The EPA had detailed risks to nonsmokers from second-hand smoke. Whistle-blowers had smuggled out internal tobacco companies' documents

³⁶⁴ See Vandall, *supra* note 73, at 805 n.22 (noting that tobacco industry had spent over \$30 million to lobby Congress in the past year).

³⁶⁵ John Mintz & Ceci Connolly, *Smoked/The White House Offensive: Three Unlikely Allies Built a Broad Anti-Tobacco Wave*, WASH. POST, Mar. 31, 1998, at A1; Mintz & Connolly, *supra* note 215, at A1; John Mintz & Ceci Connolly, *Smoked/Congress Rebuffs Big Tobacco: Cigarette Industry Confronts a Desertion of Support*, WASH. POST, Mar. 29, 1998, at A1.

confirming that the companies knew of tobacco's addictive and dangerous qualities but had hidden and dissembled the information. In April of 1994, tobacco companies' executives denied under oath that cigarettes are addictive. That they were even required to take an oath raised the executives' consciousness about the level of public mistrust.

Friends and relatives of people who died because of tobacco communicated their anger to pollsters. Ex-smokers' ire followed, as did that of smokers who had tried unsuccessfully to quit. A Jacksonville, Florida jury's \$1,000,000 verdict favored a deceased smoker's family, but the state court of appeals reversed the verdict and transferred the case for trial in another county.³⁶⁶ Voters registered support for efforts to crack down on teenage smoking. Serious proposals emerged to regulate tobacco as a drug, to limit marketing and sales to children, to compel the industry to finance a campaign against smoking, to ban cigarette vending machines, and to forbid the tobacco companies' sponsorship of sporting events.

Several features of the Mississippi Medicaid litigation, which were unrelated to the substantive theories the State adduced, may have fueled the tobacco companies' dolorous predictions. Mississippi lawyer Michael Lewis contributed the innovation that the State ought to sue the tobacco companies to recover Medicaid outlays. The smokers' arguable responsibility for their own plight was absent; "the state never inhaled a puff, but its Medicaid program bore the costs of caring for sick patients."³⁶⁷

Richard Scruggs was a key lawyer in the Mississippi litigation. Scruggs's success representing plaintiffs in asbestos litigation had already made him wealthy. In the asbestos litigation he had learned to spend money in advance and to negotiate settlements. Scruggs, who put up five million dollars to finance the lawsuit, was a law school classmate of Mississippi Attorney General Michael Moore, and his brother-in-law is Mississippi United States Senator

³⁶⁶ *Brown & Williamson Tobacco Corp. v. Widdick*, 717 So.2d 572 (Fla. Dist. Ct. App. 1998). In February 1999, after a former smoker with inoperable lung cancer received a San Francisco jury's verdicts for \$1,500,000 compensatory damages and \$50,000,000 punitive damages, the defendant Philip Morris's stock fell 8% in one day. John Schwartz, *Jury Awards Ex-Smoker \$51.5 Million*, WASH. POST, Feb. 11, 1999, at A3.

³⁶⁷ John Mintz & Ceci Connoley, *Wounding the Giant*, WASH. POST, Mar. 30, 1998, at A1.

and Majority Leader Trent Lott. The State's lawsuit was filed in Scruggs's hometown of Pascagoula, in Jackson County on the Gulf Coast, a strategy known, at least in the South, as "home cookin'."

The State plaintiffs cultivated close relationships with tobacco companies' whistleblowers and the public-health community. With Attorney General Moore, Scruggs persuaded thirty-nine other states to file similar actions. Retiring Michigan Attorney General Frank Kelley is quoted as attributing the 1998 settlement to the "sheer numbers," what eventually became forty-six states bringing "economic pressure" to bear on the tobacco companies. The states' group litigation efforts took thirty years to develop and the 1998 settlement was "the culmination of collective efforts on consumer protection and antitrust and other issues."³⁶⁸ The aggregate effect of the combination of tobacco companies' whistleblowers with the states' investigation, disclosure, and discovery is revealed by one statistic: 33,000,000 pages of internal tobacco industry documents are available from the Minnesota litigation.³⁶⁹

