DECEIVE, PROFIT, REPEAT: PUBLIC DECEPTION SCHEMES TO CONCEAL PRODUCT DANGERS

Wes Henricksen†

Companies in numerous industries have misled the public by hiding the dangers posed by their products. Sugar manufacturers hid the dangers of high fructose corn syrup and misdirected the public's attention to fat, causing an epidemic of diabetes, obesity, and heart disease. Opioid manufacturers hid the dangers and addictiveness of opioid painkillers, leading to the opioid crisis. Fossil fuel companies misled the public about the causes, certainty, and effects of global warming, resulting in massive unregulated CO_2 emissions and causing one of the greatest threats to humankind. This Article identifies all such schemes as belonging to a category of wrongs called "Public Deception Schemes to Conceal Product Dangers," or "PDCPD Schemes." PDCPD Schemes do not fit into any existing tort framework. Accordingly, those harmed by such schemes are often left with no way to seek redress against the wrongdoer. This Article proposes that this gap in the tort law be closed by legislation similar to how the state "blue sky" laws and Section 10(b) of the Securities Exchange Act of 1934 closed the loophole in fraud law that allowed those committing securities fraud to evade liability. Closing this gap would further numerous tort policy goals, including shifting the loss to those responsible for causing it and expanding the scope of liability for those who commit intentional, wrongful conduct.

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INTRODUCTION

Between 2012 and 2017, a professor at the University of California, San Francisco, uncovered a cache of documents revealing that the sugar industry had, for decades, misled the public about the health dangers of sugar.[1] The sugar industry, Dr. Cristin Kearns discovered, had launched

[1] Anahad O'Connor, *How the Sugar Industry Shifted Blame to Fat*, N.Y. TIMES (Sept. 12, 2016) [hereinafter O'Connor, *Shifted Blame to Fat*], https://www.nytimes.com/2016/09/13/well/eat/how-the-sugar-industry-shifted-blame-to-fat.html?module=inline [https://perma.cc/

a campaign in the 1960s to counter "negative attitudes toward sugar" in part by funding sugar research that produced favorable results.[2] The campaign was orchestrated by John Hickson, a top executive at the sugar association who later joined the tobacco industry.[3] As part of the sugar industry campaign, Mr. Hickson secretly paid two influential Harvard scientists to publish a major review paper in 1967 that minimized the link between sugar and heart health and shifted blame to saturated fat.[4]

The campaign worked. Over the past fifty years, consumption of sugar has tripled worldwide.[5] In the United States, sugar consumption in both children and adult diets increased markedly over that same period.[6] Moreover, there have been even sharper increases in the consumption of certain, more harmful sugars like high-fructose corn syrup (HFCS).[7] HFCS, in fact, can now be found in a wide array of processed foods and beverages, like juices, yogurts, cereals, and breads.[8] The United States now leads the world in added sugar consumption, as the only country where more than six hundred calories of added sugar are consumed per person per day nationwide.[9]

This rise in sugar consumption has come at a cost. Recent research has identified sugar as the single leading non-regulated component contributing to the recent spike in metabolic syndrome diseases such as diabetes, hypertension, lipid problems, cardiovascular disease, and

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FMH3-CSFY]; Anahad O'Connor, *Sugar Industry Long Downplayed Potential Harms*, N.Y. TIMES (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/well/eat/sugar-industry-long-downplayed-potential-harms-of-sugar.html [https://perma.cc/A79F-Z9V4].

2 *See* O'Connor, *Downplayed Potential Harms*, *supra* note 1 (quoting another source); Cristin E. Kearns, Laura A. Schmidt, Dorie Apollonio & Stanton Glantz, *The Sugar Industry's Influence on Policy*, 360 SCIENCE 501, 501 (2018); Cristin E. Kearns, Stanton A. Glantz & Laura A. Schmidt, *Sugar Industry Influence on the Scientific Agenda of the National Institute of Dental Research's 1971 National Caries Program: A Historical Analysis of Internal Documents*, 12 PLOS MED. 1 (2015), https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001798 [https://perma.cc/MQ4H-5TLG].

3 O'Connor, *Downplayed Potential Harms*, *supra* note 1.

4 *Id.*

5 Robert H. Lustig, Laura A. Schmidt & Claire D. Brindis, *The Toxic Truth About Sugar*, 482 NATURE 27, 28 (2012).

6 Elyse S. Powell, Lindsey P. Smith-Taillie & Barry M. Popkin, *Added Sugars Intake Across the Distribution of US Children and Adult Consumers: 1977–2012*, 116 J. ACAD. NUTRITION & DIETETICS 1543 (2016).

7 Lustig, Schmidt & Brindis, *supra* note 5.

8 Kay Parker, Michelle Salas & Veronica C. Nwosu, *High Fructose Corn Syrup: Production, Uses and Public Health Concerns*, 5 BIOTECHNOLOGY & MOLECULAR BIOLOGY REV. 71 (2010); *see also* Lustig, Schmidt & Brindis, *supra* note 5.

9 Lustig, Schmidt & Brindis, *supra* note 5.

non-alcoholic fatty liver disease.[10] The other two contributing factors, tobacco and alcohol, are already heavily regulated.[11] Sugar has been a leading cause in the rise of obesity and metabolic syndrome diseases, costing enormous amounts of money to the economy and driving the sharply rising health care costs in the United States.[12]

Many who read about Dr. Kearns' discovery of the sugar industry's deception when the media covered it in 2016 and 2017[13] felt a twinge of déjà vu. Something about it felt oddly familiar. That was because the sugar industry's scheme echoed another story that had made headlines in the American media right around the same time. In 2016 and 2017, a series of investigative news stories broke about the opioid industry's campaign of public deception[14] wherein they sought to hide or downplay the addictiveness and destructiveness of opioid painkillers.[15] This caused a public outcry from, among others, political and

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10 *Id.*; Kimber L. Stanhope, *Sugar Consumption, Metabolic Disease and Obesity: The State of the Controversy*, 53 CRITICAL REVS. CLINICAL LAB'Y SCIS. 52 (2016); *see also* Fumiaki Imamura, Laura O'Connor, Zheng Ye, Jaakko Mursu, Yasuaki Hayashino, Shilpa N. Bhupathiraju & Nita G. Forouhi, *Consumption of Sugar Sweetened Beverages, Artificially Sweetened Beverages, and Fruit Juice and Incidence of Type 2 Diabetes: Systematic Review, Meta-Analysis, and Estimation of Population Attributable Fraction*, BMJ (July 21, 2015), https://www.bmj.com/content/351/bmj.h3576 [https://perma.cc/W65E-8HBN].

11 Lustig, Schmidt & Brindis, *supra* note 5.

12 *See* Mary Ann Liebert, *Metabolic Syndrome Risk Factors Drive Significantly Higher Health Care Costs*, SCIENCEDAILY (Sept. 17, 2009), https://www.sciencedaily.com/releases/2009/09/090917111625.htm [https://perma.cc/F5B7-UQD9].

13 *See, e.g.*, O'Connor, *Shifted Blame to Fat*, *supra* note 1; Tanya Basu, *Researchers Publish Bombshell Report that Suggests Sugar Industry Conspiracy*, DAILY BEAST (Nov. 21, 2017, 8:33 PM), https://www.thedailybeast.com/researchers-publish-bombshell-report-that-suggests-sugar-industry-conspiracy [https://perma.cc/K98P-EMU9]; *Report: Sugar Industry Downplayed Role in Heart Disease*, CBS NEWS (Sept. 17, 2016, 7:36 PM), https://www.cbsnews.com/news/sugar-industry-scientific-heart-research-that-made-fat-look-bad [https://perma.cc/7HWX-WDG7].

14 As stated in Wes Henricksen, *Intended Injury: Transferred Intent and Reliance in Climate Change Fraud*, 72 ARK. L. REV. 713, 730 (2019):

> "Private deception," . . . as these terms are used in this article, is where Person A misleads Person B to Person B's detriment. Here, Person B must reasonably rely on Person A's misleading representation in order to recover. By contrast, "public deception," as the term is used in this article, is where Person A makes a misleading representation to a large number of people, or even to the public at large, intending that someone, though not necessarily any particular person, rely on it to Person A's advantage, and someone does rely on it to Person A's advantage.

15 John R. Roby, *Broome May Sue Opioid Drugmakers*, STAR-GAZETTE (Elmira, N.Y.), Oct. 31, 2016, at 5A; Alfonse D'Amato, *Long Island Can't Give up the Fight Against Opioids*, LONG ISLAND HERALD (Sept. 15, 2016), https://www.liherald.com/stories/long-island-cant-give-up-the-fight-against-opioids,83726 [https://perma.cc/4GM4-DCWX].

community leaders.[16] It also led to a number of lawsuits against pharmaceutical companies to hold them liable for the deception.[17]

The parallels between the sugar and opioid industries' public deceptions were astonishing. Like the sugar industry, the opioid industry, led early on by its number-one market leader, OxyContin, spent millions of dollars to mislead the public about the dangers posed by its product. The effects on American health were, and still are, tragic. By 2004 OxyContin was the most abused drug in the United States.[18] In recent years and up to the present, opioid pain drugs have killed around 130 Americans a day.[19] The opioid epidemic, led by a small handful of giant pharmaceutical companies, has been labeled "the worst public health crisis in American history."[20] Although Americans make up only five percent of the global population, Americans consume eighty percent of the world's opioids.[21] And for some of the most potent and dangerous kinds of opioids, the synthetic variety, Americans consume even more; Americans consume eighty-two percent of the world's oxycodone and more than ninety-nine percent of its hydrocodone.[22]

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16 *See, e.g.*, Press Release, Dick Durbin, U.S. Sen., Durbin Sends Letter to DEA Calling for Stricter Limits of Opioid Pills (July 19, 2016), https://www.durbin.senate.gov/newsroom/press-releases/durbin-sends-letter-to-dea-calling-for-stricter-limits-of-opioid-pills- [https://perma.cc/Z89C-8Y4L].

17 *See, e.g.*, Ted Gregory, *Collar Counties Target Opioid Manufacturers*, CHI. TRIB., Dec. 22, 2017, at 9; Jasper Scherer, *Bexar County Suing Opioid Manufacturers, Distributors*, SAN ANTONIO EXPRESS NEWS (Oct. 3, 2017, 10:06 PM), https://www.expressnews.com/news/local/article/Bexar-County-suing-opioid-manufacturers-12251102.php [https://perma.cc/6TCL-CFM9]; Nadia Kounang, *States Investigate Opioid Manufacturers*, CNN (June 16, 2017, 1:32 PM), https://www.cnn.com/2017/06/16/health/state-attorney-generals-investigate-opioids/index.html [https://perma.cc/TXV9-U2TF]; John C. Moritz, *6 States Sue Maker of OxyContin as They Battle Expenses, Human Costs of Opioid Crisis*, USA TODAY (May 16, 2018, 8:37 AM), https://www.usatoday.com/story/news/nation-now/2018/05/15/six-attorney-generals-opioid-lawsuits/612721002 [https://perma.cc/L2ZS-QZBW].

