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BROWN V. PHILIP MORRIS, INC., 250 F.3d 789 (3rd Cir. 2001).

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FACTS

Plaintiffs (the "Black Smokers")[1] brought this class action suit on behalf of all African-Americans who had purchased or consumed mentholated tobacco products since 1954.[2] The Black Smokers sued various tobacco companies, claiming that these companies discriminated against the African-American public by targeting them with advertisements for mentholated tobacco products.[3] The Black Smokers claim that the tobacco companies knowingly harmed the African-American community by deceiving them into believing that menthol cigarettes are healthier than non-mentholated cigarettes.[4] Furthermore, the plaintiffs contended, and the defendants did not dispute, that mentholated tobacco products actually do pose a greater health risk than non-mentholated products.[5] The Black Smokers maintained that the target advertising caused harmful disparities in the smoking population.[6] According to the Black Smokers, African-Americans, who make up 10.3 % of the U.S. population, constitute 31%[7] of all mentholated tobacco users.[8] The Black Smokers also stated that the tobacco companies did not advertise these same messages to white consumers.[9] Based on the above facts, the plaintiffs sued the defendant tobacco companies in the United States District Court for the Eastern District of Pennsylvania on October 19, 1998.[10]

The Black Smokers based their claims on several theories of law.[11] First, they claimed that defendants violated the civil rights statutes codified at 42 U.S.C. §§ 1981, 1982, and 1985(3) by infringing on African-Americans' right to contract for and to purchase and hold, personal property on the same grounds as "white" Americans.[12] Second, they argued that the tobacco companies targeted African-Americans with defective products and that defendants' advertisements constituted express warranties containing false and

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1. "Black Smokers" is a term used by plaintiffs to describe themselves. The court adopts it in its opinion.
2. Brown v. Philip Morris Inc., 250 F.3d 789, 793 (3rd Cir. 2001).
3. *Brown*, 250 F.3d at 793.
4. *Id.*
5. *Id.* at 794.
6. *Id.* at 795.
7. *Id.* at 794. While Black Smokers cited reports placing the percentage of African-American menthol smokers at 31%, 61.5% and 66%, the court relied on the 31% figure. It is unclear whether Black Smokers conceded to the 31% figure or whether the court chose the figure without stating why it did so.
8. *Id.*
9. *Id.* at 795.
10. *Id.*
11. *Id.* at 797-799.
12. *Id.*

misleading statements.[13] Third, Black Smokers claimed that the defendants are federal actors, who violated a constitutional right under *Bivens v. Six Unknown Federal Narcotics Agents*,[14] and that the defendants' target advertising violated the Fifth Amendment.[15] Fourth and finally, the Black Smokers claimed the tobacco companies are state actors, who violated the full and equal benefit clause, 42 U.S.C. § 1983, and the Fourteenth Amendment.[16]

The District Court granted defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6).[17] Plaintiff appealed to the United States Court of Appeals for the Third Circuit.[18]

HOLDING

A. First, the court held that in order to bring a cause of action under 42 U.S.C. §§ 1981, 1982, or 1985(3), claiming that the defendant engaged in discriminatory target advertising, a plaintiff must demonstrate a disparity between products the defendant sold to plaintiff's racial group and products the defendant sold to others.[19] B. Second, the court held that the defendants cannot be sued for false or misleading advertising because the Federal Cigarette Labeling Acts[20] preempt such claims.[21] C. Third, the court held that the defendants cannot be sued for target advertising under *Bivens v. Six Unknown Federal Narcotics Agents*[22] or the Fifth Amendment because they are not federal actors.[23] D. Fourth, the court held that the defendants cannot be sued for target advertising under the full and equal benefit clause, 42 U.S.C. § 1983, or the Fourteenth Amendment because they are not state actors.[24]

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13. *Id.*

14. 403 U.S. 388 (1971). A Bivens Claim (the federal version of a § 1983 claim) states that the defendant violated the plaintiff's rights under color of federal law. *Brown*, 250 F.3d at 800 (*citing* Alexander v. Pennsylvania Dep't of Banking, 1994 U.S. Dist. LEXIS 5183, No. Civ. 93-5510, 1994 WL 144305, at *3 (E.D. Pa. April 21, 1994)).

15. *Brown*, 250 F.3d at 800.

16. *Id.*

17. *Id.* at 795-96.

18. *Id.* at 789.