Back in Jackson County, Mississippi, trial Judge-Chancellor William Myers's rulings favored the State; the Mississippi Supreme Court's procedural rulings did also.³⁷⁰ After the Mississippi Supreme Court's preliminary decisions, Phillip Morris stock tumbled 8%.³⁷¹ "Wall Street saw that a billion-dollar-plus ruling might release spasms of like judgments."³⁷²

Finally, quoting from *The Washington Post*, the tobacco companies' lawyers were out of their depth. "Cigarette executives say the industry's legions of big-city litigators were flummoxed by the Mississippi case. "These \$500-an-hour company lawyers didn't

³⁶⁸ Eric Freedman, *Pioneer of AG-as-Activist to Retire After 37 Years*, NAT'L L.J., Dec. 28, 1998-Jan. 4, 1999, at A6.

³⁶⁹ *Hubert Humphrey III*, *supra* note 13, at 474.

³⁷⁰ *In re Corr-Williams Tobacco Co.*, 691 So.2d 424 (Miss. 1997); *In re Fordice*, 691 So.2d 429 (Miss. 1997). The tobacco companies and other defendants sought appellate review by (1) extraordinary writ of the chancellor's decisions on pretrial motions, and (2) an original action for declaratory judgment-extraordinary writ filed in the supreme court. The focus was on the attorney general's authority to sue. The Mississippi Supreme Court refused review on the ground that the defendants ought to wait for a final judgment and then appeal in an orderly way.

³⁷¹ Mintz & Connoley, *supra* note 367.

³⁷² *Id.*

understand small southern towns,' said one tobacco industry attorney. "They were bamboozled." ³⁷³

So, after the Mississippi Supreme Court's preliminary procedural decision, the tobacco companies no longer wanted to face a Chancery trial on the issues of whether they had been unjustly enriched and, if so, how much they should pay. The paradigm had moved. But not because of professors' articles or judges' opinions. The companies and the State settled.

The law of restitution, as it has been developed and presently stands, must be stretched and expanded before it will encompass the State's unjust enrichment-restitution argument. Settlement may have made perfect political or business sense to the tobacco companies. But, in light of the law on the tobacco companies' side, settlement did not make a lot of legal sense. They, however, may not have caught on. Understanding neither the courthouse culture nor the substantive law, the tobacco companies may have been "flummoxed" and "bamboozled" on both levels.

Rendleman's rule: Don't decide that because Southerners talk slower than you do, they think slower too. That's a big mistake.

XIV. LEGITIMACY - LEGISLATION - LITIGATION - SETTLEMENT

Legal change usually involves litigation, legislation, or a combination. Common law courts tend to reduce externalities, to force businesses to pay their own overhead. Tobacco companies' overhead came to be seen to include the government's medical expenses for smokers. The question has been how to implement this insight. Legislation and litigation had not worked to reverse the paradigm of "tobacco companies win." Internalization occurred through settlement.

The *Economist* magazine denounced a trend that "poses a bigger threat to Americans than either tobacco or guns."³⁷⁴ "American public officials have usurped democratic debate on both tobacco and handguns by launching a wave of lawsuits designed to win through

³⁷³ *Id.*

³⁷⁴ *When Lawsuits Make Policy*, *ECONOMIST*, Nov. 21, 1998, at 17.

legal threats what they have been unable to win in Congress and state legislatures—stricter regulation and heavier taxation.”³⁷⁵

In the states’ common law legal cultures, however, legislation is not the sole path to public policy; civil litigation is recognized as a normal way to create and establish new legal rules. “Civil litigation,” as Professor Owen Fiss reminded us, “is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.”³⁷⁶

Like most civil litigation, the Mississippi Medicaid recovery action ended with a negotiated settlement. Settlements have advantages for litigants in addition to saving time and reducing litigation expenses. Liberated from the limitations of substantive entitlements and blunt judicial remedies, the parties’ settlement may deal with relationship issues unique to the dispute and distribute the give and take creatively. Unlike most civil litigation, the Mississippi lawsuit, because of its official plaintiff, the State’s creative substantive theories, and its high stakes, was anything but routine.