18 Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221 (2009).

19 *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (May 27, 2020), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis [https://perma.cc/AC2K-YKBF].

20 Neil Howe, *America's Opioid Crisis: A Nation Hooked*, FORBES (Nov. 30, 2017, 1:42 PM), https://www.forbes.com/sites/neilhowe/2017/11/30/americas-opioid-crisis-a-nation-hooked/#47f440f56a57 [https://perma.cc/5R3L-7AC7]; Jessica Bruder, *The Worst Drug Crisis in American History*, N.Y. TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/books/review/beth-macy-dopesick.html [https://perma.cc/QE6E-4BVZ].

21 Laxmaiah Manchikanti, Bert Fellows, Hary Ailinani & Vidyasagar Pampati, *Therapeutic Use, Abuse, and Nonmedical Use of Opioids: A Ten-Year Perspective*, 13 PAIN PHYSICIAN 401, 402 (2010).

22 *The Big List of Narcotic Drugs*, AM. ADDICTION CTRS. (June 22, 2021), https://americanaddictioncenters.org/the-big-list-of-narcotic-drugs [https://perma.cc/6HCW-WUY3]; Int'l Narcotics Control Bd., *Narcotic Drugs: Estimated World Requirements for 2009*, at 92, U.N. Doc. E/INCB/2008/2 (2009).

Beginning opioid use is a death sentence for thousands, and a ticket for addiction misery for millions of others. This, among many other dangers, was never mentioned in the opioid manufacturers' marketing push.

The opioid industry's public deception scandal, however, seemed to echo yet another very similar scandal in the news about a year prior. In 2015, two major media outlets revealed that recently uncovered internal corporate documents from ExxonMobil[23] showed that the company, the world's largest oil company,[24] had funded a massive campaign of climate change deception beginning in about 1990 and continuing through at least 2010.[25] Like the sugar industry's public deception, ExxonMobil spent millions to pay Harvard-affiliated academics to shill for the industry by publishing papers that supported the corporate campaign of climate change doubt.[26] Like the sugar and opioid industries, the public deception centered on downplaying, hiding, and outright lying about the dangers posed by the product being sold. Like sugar and opioids, the fossil fuel industry's deception has caused catastrophic harm, and will continue to be a destructive force for years to come. Sea-level rise, more frequent and stronger extreme

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23 Exxon Corporation and Mobil Oil Corporation signed an $80 billion merger agreement in 1998 to form a new company called ExxonMobil Corporation, the largest company in the world at the time. *See* Allen R. Myerson & Agis Salpukas, *Exxon and Mobil Announce $80 Billion Deal to Create World's Largest Company*, N.Y. TIMES (Dec. 2, 1998), https://www.nytimes.com/1998/12/02/business/big-oil-overview-exxon-mobil-announce-80-billion-deal-create-world-s-largest.html [https://perma.cc/LY93-8YPR]; *see also* Lauren Debter, *The World's Largest Oil and Gas Companies 2016: Exxon Is Still King*, FORBES (May 26, 2016, 3:06 PM), https://www.forbes.com/sites/laurengensler/2016/05/26/global-2000-worlds-largest-oil-and-gas-companies/?sh=40b393ae28b6 [https://perma.cc/5W39-UQLD]. This Article will refer to the company post-merger as "ExxonMobil," and pre-merger as "Exxon."

24 *See* sources cited *supra* note 23.

25 Neela Banerjee, Lisa Song & David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, INSIDE CLIMATE NEWS (Sept. 16, 2015), https://insideclimatenews.org/news/16092015/exxons-own-research-confirmed-fossil-fuels-role-in-global-warming [https://perma.cc/UXX4-DHFE]; Sara Jerving, Katie Jennings, Masako Melissa Hirsch & Susanne Rust, *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), https://graphics.latimes.com/exxon-arctic [https://perma.cc/6E7M-CWD3]; Susanne Rust, *Report Details How ExxonMobil and Fossil Fuel Firms Sowed Seeds of Doubt on Climate Change*, L.A. TIMES (Oct. 21, 2019, 4:00 AM), https://www.latimes.com/environment/story/2019-10-21/oil-companies-exxon-climate-change-denial-report [https://perma.cc/6XRP-AWDU].

26 Suzanne Goldenberg, *Work of Prominent Climate Change Denier Was Funded by Energy Industry*, GUARDIAN (Feb. 21, 2015, 4:32 PM), https://www.theguardian.com/environment/2015/feb/21/climate-change-denier-willie-soon-funded-energy-industry [https://perma.cc/8WLF-L2N3].

weather events, heatwaves, droughts, floods, and massive population displacement are all projected to take place in the coming decades.[27]

In the case of all three of these schemes to deceive the public—by the sugar, opioid, and fossil fuel industries—the modus operandi was, and is, the same. There is a product that is both profitable and destructive, but its destructiveness is not readily apparent because the causal connection between the product and the harm it causes can only be bridged with scientific knowledge. The companies selling the product tell the public that the science linking the product to the harm it causes is unsettled or unknown when, in fact, the science is well enough established to warrant regulation of the product and, in many cases, imposition of liability for harm caused by it.[28] The corporate message of scientific doubt or silence on the causal connection, in other words, does not square with what scientists know. This makes the assertion—or, in the case of an omission, silence—misleading or even false[29] but, under current tort law, those harmed by such deceptive practices have no claim against the wrongdoers.

The schemes carried out by the sugar, opioid, and fossil fuel industries, among others, fit within a category of wrongs I call "Public Deception Schemes to Conceal Product Dangers" or "PDCPD Schemes." Every PDCPD Scheme has three elements: (1) a company sells a deceptively dangerous product;[30] (2) the company knows or has

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27 *Special Report: Global Warming of 1.5°C: Impacts of 1.5°C Global Warming on Natural and Human Systems*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2018), https://www.ipcc.ch/sr15/chapter/chapter-3 [https://perma.cc/ED3S-VCTY].

28 *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. REV. 67, 70–71 (2010); Jerome O. Nriagu, *Clair Patterson and Robert Kehoe's Paradigm of "Show Me the Data" on Environmental Lead Poisoning*, 78 ENV'T RSCH. 71, 73 (1998); Lynne Peeples, *Fracking Industry Distorts Science to Deceive Public and Policymakers, Says Watchdog Group*, HUFFINGTON POST (Dec. 6, 2017, 10:20 PM), https://www.huffingtonpost.ca/entry/fracking-research-deceive_n_6724162?ri18n=true [https://perma.cc/NBQ5-VP8S]; PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 14–18 (1985); NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING 14, 24, 33 (2010); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 35, 41 (2003); William R. Freudenburg, Robert Gramling & Debra J. Davidson, *Scientific Certainty Argumentation Methods (SCAMs): Science and the Politics of Doubt*, 78 SOCIO. INQUIRY 2, 16 (2008); Martha McCabe, *Pesticide Law Enforcement: A View from the States*, 4 J. ENV'T L. & LITIG. 35, 51 (1989).

29 *See* Wes E. Henricksen, *Scientific Knowledge Fraud*, 97 OR. L. REV. 307, 329–38 (2019) (arguing that the scientific community's knowledge should serve as the baseline truth to determine truthfulness or falsity of a representation pertaining to scientific knowledge).

30 That is, the product poses a danger, but the danger is not readily apparent to non-experts. As pointed out by Caroline Cecot, "[t]he long average latency periods for various known disease-

reason to know that the product causes harm to human health, life, or the environment;[31] and (3) the company purposefully misleads the public about the dangers posed by the product, most often by hiding the causal link or raising doubt about the science bridging the gap between product and harm.[32] Where these three elements are met, it is a PDCPD Scheme. In addition to sugar, opioids, and fossil fuels, other PDCPD Schemes have come to light in the past few decades. They include companies selling tobacco, e-cigarettes, soft drinks, artificial sweeteners, fast food, processed food, prenatal drugs, pain killers, pesticides, formaldehyde, asbestos, agent orange, poisonous gasoline additives like Methyl tert-butyl ether (MTBE), cancer-causing brake pads, beauty products, baby powder, and lead-laced paint, gas, and toys.[33] This list is not exhaustive.

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causing substances—for example, twenty-five years for arsenic and eighteen years for asbestos—frustrate efforts to link any injury to the defendant's past conduct." Caroline Cecot, *The Data Gap: Promoting Analysis of Exposure-Related Harms*, 69 DEPAUL L. REV. 297, 300 (2020) (footnotes omitted). The hidden danger posed by a toxic product varies greatly from product to product. It is often, however, a threat either to human health, life, or the environment. *See, e.g.*, Ula Chrobak, *Coal Ash, Earthquakes, and Other Hazards Posed by Fossil Fuels*, POPULAR SCI. (Mar. 7, 2019, 6:00 PM), https://www.popsci.com/hazards-fossil-fuels [https://perma.cc/DER3-YCVV]; Associated Press, *Fossil Fuel Dependence Poses 'Direct Existential Threat', Warns UN Chief*, GUARDIAN (Sept. 11, 2018, 6:49 AM), https://www.theguardian.com/environment/2018/sep/11/fossil-fuel-dependence-poses-direct-existential-threat-warns-un-chief [https://perma.cc/2UEP-LABJ]; Yvette Cabrera, *There's Still Lead in Your Unleaded Gasoline—and It May Be Putting Kids at Risk*, THINKPROGRESS (Apr. 13, 2017, 3:55 PM), https://archive.thinkprogress.org/theres-still-lead-in-your-unleaded-gasoline-f0124ebdcb17 [https://perma.cc/PM8S-ET4T].

31 In short, if there is no knowledge of falsity, there is no deception. *See* S. Bldg. & Loan Ass'n v. Holmes, 149 So. 861, 861 (Ala. 1933) (noting that the plaintiff in a fraud case has "[t]he burden of establishing the falsity of the representations and *knowledge of their falsity*").

32 This could be an affirmative misrepresentation or an omission. Most often, the companies carrying out PDCPD Schemes employ some combination of these two deceptive methods. *See, e.g.*, ORESKES & CONWAY, *supra* note 28, at 14, 24, 33 (noting how the tobacco and fossil fuel industries mislead the public in similar ways about the destructiveness of their respective products).