19. *Id.* at 794 and 805-806.

20. 15 U.S.C. § 1331, *et seq.* The Federal Cigarette Labeling and Advertising Act of 1965 and its successor, the Public Health Cigarette Smoking Act of 1969 set out the advertising and labeling regulations that Tobacco Companies must follow.

21. *Brown*, 250 F.3d at 798 (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31 (1992).

22. 403 U.S. 388 (1971).

23. *Brown*, 250 F.3d at 794.

24. *Id.* at 806.

ANALYSIS

A. §§ 1981, 1982, and 1985(3) Claims

1. §§ 1981, 1982 Claims

The Black Smokers claimed that defendants violated 42 U.S.C. §§ 1981 and 1982 by infringing on the right of African-Americans to contract for, purchase, and hold personal property on the same grounds as "white" Americans.[25] To state a claim under § 1981, a plaintiff must allege facts that support: "(1) [that plaintiff] is a member of a racial minority; (2) intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in the statute[,] which includes the right to enforce contracts."[26] To state a claim under § 1982, a plaintiff must allege facts that support: "(1) the defendant's racial animus; (2) intentional discrimination; and (3) that the defendant deprived plaintiff of his rights because of race."[27] The court concluded that the Black Smokers failed to meet these tests because their claim, that the tobacco companies' target advertising restricted their right to contract for and own non-mentholated cigarettes, had no authoritative backing.[28]

Plaintiffs' case relied heavily on *Roper v. Edwards*,[29] which suggests that a cause of action exists when a defendant intentionally markets a defective product to a person on the basis of race.[30] The court distinguished the Black Smokers' case, explaining that in *Roper*, the defendant sold the defective product to African-Americans only, and that tobacco companies sell the same mentholated tobacco products to all customers, regardless of race.[31] The court declared that if a situation arose where defendants sold virtually all mentholated cigarettes to African-Americans and all non-mentholated

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25. *Id.* at 797-799.

26. *Id.* at 797 (quoting Yelverton v. Lehman, 1996 U.S. Dist. LEXIS 7651, No. Civ. A. 94-6114, 1996 WL 2965551, at *7 (E.D. Pa. June 3, 1996), *aff'd mem.*, 175 F.3d 1012 (3rd Cir. 1999)).

27. *Id.* at 797 (quoting Garg v. Albany Indus. Dev. Agency, 899 F. Supp. 961, 968 (N.D.N.Y. 1995), *aff'd*, 104 F.3d 351 (Table), 1996 WL 547184 (2nd Cir. 1996)).

28. *Id.* at 798.

29. 815 F.2d 1474 (11th Cir. 1987) (allowing cause of action under 42 U.S.C. § 1981 when defendant engages in racially discriminatory target advertising to sell defective products.) In *Roper* the Eleventh Circuit considered whether a cause of action existed where the defendant burial vault manufacturer made targeted sales of defective burial vaults to black customers. The plaintiff, a white customer, to whom the defendant inadvertently sold a defective burial vault brought suit. Although the Eleventh Circuit eventually rejected the plaintiffs' claims on other grounds, they did suggest that a cause of action under § 1981 would have existed were the plaintiff black.

30. *Brown*, 250 F.3d at 798.

31. *Id.*

cigarettes to others, the facts might come within the scope of *Roper*.[32] In a similar vein, the Black Smokers compared their case to segregated housing cases, such as *Clark v. Universal Builders, Inc.*,[33] that allow a cause of action when defendants steer minority groups into segregated housing.[34] The court rejected this argument as well, citing the lack of a segregated market.[35] Furthermore, Black Smokers failed to raise this claim at the District Court level and therefore, the court rejected the claim on procedural grounds.[36]

The court summarized Black Smokers' failure to state a claim under §§ 1981 and 1982 by asserting that their claims essentially constituted discriminatory advertising claims.[37] The court found that case law demonstrates that such claims are not actionable under §§ 1981 and 1982 of the civil rights statutes because discriminatory advertising is unlikely to violate a protected right.[38]

2. § 1985(3) Claim

The plaintiffs claimed that the defendants, through their concerted advertising operations, breached 42 U.S.C. § 1985(3) by conspiring to violate federal rights and privileges.[39] Under this statute a plaintiff must show: "(a) that a racial or other class-based invidious discriminatory animus lay behind the coconspirators' actions, (b) that the coconspirators intended to deprive the victim of a right guaranteed by the Constitution against private impairment, and (c) that that right was consciously targeted and not just incidentally affected."[40] The court upheld the District Court's ruling that the Black Smokers failed to meet requirement (b).[41] Black Smokers further alleged that