Settlement, Professor Fiss continued, reduces “the social function of the lawsuit to one of resolving private disputes.”³⁷⁷ “Adjudication uses public resources and employs . . . public officials chosen by a process in which the public participates. . . . These officials . . . possess a power that has been defined and conferred by public law, not by private agreement. . . . Their job is . . . to explicate and give force to the values embodied in authoritative texts such as the Constitution, [the common law], and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.”³⁷⁸ When litigants settle, “society gets less than what appears, and for a price it does not know it is paying. Parties might settle leaving justice undone.”³⁷⁹

Might the Mississippi tobacco settlement bear out Professor Fiss’s qualms? If adjudication leads to adversary argument and reasoned articulation grounded on principle, settlement privatizes

³⁷⁵ *Id.*

³⁷⁶ Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984).

³⁷⁷ *Id.* at 1085.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

the substantive law. The development of a private legal system jeopardizes the rule of law as Professor Fiss defined it. The tobacco settlement bypassed the ordinary process of changing the law through either legislation or common law adjudication.

What consequences does this detour have? For Professor Roger Crampton, the potential conflicts of interest in the 1997 tobacco settlement raised "fundamental questions about the way in which political institutions should operate."³⁸⁰ According to Professor Crampton the private lawyers are interested in income, the state attorney generals are interested in political advancement, and the tobacco companies' lawyers' interest lies in protecting their clients.³⁸¹ Liberation from substantive law, legal remedies, and formal adjudication has disadvantages which may exceed their advantages. The public interest may receive short shrift.

More clarity about how the settlement comports with existing positive law would boost its credibility and quell some criticism. Professor Tom Mason, expressed his curiosity at a panel on the 1997 settlement.³⁸² "I'll say I'm really sorry that they settled this thing because they had some completely unique legal theories. . . . I wish I could have seen that law either being made or at least seen the court have an opportunity to deal with them."³⁸³

Before most litigants settle a lawsuit, they assess the substantive law and forecast the way a court will be likely to apply it. The State's characterizations and restitution arguments, although based on incomplete research and unpolished analysis, reached out to grasp the forward edge of the common law's creative possibilities. The State's arguments stretched the existing law in ways most academic restitution specialists and appellate courts would probably have rejected. Most defendants would have sought definitive adjudication.

This settlement focuses attention on the tenure-review anomaly. If, as I have speculated above, the State's restitution arguments

³⁸⁰ Peter Carstensen, et al., *The So-Called Global Tobacco Settlement: Its Implications for Public Health and Public Policy—An Executive Summary of a Conference at the University of Wisconsin Law School*, 22 S. ILL. U. L.J. 705, 723 (1998).

³⁸¹ *Id.* at 722-23.

³⁸² Panel Discussion, *supra* note 7.

³⁸³ *Id.* at 881.

would probably have been skeptically received by well-briefed appellate courts and academic restitution specialists, how could the same arguments have been the foundation for the settlement? Although law professors are often criticized for promulgating impractical theory, this particular professor is perplexed by the tobacco companies' acceptance of the State's bold characterizations and pie-in-the-sky restitution arguments.

The settlement has risks. First, a settlement may lack policymaking legitimacy, because it simultaneously usurps the elective legislative process and short-circuits the common law process of adversary argumentation leading to reasoned judicial articulation. A response is the one made above—you professors pay excessive attention to theory. As Milsom observed, "But practitioners and judges do not normally give a pin for legal development. Their duty is to these clients and the proper disposition of this case."³⁸⁴

My reply is the settlement's second risk. The public's interest, including the present and potential individual smokers' and the taxpayers', may be clouded in the dust of lawyers' zeal to represent clients. More definitely, the settling litigants did not focus on addition in general or on youth smoking in particular; the settlement allows the state legislatures to appropriate money without being subjected to the discipline of taxing; most of the settlement proceeds will not be used to reduce or prevent smoking.

The Mississippi settlement appears to me to have been made either in a state of optimistic innocence of the law of restitution or of indifference to it, perhaps both. As Professor Andrew Kull patiently explained in a telephone conversation, "If you have a settlement, you don't need a theory." But to settle intelligently, you at least need to have a clue.

So Professor Mason, although this effort will neither answer all your questions nor quiet all your concerns, it ought, at least, to dispel the notion that the Mississippi settlement was based on a thoughtful analysis of the facts in light of the substantive law which led to a calculated estimate that liability for restitution was likely.

³⁸⁴ MILSOM, *supra* note 74, at 77.