33 *See* COMM. ON THE PUB. HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE FOR PURCHASING TOBACCO PRODS., PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS 91–128 (Richard J. Bonnie, Kathleen Stratton & Leslie Y. Kwan eds., 2015), https://www.ncbi.nlm.nih.gov/books/NBK310413 [https://perma.cc/5K8X-XDN7] (tobacco); Frederica Perera, *Pollution from Fossil-Fuel Combustion Is the Leading Environmental Threat to Global Pediatric Health and Equity: Solutions Exist*, 15 INT'L J. ENV'T RSCH. & PUB. HEALTH 16 (2017) (fossil fuel); Eur. Lung Found., *Ban E-Cig Flavors and Misleading Advertisements to Protect Youth, Says Global Respiratory Group*, SCIENCEDAILY (May 30, 2018), https://www.sciencedaily.com/releases/2018/05/180530192215.htm [https://perma.cc/NU6C-CAC2] (e-cigarettes); Brad Rodu, Opinion, *It's Time to Stop Confusing the Public with Sensationalist Rhetoric on E-Cigarettes*, COURIER J. (May 10, 2019, 12:37 PM), https://www.courier-journal.com/story/opinion/2019/05/10/vaping-e-cigarette-debate-has-been-plagued-misinformation/1152202001 [https://perma.cc/7XUG-W36R] (e-cigarettes);

The PDCPD Scheme definition is imperfect. Some may argue it is overinclusive, or that each distinct scheme should be addressed on its own merits rather than lumped into this broad category. What, after all, does lung cancer have to do with sea level rise? This view finds substantial support in the law because this is how the law today treats these schemes. But it is precisely this failure to lump such similar schemes together that has allowed them to flourish. So far, the companies carrying them out have evaded liability and, in the process, killed tens of millions of people, sickened millions more, and wreaked destruction on the environment.[34] If, however, we desire to punish or prohibit such schemes, we must first recognize what is going on. Pulling together the numerous PDCPD Schemes to reveal the breadth of the problem is an important first step.

Stanton A. Glantz et al., *FDA Should Prohibit E-Cigarette Marketing that Promotes False Health Claims*, CTR. FOR TOBACCO CONTROL RSCH. & EDUC., UNIV. OF CAL. S.F. (June 3, 2014), https://tobacco.ucsf.edu/fda-should-prohibit-e-cigarette-marketing-promotes-false-health-claims-public-comment [https://perma.cc/Y6AR-TYMD] (e-cigarettes); Anahad O'Connor, *Studies Linked to Soda Industry Mask Health Risks*, N.Y. TIMES (Oct. 31, 2016), https://www.nytimes.com/2016/11/01/well/eat/studies-linked-to-soda-industry-mask-health-risks.html [https://perma.cc/7MNK-UW8X] (soft drinks); Chase Purdy, *Coca-Cola Is Being Sued for Misleading People over the Healthfulness of Its Sodas*, QUARTZ (Jan. 4, 2017), https://qz.com/878091/coca-cola-is-subject-of-lawsuit-about-sugary-sodas-impact-on-health-and-obesity [https://perma.cc/Q6A6-S6A8] (soft drinks); Holly Strawbridge, *Artificial Sweeteners: Sugar-Free, but at What Cost?*, HARV. HEALTH PUBL'G (Jan. 29, 2020), https://www.health.harvard.edu/blog/artificial-sweeteners-sugar-free-but-at-what-cost-201207165030 [https://perma.cc/BX82-5WMX] (artificial sweeteners); Joel Fuhrman, *The Hidden Dangers of Fast and Processed Food*, 12 AM. J. LIFESTYLE MED. 375 (2018); Jennifer L. Harris & Samantha K. Graff, *Protecting Young People from Junk Food Advertising: Implications of Psychological Research for First Amendment Law*, 102 AM. J. PUB. HEALTH 214 (2012) (fast food and processed food); Barbara L. Thompson, Pat Levitt & Gregg D. Stanwood, *Prenatal Exposure to Drugs: Effects on Brain Development and Implications for Policy and Education*, 10 NATURE REVS. NEUROSCIENCE 303 (2009) (prenatal drugs); Barry Meier, *Sacklers Directed Efforts to Mislead Public About OxyContin, Court Filing Claims*, N.Y. TIMES (Jan. 15, 2019), https://www.nytimes.com/2019/01/15/health/sacklers-purdue-oxycontin-opioids.html [https://perma.cc/NUW4-2AKE] (opioid painkillers); Press Release, EPA, EPA Takes Action to Provide Accurate Risk Information to Consumers, Stop False Labeling on Products (Aug. 8, 2019), https://www.epa.gov/newsreleases/epa-takes-action-provide-accurate-risk-information-consumers-stop-false-labeling [https://perma.cc/W2MZ-5VUR] (pesticides); Cheryl Wischhover, *Johnson & Johnson Accused of Hiding the Asbestos in Its Baby Powder for Decades*, VOX (Dec. 14, 2018, 5:50 PM), https://www.vox.com/the-goods/2018/12/14/18141265/johnson-johnson-talc-asbestos-lawsuits-cover-up-stock-price [https://perma.cc/LMT2-SDMX] (asbestos); Robert T. Drew, *Misunderstood MTBE*, 103 ENV'T HEALTH PERSPS. 420, 420 (1995) (poisonous gasoline additives); Lisa Girion, *Johnson & Johnson Knew for Decades that Asbestos Lurked in Its Baby Powder*, REUTERS (Dec. 14, 2018, 2:00 PM), https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer [https://perma.cc/XD97-BHXL] (baby powder); Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color*, 41 HARV. ENV'T L. REV. 493 (2017) (lead-laced paint, gas, and toys).

34 *See* sources cited *supra* note 33.

Others may argue the exact opposite, that the PDCPD Scheme definition is *under*inclusive because it leaves out a number of public deception campaigns, such as those pertaining to guns, abortion, vaccinations, the teaching of evolution in school, military invasions, and foreign drone strikes. While these other "political public deception"[35] campaigns share many attributes with PDCPD Schemes, this article intentionally focuses only on companies misleading the public about dangers posed by their products, because many of these other schemes center more on political questions rather than commercial ones. Of course, an issue like climate change denial involves a mix of both commercial and political components. But, because the genesis of the public deception campaign by the fossil fuel industry is profit-seeking, this makes the political component of the issue a byproduct of the public deception campaign—a purposefully created byproduct, but a byproduct, nonetheless.

Moreover, avoiding political questions in this Article is also necessary to lessen or simplify, to the extent possible, the First Amendment issues this topic inevitably implicates.[36] This is not a constitutional law article. Instead, this article will focus on tort aspects of the issue, and, to a lesser extent, criminal law aspects. I recognize, however, that First Amendment concerns must be dealt with to make full and satisfactory progress on this issue. Those issues will need to be addressed by other scholarship.

The problem this article seeks to address is the fact that, because PDCPD Schemes do not fit into the existing tort framework, those harmed by such schemes often have no way to seek compensation from

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35 "Political public deception" will, in this Article, refer to politically-centered deceptive campaigns such as those carried out by those deceiving the public about guns, abortion, dangers posed by immigrants, and the like. On the other hand, "commercial public deception" refers specifically to the kinds of public deception campaigns carried out by companies and those working on their behalf, for profit. PDCPD Schemes, such as those by the sugar, opioid, and fossil fuel industries, to hide dangers posed by their products, are one species of commercial public deception.

36 For example, the Supreme Court in *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*) ruled that common law claims were displaced by the Environmental Protection Agency's authority to regulate greenhouse gas emissions under the Clean Air Act (CAA). In the Ninth Circuit, the court in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (*Kivalina*) held that the CAA displaced public nuisance claims. According to one author, *AEP* and *Kivalina* "might spell the end of climate change tort litigation in the federal courts." Quin M. Sorenson, Native Village of Kivalina v. ExxonMobil Corp.*: The End of "Climate Change" Tort Litigation?*, ABA (Jan. 1, 2013), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2012_13/january_february/native_village_kivalina_v_exxonmobil_corp_end_climate_change_tort_litigation [https://perma.cc/E8MH-GQ9P].

the wrongdoer.[37] Companies profit off of the public's inability to hold those companies liable for the harms they cause, and the public is left paying the costs of the harm purposefully caused by the makers of poisonous products.

This Article posits that one way to close this gap in tort law, though certainly not the only way,[38] would be for Congress or the state legislatures to pass a comprehensive set of laws aimed at prohibiting PDCPD Schemes and punishing those who carry them out. The gap in the law today, which allows manufacturers of poisonous products to evade liability by misleading the public, rather than any particular individual, is similar to the gap in the law in the early twentieth century which allowed securities fraud to go under-punished for a similar reason. Like PDCPD Schemes, massive securities fraud schemes were being carried out and the fraud laws were insufficient to deal with the problem for the same reason that fraud law today fails to deal adequately with PDCPD Schemes. Accordingly, and in reaction, the U.S. Congress passed Section 10(b) of the Securities Exchange Act of 1934 ('34 Act) to close that gap in the law.[39] This Article proposes that Congress or state legislatures pass a similar set of laws to close the gap that allows PDCPD Schemes to go on uninhibited and unpunished. Closing this gap would further numerous tort policy goals, including

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37 PDCPD Schemes are not adequately addressed by negligence, strict products liability, fraud, or any other tort doctrine. *See infra* Parts I–II. I am not the first to note this shortcoming in the tort law; at least one other author has proposed establishing a new fraud-based tort to address one PDCPD Scheme, climate change fraud. *See* James Parker-Flynn, *The Fraudulent Misrepresentation of Climate Science*, 43 ENV'T L. REP. NEWS & ANALYSIS 11098 (2013) (proposing a new civil cause of action for the fraudulent misrepresentation of climate science). Those who carry out PDCPD Schemes are, from time to time, convicted of crimes for the deceptions. *See, e.g.*, Gabrielle Emanuel & Vanessa Romo, *Pharmaceutical Executive John Kapoor Sentenced to 66 Months in Prison in Opioid Trial*, NPR (Jan. 23, 2020, 5:30 PM), https://www.npr.org/2020/01/23/798973304/pharmaceutical-executive-john-kapoor-sentenced-to-66-months-in-prison-in-opioid [https://perma.cc/Z9AT-NWW2] (pharmaceutical executive John Kapoor sentenced to sixty-six months in prison following opioid trial for RICO and fraud). But these criminal convictions not only fail to deter or adequately punish most who carry out PDCPD Schemes, but they also fail to provide adequate legal redress to injured plaintiffs, as detailed in Parts I and II of this Article.

38 One other possible solution would be Parker-Flynn's suggestion of a new tort cause of action for misrepresentation of climate change science. Parker-Flynn, *supra* note 37, at 11099. Another possible solution would be to treat public deceptions the way securities law treats fraud on the market, by inferring reliance by the fact that the representation was made to the public. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Fraud-on-the-Market Tort*, 66 VAND. L. REV. 1755, 1759–60 (2013) (exploring the role of fraud-on-the-market in the context of "impersonal deceits" in tort).