32. *Id.*
33. 501 F.2d 324 (7th Cir. 1973).
34. *Brown*, 250 F.3d at 799.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 799-800.
39. *Id.* at 805-06.
40. *Id.* at 805 (quoting Spencer v. Casavilla 44 F.3d 74, 77 (2nd Cir. 1994) (citations omitted)).
41. *Id.*. Requirement (b) demands a Constitutionally protected right and Black smokers alleged the right to be free from discrimination by a private actor, which is a statutorily protected right.

a § 1985(3) claim can be supported by their §§ 1981 and 1982 claims, but the court rejected this argument for lack of support in case law[42] and because Black Smokers failed to state a claim under §§ 1981 or 1982.[43]

B. Misrepresentation/False Advertising Claim

The Black Smokers also claimed that the defendants' advertisements constituted express warranties that contained false and misleading statements.[44] The court dismissed this argument stating that the Labeling Acts preempted such claims because they rely on omissions in the manufacturer's advertising.[45]

C. Federal Action Doctrine

The Black Smokers brought claims under *Bivens* and the Fifth Amendment, which require that defendants be federal actors.[46] The court rejected these claims because the defendants could not be regarded as federal actors.[47]

To determine whether the defendants were federal actors the court applied the "state action" test.[48] The first prong of the test asks whether the alleged constitutional violation arose from a right or privilege having its source in federal authority.[49] The court found that the Black Smokers failed to satisfy the first prong because the Black Smokers' claims failed to allege that the defendants deprived them of a Constitutionally protected right.[50] Furthermore, the court said that the tobacco companies' activities cannot be said to be approved by the government merely because they complied with the Federal Labeling Act;[51] the act of complying with federal law cannot be the basis for

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42. *Id.* at 806, (citing Sanders v. Prentice-Hall Corp., 178 F.3d 1296 (Table) (6th Cir. 1999); Libertad v. Welch, 53 F.3d 428, 447 n.15 (1st Cir. 1995); Tilton v. Richardson 6 F.3d 683, 686 (10th Cir. 1993).

43. *Id.* at 806.

44. *Id.* at 798.

45. *Id.* The Federal Cigarette Labeling and Advertising Act of 1965 and its successor, the Public Health Cigarette Smoking Act of 1969 set out the advertising and labeling regulations that Tobacco Companies must follow. *Id.* at 796 (citing 15 U.S.C. § 1331, *et seq*). These acts preempt state law damages actions in cases of failure to warn when such claims rely on omissions or inclusions in a manufacturer's advertising. *Id.* (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 511 (1992)).

46. *Id.* at 800.

47. *Id.*

48. *Id.* at 801. The court used the two prong test originating from Lugar v. Edmondson Oil Co. Inc, 457 U.S. 922 , 937-42 (1982) and summarized in Edmonson v. Leesville Concrete Inc., 500 U.S. 614, 620 (1991).

49. *Id.* at 801 (citing *Leesville Concrete*, 500 U.S. at 620 (applying *Lugar*)).

50. *Id.*

51. *Id.*

transforming a party into a federal actor.[52]

The second prong of the "state action" test consists of three theories under which a private party can be fairly described as a federal actor: (i) the public function test; (ii) the close nexus test; and (iii) the symbiotic relationship test.[53] The public function test asks whether the government is "using the private entity to avoid a constitutional obligation or to engage in activities reserved to the government."[54] The court asserted that the sale of a legal product, even if governmentally regulated, is a private function, and not within the sweep of the public function test.[55] Thus the defendants were not engaged in a public function and were not federal actors under the test.