39 15 U.S.C. § 78j(b).

shifting the loss to those responsible for causing it and expanding the scope of liability for those who commit intentional, wrongful conduct.[40]

The Article proceeds in four parts. In Part I, I discuss the failure of common law fraud to adequately address the fraudulent PDCPD Schemes. There are historical and policy reasons fraud has been interpreted—wrongly, I argue—to exclude PDCPD Schemes. In Part II, I describe how other areas of tort likewise fail to adequately provide redress to victims harmed by PDCPD Schemes. This Part covers consumer protection laws, negligence, products liability, intentional torts, and nuisance. In Part III, I discuss how securities fraud, a form of public deception for gain, had, up until the 1930s, likewise been inadequately addressed by common law fraud, and how this gap in the law was closed by Congress's passage of Section 10(b) of the '34 Act. In Part IV, I propose that Congress or state legislatures pass a set of laws aimed at prohibiting PDCPD Schemes and punishing those who carry them out the way that Congress passed Section 10(b) of the '34 Act to prohibit and punish impersonal deceptions carried out in the securities markets. I also discuss how closing this gap in the tort law furthers several well-established policy aims.

I. PDCPD SCHEMES ARE FRAUDULENT IN NATURE BUT, UNDER THE LAW, THEY ARE NOT CONSIDERED *FRAUD*

Conduct deemed "fraudulent" is broadly prohibited and punished under the law. For instance, deceiving another for profit generally falls

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40 *See, e.g.*, Siegel v. Howell, No. CV 980409394S, 1999 WL 966540, at *4 (Conn. Super. Ct. 1999) (noting "[t]he policy purpose of shifting the loss to responsible parties"); Dragan M. Cetkovic, *Loss Shifting: Upstream Common Law Indemnity in Products Liability*, 61 DEF. COUNS. J. 75, 88 (1994) (discussing "the policy aim of shifting the total loss to the party responsible for the creation of the risk"); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 (AM. L. INST., Tentative Draft No. 1, 2015) (noting that "the principle that scope of liability should be expanded in the case of intentional torts is also a potent one, at least for those intentional tortfeasors who display significant culpability"); *see also* Alexander C. Kaufman, *Voters Back Liability for Companies that Mislead About Climate Change: Poll*, HUFFINGTON POST (Aug. 23, 2019, 3:26 PM), https://www.huffpost.com/entry/climate-liability_n_5d6025fae4b0b59d257433bd [https://perma.cc/ER7M-2GZ6] (discussing voters' support of the policy of imposing liability on those carrying out PDCPD Schemes); Lesley Fair, *Ad Agency to Pay $2 Million for Role in Deceptive Weight Loss and "Free" Offers*, FTC (Feb. 7, 2018, 10:50 AM), https://www.ftc.gov/news-events/blogs/business-blog/2018/02/ad-agency-pay-2-million-role-deceptive-weight-loss-free [https://perma.cc/GKN7-LHJD] (announcing a $2 million judgment against an ad agency for deceiving the public by making false claims with regard to weight loss products).

under the common law tort of fraud.[41] In addition, statutes prohibit mail and wire fraud, conspiring to commit any kind of fraudulent act, carrying on fraudulent business practices that harm consumers, and committing insurance and securities fraud.[42] But what *is* fraud, and what constitutes fraudulent conduct? Who gets to decide? And how does that definition relate to PDCPD Schemes?

Fraud is generally considered to occur where Person A lies to Person B, by making either a material misrepresentation or material omission, to trick Person B into believing the lie and justifiably relying on it to Person B's detriment, and to Person A's benefit. This is the basis for common law fraud.[43] It involves a deception, a benefit received by the one doing the deceiving, and harm to the victim caused by the deception and the reliance thereon.[44]

Not every instance of what is considered legal fraud, however, fits this fact pattern exactly. Take, for example, the reliance requirement. Although some jurisdictions require that the victim "justifiably" or "reasonably" rely on the misrepresentation or omission,[45] other jurisdictions require only actual reliance.[46] Securities fraud does away with the first-person reliance requirement entirely. A plaintiff in a securities fraud case is presumed to have relied on the defendant's

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41 *See, e.g.*, West v. JPMorgan Chase Bank, N.A., 154 Cal. Rptr. 3d 285, 295 (Ct. App. 2013) (California common law fraud); GEICO Gen. Ins. Co. v. Hoy, 136 So. 3d 647, 651 (Fla. Dist. Ct. App. 2013) (Florida common law fraud); Norddeutsche Landesbank Girozentrale v. Tilton, 48 N.Y.S.3d 98, 105 (App. Div. 2017) (New York common law fraud); Zaidi v. Shah, 502 S.W.3d 434, 441 (Tex. App. 2016) (Texas common law fraud); Adelphia Recovery Tr. v. Bank of Am., 624 F. Supp. 2d 292, 325–26 (S.D.N.Y. 2009) (Pennsylvania common law fraud).

42 *See, e.g.*, 18 U.S.C. § 1341 (federal mail fraud); 18 U.S.C. § 1343 (federal wire fraud); CAL. CORP. CODE § 25401 (West 2016) (California securities fraud); FLA. STAT. § 517.301 (2021) (Florida securities fraud); N.Y. GEN. BUS. LAW §§ 352, 353 (McKinney 2021) (New York securities fraud); TEX. REV. CIV. STAT. ANN. art. 581-33-1 (West 2021) (Texas securities fraud); 17 C.F.R. § 240.10b-5 (2011) (federal securities fraud).

43 *See* statutes cited *supra* note 42; Vichi v. Koninklijke Philips Elecs., N.V., 85 A.3d 725, 773 (Del. Ch. 2014); Debbs v. Chrysler Corp., 810 A.2d 137, 155 (Pa. Super. Ct. 2002).

44 *See* cases cited *supra* note 41.

45 For example, under North Carolina law, to support a fraud claim, any reliance on the allegedly false representations must be reasonable. Taylor v. Bettis, 976 F. Supp. 2d 721, 741 (E.D.N.C. 2013). To plead a claim for fraud in the inducement or fraudulent concealment under New York law, plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations. ACA Fin. Guar. Corp. v. Goldman, Sachs & Co., 32 N.E.3d 921, 922 (N.Y. 2015); *see also* 37 AM. JUR. 2D *Fraud and Deceit* § 231, Westlaw (database updated Feb. 2021), and cases cited therein.

46 Under Oklahoma law, liability for fraudulent misrepresentation depends upon whether the person relying on misrepresentation was in fact deceived, and not upon whether an ordinarily prudent person should have been misled. Schlanger Ins. Tr. v. John Hancock Life Ins. (U.S.A, Inc.), 897 F. Supp. 2d 1109, 1119 (N.D. Okla. 2012).

material misrepresentations or omissions.[47] Accordingly, the plaintiff need not normally allege or prove actual reliance in most securities fraud cases.[48] That is, it is often irrelevant whether the shareholder plaintiff ever even saw or knew of the material misrepresentations he or she "relied" on.

Sometimes, reliance on a representation made not by the defendant, but by some other third party, is enough. This is the so-called "indirect reliance" doctrine.[49] This doctrine applies where a plaintiff received the misleading representation from someone who had received it, directly or indirectly, from the defendant, and the defendant either intended the misrepresentation to be conveyed to the plaintiff or should have known that it could have been so conveyed.[50] It also applies where a misrepresentation is communicated to an agent of the plaintiff, and the agent acts upon it to the plaintiff's damage.[51] A fraud claim based on "indirect reliance" may also lie where there is a chain of fraudulent representations which are repeated by one victim to another. "[I]n such a situation, it must be shown that the defendant made the misrepresentations or omissions directly to one victim, who then repeated the misrepresentations or omissions to another, who thus was an indirect recipient of the defendant's communications."[52]

Reliance is not the only element where exceptions are made. Although fraud claims often require that a plaintiff's damages arise out of reliance on the misrepresentation or omission, the U.S. Supreme Court has held that legal injury from a fraudulent misrepresentation is not limited to only those who rely on it.[53] For example, plaintiffs in a civil RICO action were held to be able to seek damages against a defendant who committed fraudulent acts even absent any showing of having relied on the defendant's misrepresentations.[54]

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47 Affiliated Ute Citizens v. United States, 406 U.S. 128, 153 (1972); Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988).

48 *Affiliated Ute Citizens*, 406 U.S. at 153; *Basic Inc.*, 485 U.S. at 247.

49 *See* 37 AM. JUR. 2D *Fraud and Deceit* § 232, Westlaw (database updated May 2021).

50 Amusement Indus., Inc. v. Stern, 786 F. Supp. 2d 758, 772–73 (S.D.N.Y. 2011) (applying New York law).

51 Lovejoy v. AT&T Corp., 111 Cal. Rptr. 2d 711, 718 (Ct. App. 2001).

52 37 AM. JUR. 2D *Fraud and Deceit* § 232, Westlaw (database updated May 2021) (citing Gawara v. U.S. Brass Corp., 74 Cal. Rptr. 2d 663 (Ct. App. 1998)). "Thus, if a party to a transaction makes a false statement to another party, intending or knowing that the other party in the transaction will hear it and rely on it, and the second party to the transaction actually hears the substance of the misrepresentation, by means however attenuated, and considers the actual content of that misrepresentation when making the decision to complete the transaction, then that person has established 'indirect reliance' sufficient to support a fraud claim." *Id.* (citing Kaufman v. i-Stat Corp., 754 A.2d 1188 (N.J. 2000)).

53 Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 661 (2008).

54 *Id.*

There is also a wide variance among different jurisdictions and kinds of fraud claims with regard to who may secure redress for fraud. The answer to this question generally depends upon the elements of the cause of action in question, what acts constituted the fraud or misrepresentation, and who has been injured thereby.[55] Generally, those within the foreseeable purview of relying on the fraud and who are injured thereby have recourse.[56] Particular rules, however, may limit who is entitled to relief, which also varies by jurisdiction, such as requirements of privity[57] or that the party seeking redress be the party the fraud was intended to deceive.[58] That is, in general the fraud must have been directed toward the person bringing the fraud claim in the sense that this was a person intended to act upon it.[59] But in some jurisdictions the connection between plaintiff and defendant may be, as discussed above, indirect and nevertheless a fraud claim may lie.[60]

Moreover, securities fraud allows a plaintiff to sue a defendant even if the defendant could not have foreseen that that particular plaintiff would have relied on and been damaged by the misrepresentation or omission.[61] This is also true of consumer protection laws, which allow a damaged consumer to sue a defendant for deceptive business practices even when there is no relationship at all between the plaintiff and defendant.[62]

Taken together, the full scope of the various fraud-based laws generally prohibits and punishes those who purposefully deceive others for profit.[63] And where someone is foreseeably damaged by reliance on the deception, tort law provides such harmed individuals recourse to seek redress.[64]

Although PDCPD Schemes fit within the broader scope of fraudulent conduct—that is, they are deceptions for profit, which result

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55 37 AM. JUR. 2D *Fraud and Deceit* § 281, Westlaw (database updated Feb. 2021).

56 Fremont Fin. Corp. v. IPC/Levy, Inc., 994 F. Supp. 988 (N.D. Ill. 1998); John Beaudette, Inc. v. Sentry Ins. A Mut. Co., 94 F. Supp. 2d 77 (D. Mass. 1999); Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101 (Ct. App. 1998); Hendon Props., LLC v. Cinema Dev., LLC, 620 S.E.2d 644 (Ga. Ct. App. 2005).

57 37 AM. JUR. 2D *Fraud and Deceit* §§ 282–285, Westlaw (database updated Feb. 2021).

58 Pegram v. Hebding, 667 So. 2d 696, 702–03 (Ala. 1995).

59 *Id.* On the other hand, liability for negligent misrepresentation on the part of a defendant who is under a public duty to give information extends to a loss suffered by any of the class of persons for whose benefit the duty is created in any of the transactions in which it is intended to protect them. Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 337 (Fla. 1997).

60 Herpich v. Wallace, 430 F.2d 792, 804 (5th Cir. 1970).

61 SEC v. Apuzzo, 689 F.3d 204, 213 (2d Cir. 2012).

62 Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co., 543 A.2d 1020, 1026 (N.J. Super. Ct. App. Div. 1988).

63 *See supra* note 42.

64 *See supra* notes 41, 45–46.

in damage to innocent persons as a result of reliance on the deceit—they are almost never considered to be within the purview of fraud law. The damage to human health and life, as well as to the environment, resulting from this large loophole in the fraud laws is well documented.[65] The question is why PDCPD Schemes are not treated as fraud, and whether the current state of the law is desirable and, if not, whether and how it can be changed.

Below, I will briefly discuss the problem, which is that PDCPD Schemes fall outside what is considered fraud under today's law. If another tort doctrine filled the gap, then this might fix the problem.[66] However, no other tort adequately addresses PDCPD Schemes, as discussed in Part II. Each of these issues is addressed, in turn, below.

A. Civil Fraud Law Has, Since Its Emergence in the Eighteenth Century, Far Better Addressed Personal Deceptions than Impersonal Ones

Fraud first appeared as an independent tort in the 1789 case of *Pasley v. Freeman*.[67] Up to that point in time, there was no law against deceiving for profit, except as between parties to a contract.[68] Absent a contract, it was perfectly permissible to profit off of lies about the quality or safety of a product, the authenticity of a work of art, or the creditworthiness of a buyer.[69] Any harm to the victim resulting from believing or relying on the deception was not redressable in tort.

After fraud appeared in *Pasley*, it grew and developed over time through English and American jurisprudence. The case of *Derry v. Peek*,[70] decided exactly one hundred years after *Pasley*, set out the fraud test still used today in common law jurisdictions all over the world. As has been pointed out elsewhere,[71] the outcomes of these two seminal fraud cases reflect the early development of fraud law as a remedy far

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65 *See supra* note 33; Henricksen, *supra* note 29, at 308–09.

66 Moreover, First Amendment and standing issues further cloud the picture. These will not, however, be addressed in this Article. *See supra* note 36 and accompanying text.

67 Pasley v. Freeman [1789] 100 Eng. Rep. 450 (K.B.) (false credit recommendation of customer to seller).

68 Christel Croxen, *Fraud—Rights of Action and Defenses: Statute of Frauds Does Not Preclude the Assertion of a Deceit Claim*, 87 N.D. L. REV. 743, 747 (2011).

69 *Id.*

70 Derry v. Peek, [1889] 14 App. Cas. 337 (UKHL) (appeal taken from Eng.) (false representations made in shareholder prospectus).

71 *See, e.g.*, Croxen, *supra* note 68, at 747–48 (noting the seminal stature of *Pasley* and *Derry* in fraud law); Leon Green, *The Communicative Torts*, 54 TEX. L. REV. 1, 26 (1975) (noting the same as above).

more accessible to those harmed by personal deceptions than to those harmed by impersonal deceptions.

In *Pasley*, the defendant purposefully deceived the plaintiff, a store owner, by claiming a customer placing a large order on credit was creditworthy, solvent, and trustworthy, when in fact the defendant knew the customer likely would not pay for the goods.[72] In fact, the customer disappeared and never made payment, resulting in significant loss for the plaintiff.[73] The court there recognized that, under the law, no action existed to redress this kind of deception.[74] It then went on to rule in the plaintiff's favor anyway, inventing the tort of fraud with the stroke of a pen.[75]

The deception in *Pasley* was personal in nature. It was one-on-one; the defendant personally promised the plaintiff that the customer he was selling merchandise to on credit was "good for it." The defendant induced the plaintiff to sell on credit to an uncreditworthy customer. As a result of the defendant's purposeful deception, the plaintiff lost money. After *Pasley*, this type of deception became the tort of deceit, now often called fraud.[76]

Derry, on the other hand, involved impersonal deception: securities fraud on the public. There, the defendant railway company issued a prospectus to attract investors that stated the company had obtained a government permit to begin using steam or mechanical power for all of its trains rather than the usual horse-drawn power.[77] This, the prospectus predicted, would result in great savings and increased profitability.[78] The plaintiff, after reading the prospectus, bought shares in the defendant's company.[79]

In fact, the company had not obtained a permit to operate on steam or mechanical power.[80] But the directors of the company, who drafted and approved the prospectus, sincerely thought the company would obtain the permit.[81] Such permits were, at the time, almost always issued as a matter of course.[82] Notwithstanding this, the railway company's application for the permit was, shortly after the plaintiff bought shares,

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72 Pasley v. Freeman [1789] 100 Eng. Rep. 450 (K.B.).

73 *Id.* at 451.

74 *Id.* at 453.

75 *Id.* at 457.

76 *See* Calandro v. Parkerson, 936 S.W.2d 755, 759 (1997) (noting that the appellants' claim for "deceit" is "also known as fraud or misrepresentation").

77 Derry v. Peek [1889] 14 App. Cas. 337 (UKHL) 337–38 (appeal taken from Eng.).

78 *Id.* at 338.

79 *Id.*

80 *Id.* at 338–40.

81 *Id.* at 340–41.

82 *Id.* at 378–79.

denied.[83] This denial relegated the company to horse-drawn power, which was quickly falling out of use.[84] The company shortly thereafter went bankrupt and folded.[85]

The plaintiff sued the directors of the company for deceit.[86] The directors argued that they could not have defrauded the plaintiff because even if their representations in the prospectus turned out to be mistaken, they had sincerely believed the representations when they made them.[87] Lord Herschell authored the opinion of the House of Lords which ruled in favor of the defendants.[88]

In the court opinion, Herschell conceded that the prospectus's claim that the company had received a permit to operate steam or mechanical powered trains was "in some respects inaccurate and not altogether free from imputation of carelessness."[89] But, Herschell held, the claim to have obtained a permit was nevertheless "a fair, honest and bonâ fide statement on the part of the defendants, and by no means exposes them to an action for deceit."[90] In so holding, Herschell emphasized the fact that the company directors honestly believed they would obtain the permit and that they had a reasonable basis for such belief.[91] The court opinion then set forth the test to determine whether a false statement is considered fraudulent: "fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."[92] This three-pronged definition is still good law today.[93]

The court's decision in *Derry* is, on one hand, confounding. After all, the court holds that because the directors sincerely believed that the company *would obtain* the permit, it was not fraudulent for them to state in a prospectus that the company *had obtained* the permit. Even if the directors sincerely believed the former proposition, why should it be permissible for them to affirmatively represent a proposition differently from what they believed? This is the confounding part of the

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83 *Id.* at 338.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* at 378–79.

88 *Id.* at 380.

89 *Id.*

90 *Id.*

91 *Id.* at 378–79.

92 *Id.* at 374.

93 *See, e.g.*, Innerimages, Inc. v. Newman, 579 S.W.3d 29, 42 (Tenn. Ct. App. 2019) ("An action for fraud requires proof of . . . knowledge that the representation was false—that the misrepresentation was made knowingly or recklessly or without belief or regard for its truth . . . .").

opinion. On the other hand, the *Derry* decision conforms perfectly to the trend running through early fraud cases whereby defendants in impersonal deception cases were treated far more deferentially than defendants in personal deception cases.[94] In *Derry*, Herschell found a reason to rule in the defendant's favor, albeit a reason unsupported even by the court's own holding, because impersonal deceptions are treated unequally to personal deceptions.[95]

As a result, the modern elements of common law fraud practically require that the deception be personal.[96] Indeed, some have gone so far as to say that fraud is "entirely personal"[97] or that a personal deception is absolutely necessary for any fraud action to lie.[98] This nearly exclusive focus on personal deceptions is also unsurprising given the origin of fraud as arising out of contract-based claims; prior to *Pasley*, only parties to a contract could seek redress for being deceived to their detriment.[99]

However, many kinds of deception that benefit the one doing the misleading and result in harm to others do not arise out of personal deceptions. Fraud on the public through the spread of misinformation has, throughout recent history, been widespread and highly profitable.[100] Securities fraud is one example of this kind of fraud on the public. Unlike most other kinds of fraud on the public, securities fraud claims have long been litigated under fraud doctrine.[101] As explained in more detail in Part III below, however, fraud law fell short of adequately addressing securities fraud claims, necessitating congressional

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94 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) (describing how American law during the eighteenth and nineteenth centuries developed in a way to increasingly protect wealth and property).

95 This disparate treatment under fraud law between personal and impersonal deceptions can be seen not only in *Pasley* and *Derry*, but in other early fraud cases as well. *See* Wes Henricksen, Fraud Law and Misinfodemics 33 n.98 (Apr. 20, 2021) (unpublished manuscript), http://ssrn.com/abstract=3773760 [https://perma.cc/DR2M-EQUW] (examining the development of early fraud law in the United States and noting the higher success rate of plaintiffs in impersonal fraud cases compared with the success rate of plaintiffs in personal fraud cases).

96 *See supra* note 41.

97 United States v. Ragland, 72 F.3d 500, 503 (6th Cir. 1996).

98 John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1002–03 (2006).

99 Croxen, *supra* note 68, at 747.

100 *See* Henricksen, *supra* note 95, pts. I, IV (unpublished manuscript) (discussing the history and development of fraud on the public through spreading misinformation).