The close nexus test requires that a private party, in relation with the federal government, deprive the plaintiff of a federal right.[56] The Black Smokers contended that they met this test because the Labeling Act encourages the tobacco companies to conceal the dangers of mentholated products, mandates inadequate warnings and preempts most tort actions against such companies.[57] The court concluded that the Labeling Act does not encourage such action, but only sets out a minimum requirement of disclosure of the risks associated with using tobacco products.[58] Additionally, the Black Smokers did not allege the violation of a federal right, which is required under the close nexus test.[59]

The court also rejected the Black Smokers' argument under the symbiotic relationship test.[60] The Black Smokers contended that the huge amount of revenue created by the tax on tobacco products creates a symbiotic relationship between the federal government and the cigarette companies.[61] The court rejected this argument because virtually all enterprises are subject to taxation in varying degrees, and therefore under plaintiffs' analysis, almost any business would meet the classification requirements of a federal actor.[62]

Alternatively, the Black Smokers argued that they met a "totality of the circumstances" test that takes an expansive view of the facts at hand in determining whether the defendant is a federal actor.[63] The Black Smokers

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52. *Id.*
53. *Id.*
54. *Id.* at 802 (citing Goussis v. Kimball, 813 F. Supp. 352, 357 (E.D. Pa. 1993).
55. *Id.*.
56. *Id.*
57. *Id.*
58. *Id.*(citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982); American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999); Goussis v. Kimball, 813 F. Supp. 352, 357 (E.D. Pa. 1993)).
59. *Id.* at 803 (citing *Goussis*, 813 F. Supp. at 357).
60. *Id.*
61. *Id.*
62. *Id.* (citing Hadges v. Yonkers Racing Corp. 918 F.2d 1079, 1082 (2nd Cir. 1990)).
63. *Id.* at 803-804.

alleged that the Labeling Acts' preemption of claims makes it so involved with the claims as to make the government's actions inseparable from the actions of the cigarette companies.[64] The court questioned the validity of the "totality of the circumstances" test, but refused this argument regardless, claiming that preemptive provisions are common in federal product safety and information disclosure legislation, and that marketing and advertising are classic private functions.[65]

D. State Action Doctrine

The Black Smokers claimed on appeal that defendants are state actors who violated the full and equal benefit clause,[66] § 1983,[67] and the Fourteenth Amendment.[68] While the court dismissed these claims because the plaintiffs failed to raise them at the district court level, it also rejected them on the grounds that the defendants could not be regarded as state actors.[69] The court reasoned that the defendants were not state actors for essentially the same reasons they were not federal actors.[70]

DISSENT

The dissent would not have rejected the Black Smokers' claims under §§ 1981, 1982, and 1985(3).[71] Judge Shadur argued that §§ 1981 and 1982 are not limited by their terms to claims of outright deprivation of the right to contract.[72] He portrayed the statutes as mandating an "equal playing field" that should not be disturbed by racially discriminatory conditions.[73] Under this analysis, he argued that the Black Smokers' claim (that target advertising

64. *Id.* at 804.

65. *Id* at 804. (*citing* Federal Hazardous Substances Act, 15 U.S.C. 1261 *et seq.*, note (b)(1)(A); Moss v. Parks Corp. 985 F.2d 736, 739-41 (4th Cir. 1993) (construing preemption provision of Federal Hazardous Substances Act)).

66. *Id.* at 799 A full and equal benefit claim states that the defendant deprived the plaintiff of the full and equal benefit of the law as it is enjoyed by white citizens. 42 U.S.C. § 1981(a) The Black Smokers argued that the defendants' target advertising violated the clause. *Id.*

67. *Id.* at 800. § 1983 provides a cause of action when a state actor deprives any person of a protected right under color of state law. 42 U.S.C. § 1983.

68. *Brown*, 250 F.3d at 800. When the Black Smokers originally brought their Fourteenth Amendment claim in Federal District Court they were only claiming that the defendants were federal actors. *Id.* at 800. A Fourteenth Amendment claim requires the plaintiffs to prove that the defendants are state actors. *Id.* at 800. Since the Black Smokers did not contend that the defendants were state actors until the appellate level, the court upheld the lower court's dismissal. *Id.*

69. *Id.* at 799-800.

70. *Id.* at 799.

71. *Id.* at 806.

72. *Id.* at 807.