101 *See* Mark A. Helman, *Rule 10B-5 Omissions Cases and the Investment Decision*, 51 FORDHAM L. REV. 399, 399–400 (1982) (explaining that a securities fraud cause of action was originally based on common law fraud); Jill E. Fisch, *The Trouble with Basic: Price Distortion After* Halliburton, 90 WASH. U. L. REV. 895, 900 (2013) (noting that common law fraud "served as the initial source of the elements of federal securities fraud").

intervention, in large part because of the impersonal nature of the deceptions involved.

Does this mean that impersonal deceptions are simply outside the scope of fraud? Perhaps. But even if this is the case under contemporary fraud law, it begs the question of whether impersonal deceptions *should be* outside the scope. This gap in the fraud law permits massive deception schemes whereby companies purposefully mislead the public into doubting whether products pose major risks that the products actually do pose—and the manufacturers know they pose. This makes this question as urgent now as it ever was.

B. *PDCPD Schemes Are Impersonal Deceptions that Emerged Only in the Twentieth Century; Those Who Carry Them Out Have Almost Completely Evaded Civil Fraud Liability*

The PDCPD Scheme, as described in this Article, did not exist until the 1920s. Up to that point, the only major category of schemes to defraud the public for gain that was of major public concern was securities fraud. As discussed below in Part III, this shortcoming in the fraud law was addressed in the 1930s.

PDCPD Schemes are different from securities fraud schemes in some ways. But the two schemes share important parallels. Perhaps the first major successful PDCPD Scheme was carried out by the makers and sellers of leaded gasoline. The story of leaded gas is the story of every PDCPD Scheme.

1. Leaded Gas

Lead, a known poison, was purposefully added to gasoline and then pumped out of exhaust pipes all over the world. It poisoned the air, land, and sea. Everyone alive between 1940 and 1990 suffered at least minor lead poisoning. Those making money off of leaded gas spent millions to hide the dangers of their product. As a result, they made billions.[102]

Lead was not, and never was, a necessary ingredient of gasoline. Gas does not naturally have lead in it, and adding lead was never about

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102 The account herein about the leaded gas PDCPD Scheme will be extremely brief. The story of leaded gas is told far more comprehensively in other places. *See, e.g.*, Jamie Lincoln Kitman, *The Secret History of Lead*, NATION (Mar. 2, 2000), https://www.thenation.com/article/archive/secret-history-lead [https://perma.cc/PT3Z-ZKMA]; Paul Brown, *Firms 'Knew of Leaded Petrol Dangers in 20s'*, GUARDIAN (July 12, 2000, 8:40 PM), https://www.theguardian.com/environment/2000/jul/13/uknews [https://perma.cc/5EMA-GA98].

customer satisfaction or performance. It was about profits. The benefits of lead were wildly and knowingly overstated to justify its use. In fact, lead is actually *bad* for car engines, a fact pointed out by leading automotive experts.[103] But while lead is bad for cars and even worse for human, animal, and plant life, it was a goldmine for those making and selling it. General Motors (GM), DuPont, and Exxon[104] launched a public relations campaign to convince the public that tetraethyl lead, or TEL, one of the most dangerous forms of lead ever discovered, is the only way to make gas perform well. They called it a "gift from god."[105] But these companies were lying. Lead did nothing that other alternative additives could not do. This was admitted by GM at the time (in private), and later confirmed when the government banned leaded gasoline in the '80s and the gas companies phased it out without delay or problem.[106] There were always other options out there.[107]

So why did they use lead? It was patentable.[108] Many other effective fuel additive options at the time were alcohol-based.[109] There was no way to exclusively produce or distribute them. Only TEL, which GM and DuPont patented, could be controlled and, therefore, exploited for profit.[110] These companies held the exclusive right to make it, mix it with gasoline, and sell it to service stations and drivers.

The dangers of TEL were known long before its use in gasoline. Who knew about the dangers? First and foremost, GM, DuPont, and Exxon knew. Internal memos and correspondence now in the public

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103 Kitman, *supra* note 102.

104 *See supra* note 25. I will refer to the company here as "Exxon" even though at the time the company went by the name Standard Oil Company of New Jersey.

105 U.S. Public Health Service, Public Health Bulletin No. 158, Proceedings of a Conference to Determine Whether or Not There Is a Public Health Question in the Manufacture, Distribution, or Use of Tetraethyl Lead Gasoline, GPO, Washington, DC, 1925; *see also* Jerome O. Nriagu, *The Rise and Fall of Leaded Gasoline*, 92 SCI. TOTAL ENV'T 13, 15–16 n.7 (1990). Notably, the claim that a toxic or fraudulent product is a "gift from god" has been used repeatedly in numerous schemes. For instance, Elizabeth Holmes claimed that her blood testing product, Theranos' Edison machine, was a "gift from god." *See* THE INVENTOR: OUT FOR BLOOD IN SILICON VALLEY (HBO 2019); *see also Man Indicted in Peachtree City Ponzi Scheme*, ATLANTA BUS. CHRON. (Sept. 23, 2010, 11:24 AM), https://www.bizjournals.com/atlanta/stories/2010/09/20/daily35.html [https://perma.cc/4DJT-K5GM] (noting that the perpetrator of a massive Ponzi scheme that bilked investors out of more than $15 million "often told potential investors that he believed his success in ForEx trading was a blessing and gift from God").

106 Kitman, *supra* note 102.

107 *Id.*

108 John W. Schlicher, *The New Patent Exhaustion Doctrine of* Quanta v. LG*: What It Means for Patent Owners, Licensees, and Product Customers*, 90 J. PAT. & TRADEMARK OFF. SOC'Y 758, 818 (2008); *see also* C. Boyden Gray & Andrew R. Varcoe, *Octane, Clean Air, and Renewable Fuels: A Modest Step Toward Energy Independence*, 10 TEX. REV. L. & POL. 9, 18–19 (2005).

109 Kitman, *supra* note 102.

110 *Id.*; Schlicher, *supra* note 108, at 818.

domain confirm this.[111] In March 1922, for example, before the patent application was even filed, Pierre du Pont wrote to his brother Irénée du Pont, the DuPont company chairman, that TEL is "a colorless liquid of sweetish odor, very poisonous if absorbed through the skin, resulting in lead poisoning almost immediately."[112] DuPont, GM, and Exxon would, in the coming years and decades, adamantly deny any knowledge of TEL's risks.[113]

The dangers of TEL were known outside of the leaded gas industry as well. Leading U.S. public health experts railed against the idea of putting lead into gas. These included Alice Hamilton, the first woman appointed to the Harvard faculty, and Yandell Henderson of Yale, the country's foremost expert on poison gases and automotive exhaust.[114] Henderson, for example, warned that by putting lead in gas "the atmosphere might be polluted to such an extent along automobile thoroughfares that those who worked or lived along such streets would gradually absorb lead in sufficient quantities to poison them in the course of months."[115] Henderson then made a prediction:

> Perhaps if leaded gasoline kills enough people soon enough to impress the public, we may get from Congress a much-needed law and appropriation for the control of harmful substances other than foods. But it seems more likely that the conditions will grow worse so gradually and the development of lead poisoning will come on so insidiously (for this is the nature of the disease) that leaded gasoline will be in nearly universal use and large numbers of cars will have been sold that can run only on that fuel before the public and the Government awaken to the situation.
>
> This is probably the greatest single question in the field of public health that has ever faced the American public. It is the question whether scientific experts are to be consulted, and the action of Government guided by their advice, or whether, on the contrary, commercial interests are to be allowed to subordinate every other consideration to that of profit.[116]

As Henderson correctly pointed out, the dangers posed by lead are slow and, in most cases, minute. Lead builds up in the body over time

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111 Kitman, *supra* note 102.

112 *Id.*

113 *Id.*

114 *See, e.g.*, Alice Hamilton, Paul Reznikoff & Grace M. Burnham, *Tetra-Ethyl Lead*, 84 JAMA 1481, 1485–86 (1925); William Kovarik, *Ethyl–Leaded Gasoline: How a Classic Occupational Disease Became an International Public Health Disaster*, 11 INT'L J. OCCUPATIONAL & ENV'T HEALTH 384 (2005).

115 Kitman, *supra* note 102.

116 *Id.*

and poisons humans, much like the slowly heating water experiment kills the frog before he is even aware he is in danger.[117] Like tobacco, asbestos, fast food, and other health hazards that kill or sicken slowly over a long period of time, lead poisoning is often a slow-moving bullet. That does not make it less dangerous, it makes it more. Almost nobody poisoned by lead knows they were poisoned by lead, or even poisoned at all. We now know, however, that millions had their lives altered or ended because of the lead that built up in their bodies on account of environmental exposure to lead from car exhaust.[118]

Leaded gas, like all products sold through PDCPD Schemes, caused massive and widespread harm to health, life, and the environment, but, like all such products, the causal connection between the product and the harm it causes was invisible to the general public and could be bridged only by experts. Although leading toxicity and environmental experts pushed to keep lead out of gas, the industry used its wealth and power to push U.S. regulators to keep their hands off of their product,[119] and paid their own experts and think tanks to produce

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117 *See* A.D. Beattie, M.R. Moore & A. Goldberg, *Tetraethyl-Lead Poisoning*, 300 LANCET 12 (1972).

118 Kitman, *supra* note 102; COMM. ON MEASURING LEAD IN CRITICAL POPULATIONS, NAT'L RSCH. COUNCIL, MEASURING LEAD EXPOSURE IN INFANTS, CHILDREN, AND OTHER SENSITIVE POPULATIONS 123–27 (1993); *Odd Gas Kills One, Makes Four Insane*, N.Y. TIMES (Oct. 27, 1924), https://www.nytimes.com/1924/10/27/archives/odd-gas-kills-one-makes-four-insane-stricken-at-work-in-standards.html [https://perma.cc/7CMF-KUNT].

119 The efforts of GM, DuPont, and Exxon were so effective that the U.S. government's actions helped the polluters rather than the public. It did this in two primary ways. First, the government regulators refused to ban, limit, or even regulate TEL in gasoline. Kitman, *supra* note 102. On the contrary, though the dangers of lead were known, U.S. regulators sided with the industry and supported it for decades. *Id.* This left the industry to essentially regulate itself. The second thing the U.S. government did was to refuse to fund any research into the dangers of leaded gasoline. *Id.* Instead, all such research was underwritten by the leaded gas cabal, GM, DuPont, and Exxon, and the results of this research, decade after decade, were always favorable to the industry. Clair Patterson testified as follows to a U.S. Senate subcommittee on air and water pollution in 1966:

> It is clear, from the history of development of the lead pollution problem in the United States that responsible and regulatory persons and organizations concerned in this matter have failed to distinguish between scientific activity and the utilization of observations for material purpose. [such utilization] is not science . . . it is the defense and promotion of industrial activity. This utilization is not done objectively. It is done subjectively. . . . It is not just a mistake for public health agencies to cooperate and collaborate with industries in investigating and deciding whether public health is endangered—it is a direct abrogation and violation of the duties and responsibilities of those public health organizations. In the past, these bodies have acted as though their own activities and those of lead industries in health matters were science, and they could be considered objectively in that sense.

Nriagu, *supra* note 28, at 76.

studies, articles, and media talking points that raised doubt about the harm caused by leaded gas.

A small handful of "rented white coat" scientists shilled for the leaded gas industry and were paid large amounts of money to do so.[120] These included Thomas Midgley and Robert Kehoe.[121] Midgley has been described as, among other distinctions, "The Man Who Harmed the World the Most," and "The Man Who Poisoned Us All."[122] Kehoe, for his part, has been credited with making leaded gas possible and profitable for more than five decades, from the mid-1920s to the 1970s, when Clair Patterson's heroic efforts finally succeeded in putting a stop to lead in gas.[123]

Lead poisoned millions, if not billions, of people. In the 1960s, Clair Patterson's work showed that lead levels were, on average, six thousand times higher in modern humans—almost all modern humans—than it had been in humans thousands of years ago. The only source of worldwide lead contamination was leaded gas, and specifically from the exhaust fumes that puffed out of exhaust pipes and into the atmosphere, where it was carried by winds, rivers, and currents to every corner of the globe. This opened up a whole new area of study: the

120 *See* Kovarik, *supra* note 114; David Heath, *Meet the 'Rented White Coats' Who Defend Toxic Chemicals*, VICE NEWS (Feb. 8, 2016, 5:05 AM), https://www.vice.com/en_us/article/8x3vjb/meet-the-rented-white-coats-who-defend-toxic-chemicals [https://perma.cc/53SL-VQUY].

121 Kovarik, *supra* note 114.

122 Susan Fourtané, *Thomas Midgley Jr.: The Man Who Harmed the World the Most*, INTERESTING ENG'G (Aug. 6, 2018), https://interestingengineering.com/thomas-midgley-jr-the-man-who-harmed-the-world-the-most [https://perma.cc/9627-VG2C]; Hugh Iglarsh, *The Man Who Poisoned Us All*, COUNTERPUNCH (Mar. 25, 2011), https://www.counterpunch.org/2011/03/25/the-man-who-poisoned-us-all [https://perma.cc/HQY9-MF97]. Environmental historian J.R. McNeill opined that Midgley "had more impact on the atmosphere than any other single organism in earth history." J.R. MCNEILL, SOMETHING NEW UNDER THE SUN: AN ENVIRONMENTAL HISTORY OF THE TWENTIETH–CENTURY WORLD 111 (2000). And author Bill Bryson remarked that Midgley possessed "an instinct for the regrettable that was almost uncanny." BILL BRYSON, A SHORT HISTORY OF NEARLY EVERYTHING 151 (2003). Midgley's boss at GM, who was also Midgley's mentor, Charles Kettering, said in 1927, "I was taught that a scientist is a man who works at his subject for the sake of the subject alone, and that a man who works on a scientific project with the idea of selling it has no right to be associated with science. . . . I have since learned that a bank account in the black is the popular applause of a scientific accomplishment." Iglarsh, *supra* note 122.

123 Herbert L. Needleman, *Clair Patterson and Robert Kehoe: Two Views on Lead Toxicity*, 78 ENV'T RSCH. 79 (1998); Lucas Reilly, *The Most Important Scientist You've Never Heard of*, MENTAL FLOSS (May 17, 2017), https://www.mentalfloss.com/article/94569/clair-patterson-scientist-who-determined-age-earth-and-then-saved-it [https://perma.cc/SR7M-SPL7].

measure of just how many people had been poisoned by lead, and how badly they had been poisoned.[124]

The results were astounding. Lead had permanently stunted neurological development in millions of children, causing permanent learning disabilities, mental problems, anxiety disorders, and a significant drop in IQ level. It also increased violence and criminality, not only in individuals, but for entire communities. This was actually measurable. Violence and criminal activity dropped in the '80s and '90s as lead levels plummeted after the banning of leaded gas. There were also millions of worldwide cases of acute lead poisoning from, for instance, children accidently splashing themselves with gas at a gas pump.

Civil lawsuits against those responsible for manufacturing and selling leaded gas began to trickle in during the 1930s.[125] These suits were for negligence, products liability, and nuisance.[126] These lawsuits went nowhere. Courts were unconvinced that leaded gas makers, who were allowed by government regulation to make and sell leaded gas, should be liable for harms caused thereby. It was seen as a political question, or one already decided by another branch of government.[127] Accordingly, it was not the place of the judiciary to infringe on this area of law.

The leaded gas PDCPD Scheme was never viewed in any appreciable way as a matter of fraudulent conduct, but rather as a regulatory matter to be addressed by the EPA and other regulatory agencies.[128] Those responsible for putting TEL in gas successfully carried out a massive campaign of deception for profit, which in turn

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124 Klara Nedrelow, *Using ToxicDocs in the Classroom: The Tetraethyl Lead Controversy, Part IV*, TOXIC DOCS BLOG (Feb. 21, 2018), https://www.toxicdocs.org/blog/using-toxicdocs-in-the-classroom-the-tetraethyl-lead-controversy-part-iv [https://perma.cc/RT3R-4C6F]; Bruce P. Lanphear, Stephen Rauch, Peggy Auinger, Ryan W. Allen & Richard W. Hornung, *Low-Level Lead Exposure and Mortality in US Adults: A Population-Based Cohort Study*, 3 LANCET PUB. HEALTH 177 (2018); Ab Latif Wani, Anjum Ara & Jawed Ahmad Usmani, *Lead Toxicity: A Review*, 8 INTERDISC. TOXICOLOGY 55 (2015); *see also* Honor Whiteman, *Over 400,000 U.S. Deaths Per Year Caused by Lead Exposure*, MED. NEWS TODAY (Mar. 13, 2018), https://www.medicalnewstoday.com/articles/321203 [https://perma.cc/5UUD-C82L].

125 *See infra* note 126; *see also* Yvette Cabrera, *Lead Culprits: Profiting from Poison*, THINKPROGRESS (July 16, 2017, 3:03 PM), https://archive.thinkprogress.org/lead-villains-profiting-from-poison-dec14d75bfc0 [https://perma.cc/9SWQ-QHMJ]; Kovarik, *supra* note 114.

126 Schedlbauer v. Chris-Craft Corp., 160 N.W.2d 889 (Mich. 1968); Rolesville v. Perry, 204 S.E.2d 719 (N.C. Ct. App. 1974); Blais v. Callahan Oil Co., 18 Conn. Supp. 146 (Super. Ct. 1952); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976); Black v. Creston Auto Co., 281 N.W. 189 (Iowa 1938); Rea v. Ford, 96 S.E.2d 92, 95–96 (Va. 1957); Hubbard v. Rowe, 5 S.E.2d 187 (S.C. 1939).

127 *See* Haydn Davies, *From Equal Protection to Private Law: What Future for Environmental Justice in U.S. Courts?*, 2 BRIT. J. AM. LEGAL STUD. 163, 194 (2013).

128 *See* David Schoenbrod, *Remarks to the Board of Trustees of the Natural Resources Defense Council*, 20 CARDOZO L. REV. 767, 768 (1999).

caused widespread harm to individuals. But because the leaded gas deception was impersonal in nature, it fell outside the bounds of civil fraud.

2. Tobacco

In 1969, Brown & Williamson, a then-subsidiary of British American Tobacco, prepared a memorandum reviewing the current state of the tobacco industry's public relations and future plans. In the memo, the author noted, "[o]ur consumer I have defined as the mass public, our product as doubt, our message as truth—well stated, and our competition as the body of anti-cigarette fact that exists in the public mind."[129] The author then added, "[d]oubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public. It is also the means of establishing a controversy."[130]

The tobacco industry figured out—though they were neither the first nor the last to do so—that if they pointed at the studies linking smoking and cancer and simply raised doubt about their truthfulness or accuracy, this would give people inclined to smoke a viable excuse for doing so even in the face of scientific studies showing it causes cancer. Doubt was enough. Tobacco sellers need not prove that tobacco was safe; rather, they shifted the burden to scientists to prove that tobacco was dangerous. This was the same tactic—the Kehoe Paradigm—used by the leaded gas industry to avoid regulation and liability for decades.[131]

The scientists were burdened with proving the danger with certainty while tobacco companies needed only raise doubt. In this way, tobacco companies deceived the public into believing smoking was safe, or at least not "proven" to be harmful. More than twenty million Americans have died from lung cancer and other illnesses resulting from firsthand and secondhand tobacco smoke.[132] Millions more have

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129 Memorandum from Brown & Williamson on the Tobacco Industry and its Future, Smoking and Health Proposal 3–4 (1969) (on file with the University of California San Francisco).

130 *Id.* at 4.

131 Nriagu, *supra* note 28, at 73; Rebecca Adler, Clair Patterson's Battle Against Lead Pollution 92–95(May 26, 2006) (B.S. thesis, California Institute of Technology).

132 *See* Off. of the Surgeon Gen., *Health Consequences of Smoking, Surgeon General Fact Sheet*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 16, 2014), https://www.hhs.gov/surgeongeneral/reports-and-publications/tobacco/consequences-smoking-factsheet/index.html [https://perma.cc/7E2L-P2VA] (noting that more than 20 million Americans have died because

died and continue to die around the world. Doubt allowed that to happen, and allowed tobacco companies to reap billions in profit while spreading disease and death.

Those harmed or killed, or those individuals' survivors, began suing tobacco companies for tort in appreciable numbers beginning in the 1950s.[133] The first wave of tobacco litigation consisted of personal injury suits by individual smokers, and began in the 1950s in the wake of the publication of several scientific studies, which sounded grave warnings of the health hazards of smoking.[134] "The tobacco companies prevailed in these early cases because plaintiffs were unable to prove a causative link between smoking and cancer."[135] "The second wave of cigarette litigation, also composed of individual personal injury suits, began in the 1980s."[136] "In the wake of the 1964 and subsequent surgeon general's reports and the federally-mandated warning label on cigarettes, the tobacco industry began arguing that the hazards of smoking were 'common knowledge' and, therefore, smokers who continued to smoke were merely exercising their 'freedom of choice.'"[137] "Thus the tobacco companies, not without a certain audacity, seamlessly shifted their battle cry from the first wave of litigation—

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of smoking since 1964, including approximately 2.5 million deaths due to exposure to secondhand smoke). As Stanford professor Robert Proctor points out, "[i]t's still the leading cause of death. It still kills over 400,000 Americans per year. It's still two jumbo jets crashing every day." Michael Mechanic, *"Golden Holocaust" Is the Book Big Tobacco Doesn't Want You to Read*, MOTHER JONES (May 2012), https://www.motherjones.com/politics/2012/05/tobacco-book-golden-holocaust-robert-proctor [https://perma.cc/Y4EG-ATSA]. Worldwide, the number is even more grim; it is estimated one hundred million people were killed by tobacco in the twentieth century, and that as many as one billion are expected to die from tobacco in this century. Miranda Hitti, *1 Billion Tobacco Deaths this Century?*, WEBMD (Feb. 7, 2008), https://www.webmd.com/smoking-cessation/news/20080207/1-billion-tobacco-deaths-this-century [https://perma.cc/N55Q-EVHQ].