73. *Id.*

impacted the African-American community to such an extent that their ability to contract for cigarettes is no longer equal with "white" smokers) is actionable under §§ 1981 and 1982.[74] Shadur pointed to the majority's statistics, which demonstrate that African-Americans constitute 10% of the nations's population and 31% of the menthol tobacco users, prove that the target advertising has had a substantial effect on the African-American community's right to contract for and own non-mentholated cigarettes.[75] Using these figures, the odds that the above distribution happened by chance are 1.28 in a trillion.[76] Shadur argued that this data undermines the court's attempt to distinguish Black Smokers' claims from *Roper* and *Clark* by using a segregated market analysis.[77] He concluded that such a large disparity is so likely to be the product of steering, that Black Smokers should have their day in court.[78]

Shadur also pointed out that the tobacco companies' claims that African-Americans were already predisposed to menthol cigarettes before the companies began their target advertising is an issue to be decided at trial.[79] Additionally, Judge Shadur commented that the proper standard of review for discrimination cases is whether the court can reasonably infer intent from disparate impact, and that the issue of intent should be resolved by a jury.[80] Justice Shadur concluded by scolding the majority; noting that all claims deserve proper attention even if they appear to be out of the ordinary or unlikely to be true.[81]

CONCLUSION

While claims of racial steering are unquestionably valid under the Fair Housing Act,[82] it is unclear whether such claims are cognizable under 42 U.S.C. §§ 1981 and 1982 or outside of the real estate arena.[83] Without legislation granting smokers a clear cause of action for discriminatory advertising under §§ 1981 or 1982, the Supreme Court may decline to extend

74. *Id.* at 807-08.
75. *Id.* at 808.
76. *Id.*
77. *Id.*
78. *Id.* at 809.
79. *Id.*
80. *Id.* at 810.
81. *Id.* at 811.
82. 42 U.S.C.A. § 3604(c).
83. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968); Spann v. Colonial Village, Inc., 899 F.2d 24, 35 (D.C. Cir. 1990); Saunders v. General Services Corp., 659 F. Supp. 1042, 1062 (E.D. Va. 1987); Ragin v. Steiner, Clateman and Assocs., 714 F. Supp. 709, 713 (S.D.N.Y. 1989).

the statutes to such claims. Ironically, the current legislation regulating tobacco companies works to shield the companies from claims such as plaintiffs' because the Labeling Acts only require one warning for all types of cigarettes.[84] Thus, smokers cannot sue the tobacco companies for failing to warn them that one type of cigarette is more harmful than others.

Another hurdle for plaintiffs seeking to sue on discriminatory advertising claims is that the Supreme Court has stated, in dicta, that § 1982 does not prohibit "advertising or other representation that indicate discriminatory preferences."[85] Numerous district courts and the D.C. Circuit have taken this statement to mean that discriminatory advertising *in the housing arena* is never a cause of action under §§ 1981 or 1982 without evidence of some other type of discrimination.[86] Furthermore, courts' lack of concern for discriminatory advertising *outside of the housing arena* may stem from the policy behind the Fair Housing Act. One of the driving reasons behind prohibiting racial steering in the housing arena is to make sure that minorities are able to reap the social and professional benefits of living in an integrated society.[87] It is difficult to see how the type of cigarettes a person smokes could substantively affect their ability to interact with others in society. Thus, the reasoning for allowing racial steering actions in the housing market does not easily carry over to the tobacco market.

On the other hand, racial steering in the tobacco markets causes a different type of damage; greater health risks to African-Americans.[88] Moreover, one could argue that the case law requiring discriminatory advertising claims to include a showing of a segregated market under §§ 1981 and 1982 is limited to suits involving housing discrimination and not applicable to other areas of discriminatory advertising. Furthermore, the Supreme Court has stated that § 1982 is to be interpreted broadly by the courts.[89] The *Brown* Court, perhaps wary of these countervailing factors, sent a mixed signal. The court concluded that Black Smokers would have a § 1981 claim under *Clark* and *Roper* if they could demonstrate the existence of a racially segregated market[90] but at the same time stated that claims of discriminatory advertising are not actionable under §§ 1981 or 1982.[91]

Assuming that the *Brown* court is correct in stating that §§ 1981 and 1982

84. 15 U.S.C. § 1331, *et seq.*
85. *Jones*,392 U.S. at 413.
86. *Spann*, 899 F.2d at 35; *Saunders*, 659 F. Supp. at 1062; *Ragin*, 714 F. Supp. at 713.
87. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 111, 115, n. 30 (1979).
88. Brown v. Philip Morris Inc., 250 F.3d 789, 794 (3rd Cir. 2001).
89. *Jones*, 392 U.S. at 437.
90. *Brown*, 250 F.3d at 798.
91. *Id.* at 799-800.

could generate a discriminatory advertising claim, the Black Smokers have an arguable case even if they cannot show a segregated market. This is because the *Brown* court's contention that *Clark*[92] and *Roper* demand a segregated market to sustain a racial steering claim is too sweeping.[93] While *Clark* held that the plaintiff had a prima facie case because he alleged the existence of dual housing markets, it never held that a dual market was essential to establishing a prima facie case.[94] In fact, the *Clark* court stressed a broad reading of § 1982 that should not be limited to prohibiting traditional forms of discrimination.[95] Thus, the *Clark* holding seems to suggest that Black Smokers claims could be actionable, even without a showing of a entirely segregated market.

The *Brown* court's reading of *Roper* is equally problematic because the court interprets it to require a completely segregated market as well.[96] There are two important problems with this reading of *Roper*. First, the *Roper* court never mentions or suggests a requirement for a segregated market.[97] Second, *Roper* did not involve a completely segregated market.[98] The plaintiff in Roper was a "white" man to whom the defendant inadvertently sold a defective burial vault marked for African-American customers.[99] Thus, a more accurate reading of *Roper* would be that as long as defendant's sale of defective products to "white" customers is an inadvertent side-effect of targeting African-Americans, the plaintiff has a cause of action under *Roper*. The Black Smokers claim that defendants only aimed the harmful advertising at African-Americans (making white menthol smokers an inadvertent side effect of the target advertising) is, therefore, arguably within the sweep of *Roper*.

The largest difference between *Roper/Clark* type cases and the Black Smokers' claim is the sale structure. In *Roper* and *Clark* the advertiser and the sales person were closely linked. Therefore the chance of inadvertent sales to white customers was low. Cigarette sales, on the other hand, are different. The advertiser and the sales person are only loosely connected. This may be part of the reason for the larger frequency of mentholated cigarette sales to white customers. In all cases, regardless of inadvertent sales, the alleged intent of the advertiser remains the same.

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92. Clark v. Universal Builders, Inc, 501 F.2d 324, 328 (7th Cir. 1973).
93. *Brown*, 250 F.3d at 798-99.
94. *Clark*, 501 F.2d at 328.
95. *Id.* at 330.
96. *Brown*, 250 F.3d at 798.
97. Roper v. Edwards, 815 F.2d 1474 (11th Cir. 1987).
98. *Roper*, 815 F.2d at 1476.
99. *Id.*

An interesting yet troubling aspect of the *Brown* court's holding is that it's outcome is rather ironic when viewed in relation to other cases in the area of racial discrimination. Intent is often the most difficult aspect of a discrimination case to prove because of the veiled nature of racial discrimination. The Supreme Court has held that a showing of discriminatory impact, by itself, is not sufficient to create an inference of the defendant's intent to discriminate.[100] In the Black Smokers case, however, the defendant conceded to intentional target advertising, and the court refused the discrimination claim because the Black Smokers failed to prove a substantial disparate impact.[101] After decades of the courts telling African-Americans, who can show discriminatory impact, that they do not have a case because they cannot prove intent, when a plaintiff finally has a clear case of intent, the court responds by stating that they need to show a greater impact to establish the violation of a protected right.

In summary, the law on whether §§ 1981 and 1982 will sustain non-housing related, discriminatory advertising claims is unclear but leans in the direction of disallowing such claims. These claims are difficult because they do not involve the ususal case of direct refusal to sell to a protected class. Should courts hold companies liable for encouraging the sale of their product in a way that is most profitable for the company? Should cowboy's be able to sue as a class because the tobacco companies target them with filterless and non-light cigarettes? On the other hand, it is troubling that the tobacco companies target mentholated products toward African-Americans. Racial targeting is especially suspect. Furthermore, unlike filterless and other highly concentrated cigarettes, mentholated cigarettes do not have blatantly obvious increased health risks. The Labeling Acts compound the problem by allowing tobacco companies to hide which products are the most harmful, thereby keeping smokers from making informed choices. It is understandable that many African-Americans feel that they have been wrongfully targeted, deceived and harmed, especially considering the tobacco companies' past history involving the enslavement of and discrimination against African Americans. Clearly, the *Brown* Court faced a difficult decision. The court's holding, although ultimately rejecting Black Smokers' particular claims, sends a mixed signal as to whether such claims could ever be actionable.

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100. Washington v. Davis, 426 U.S. 229 (1976).

101. *Brown*, 250 F.3d at 794, 798.