133 *See* Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 482 (1999) (tracing the beginnings of tobacco litigation back to the 1950s).

134 *See* Ernest L. Wynder, Evarts A. Graham & Adele B. Croninger, *Experimental Production of Carcinoma with Cigarette Tar*, 13 CANCER RSCH. 855 (1953); Richard Doll & A. Bradford Hill, *A Study of Aetiology of Carcinoma of the Lung*, 2 BRIT. MED. J. 1271 (1952); Ciresi et al., *supra* note 133, at 482.

135 Christine Hatfield, *The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV. 525, 561 (1996). "The tobacco industry has enjoyed a record of success in civil litigation unique to almost any industry, never paying one cent in settlements or awards for any injuries claimed by cigarette smokers in their civil lawsuits." *Id.* at 558.

136 Ciresi et al., *supra* note 133, at 485.

137 *Id.*; *see also* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 871 (1992).

'smoking doesn't cause cancer'—to their battle cry in the second wave of litigation—'everybody knows' that smoking causes cancer."[138]

In the 1990s, after the public finally learned that the tobacco industry deliberately concealed the health dangers and addictiveness of tobacco and purposefully designed cigarettes to be addictive, states began to bring suits against Big Tobacco.[139] In 1994, Mississippi Attorney General Mike Moore filed the first of what would become ultimately successful lawsuits against tobacco manufacturers.[140] His strategy was to use public nuisance and other equitable theories "to avoid the need to prove specific causation of any individual's illness and to eliminate defenses based upon a smoker's own conduct, such as contributory negligence and assumption of risk," which had long plagued individual plaintiffs.[141]

Forty other states filed similar lawsuits within three years.[142] States sought recovery under a diverse range of theories, including "deceptive advertising, antitrust violations, federal Racketeer Influenced Corrupt Organizations (RICO) claims, unfair competition, a variety of fraud allegations, and in at least two states, Florida and Massachusetts, statutory claims based on the enactment of specific health care cost recovery legislation."[143]

Courts never reached the merits of these claims because in June 1997, the parties agreed to a global settlement requiring tobacco companies to pay more than $368 billion over twenty-five years.[144] After Congress failed to approve the settlement, the tobacco companies settled with four states individually (Mississippi, Minnesota, Florida, and Texas) for approximately $40 billion total.[145] The tobacco

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138 Ciresi et al. *supra* note 133, at 485.

139 Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 757–58 (2003).

140 Debra Cassens Weiss, *Lawyer Who Targeted Tobacco Companies Encourages State Suits Against Drug Makers for Opioid Crisis*, ABA J. (July 25, 2017, 7:00 AM), https://www.abajournal.com/news/article/lawyer_who_targeted_tobacco_companies_encourages_state_suits_against_drug_m [https://perma.cc/K2DQ-A4G8].

141 Gifford, *supra* note 139, at 759; Paul L. Keenan, *Death by 1000 Lawsuits: The Public Litigation in Response to the Opioid Crisis Will Mirror the Global Tobacco Settlement of the 1990s*, 52 NEW ENG. L. REV. 69, 77–78 (2017); *15 Years Later, Where Did All the Cigarette Money Go?*, NPR (Oct. 13, 2013, 5:52 PM), https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go [https://perma.cc/FF9P-CUZK].

142 Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 WIDENER L. REV. 159, 164–67 (2011); Keenan, *supra* note 141, at 78.

143 Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 338 (2001).

144 Sloan & Chepke, *supra* note 142, at 168–69.

145 *Id.* at 166; Gifford, *supra* note 139, at 762.

companies then entered into the "Master Settlement Agreement" with the remaining states in the amount of $206 billion—with a total settlement amount of $246 billion spanning at least twenty-five years.[146] This was the largest civil settlement in U.S. history.[147]

Tobacco companies were ultimately convicted of criminal violations for their deceptive practices as well. In 2006, a federal district court held tobacco companies liable for violating RICO by fraudulently covering up the health risks associated with smoking and for marketing their products to children.[148]

What ties the leaded gas and tobacco stories together is the fact that, in both cases, individuals harmed were denied civil redress. As one author noted, "civil justice, at least in the context of the tobacco litigation which played out before it, was simply beyond the ability of 'a single individual human being' to afford."[149] The same was true of victims of leaded gas. The same is also true with regard to the victims of any of the dozen or more major PDCPD Schemes carried out over the past century. To paraphrase Judge Noel P. Fox, "a single individual human being" who has been "injured, aggrieved, and disadvantaged" by a PDCPD Scheme cannot obtain relief in court.[150]

3. All PDCPD Schemes

Leaded gas and tobacco serve as two representative examples that stand in place of all such schemes. Both schemes were carried out in secret, and the fact they were purposeful deceptions at all, as opposed to legitimate business practices, only came to light decades after the fact.

The deceptions were kept hidden for decades in two ways. First, the harms caused by leaded gas and tobacco take years, and sometimes decades, to manifest themselves. "The long average latency periods for various known disease-causing substances—for example, twenty-five

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146 Gifford, *supra* note 139, at 762; Keenan, *supra* note 141, at 78.

147 *3rd Circuit Snuffs Out Anti-Smoking Group's Suit Against Insurers:* Am. Legacy Found. v. Nat'l Union Fire Ins. Co., WESTLAW J. INS. COVERAGE, Nov. 19, 2010, at *1, 2010 WL 4687944.

148 *See* United States' Final Proposed Findings of Fact at ES-1, United States v. Philip Morris Inc., 499 F. Supp. 2d 1 (D.D.C. 2006) (No. 99-CV-02496) ("As set forth in these Final Proposed Findings of Fact, substantial evidence establishes that Defendants have engaged in and executed—and continue to engage in and execute—a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO."), *aff'd in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009), *order clarified*, 778 F. Supp. 2d 8 (D.D.C. 2011).

149 Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. 437, 463 (2010) (quoting Thayer v. Liggett & Myers Tobacco Co., No. 5314, 1970 U.S. Dist. LEXIS 12796, at *58 (W.D. Mich. Feb. 19, 1970)).

150 *Thayer*, 1970 U.S. Dist. LEXIS 12796, at *58–59.

years for arsenic and eighteen years for asbestos—frustrate efforts to link any injury to the defendant's past conduct."[151] Smoking-caused lung cancer, for example, has a latency period of, on average, about thirty years.[152] And while some asbestos-related diseases show up in eighteen years, asbestos-caused mesothelioma has a forty-year latency period.[153] The great gap between the use of a product and the manifestation of the harm it causes is one reason PDCPD Schemes are rarely identified until long after they were successfully carried out. Second, those carrying out PDCPD Schemes use their money and power to keep the operative facts secret and undiscoverable in court.[154] Litigation ensues, generally, only many years after the deception has occurred. Yet even then companies spend vast amounts of money keeping the deception they carried out hidden from the public, from courts, and from journalists.

To accomplish any fraud—that is, to carry it out and profit from it—a wrongdoer must both deceive another for profit (deception) and avoid liability (evasion). Deception is the focus of fraud law generally. But evasion is fifty percent of the scheme. Evasion can be accomplished either of two ways; either the wrongdoer must avoid getting caught, or the wrongdoer must prevail on the merits in court. Those carrying out PDCPD Schemes accomplish both. First, they mislead the public and government regulators on the causal connection between their product and the harms it causes, and the difficult-to-ascertain causal chain often means that victims and those advocating for them cannot know of the harm the product is causing, at least for years or sometimes decades. Second, those carrying out PDCPD Schemes spend substantial amounts of money on advocacy, lobbying, and litigation, and these efforts most often result in court victories that deprive victims, including victims clearly harmed by the dangerous product, of redress in court. Not only do the big corporations win these contests, but their advocacy, lobbying, and litigation have ensured that PDCPD Schemes are simply not viewed as fraud or any other compensable tort.

PDCPD Schemes are not a one-size-fits-all kind of wrong. Each is different. Tobacco is a drug sold in supermarket checkout aisles.

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151 Cecot, *supra* note 30, at 300 (footnotes omitted). The difficulties injured plaintiffs face arise from "the problem of insufficient and persistently lagging epidemiological data or other reliable scientific information on potential harms from exposure to substances." *Id.* at 302.

152 William Weiss, *Cigarette Smoking and Lung Cancer Trends: A Light at the End of the Tunnel?*, 111 CHEST J. 1414 (1997).

153 Karen Selby, *Mesothelioma Latency Period*, MESOTHELIOMA CTR. (June 4, 2021), https://www.asbestos.com/mesothelioma/latency-period [https://perma.cc/D95Q-87VC]; *see also* Gillian Frost, *The Latency Period of Mesothelioma Among a Cohort of British Asbestos Workers (1978–2005)*, 109 BRIT. J. CANCER 1965 (2013).

154 *See, e.g.*, *supra* notes 2–3, 14–15, 25–26 and accompanying text.

Opioids are prescription pharmaceuticals. Sugar is one of the most common food ingredients. Pesticides are outdoor poisons for plants. And fossil fuels are a whole other kind of product altogether. Moreover, each of these products causes harm in a somewhat different way from any of the other products. Yet they all fit the three-element test for PDCPD Schemes, and each has proven highly detrimental to human health, life, and/or the environment. And each has avoided liability in the same way, by the impersonal nature of the deceptions involved. Fraud law has proven ill-equipped for the monumental task of reining in the wrongdoers carrying out PDCPD Schemes.

This leads to the anomalous predicament we are in. We now know about these massive deceptive schemes to defraud the public by which numerous corporations have profited greatly off of deceptions that have correspondingly caused great harm to millions of people, and yet the laws now in force to deal with deceptions for gain do not touch these PDCPD Schemes. Moreover, no other area of tort law adequately addresses (or stops) these schemes, as discussed in Part II below. PDCPD Schemes are, by any fair measure, fraudulent in nature, but the law does not treat them as "fraud."

II. OTHER AREAS OF TORT LAW DO NOT ADEQUATELY ADDRESS PDCPD SCHEMES, LEAVING VICTIMS WITHOUT AN APPROPRIATE AVENUE TO SEEK REDRESS

One counterargument to the idea that fraud law inappropriately fails to address PDCPD Schemes is that such schemes are not within the purview of fraud but rather fall within one of the other tort doctrines. Fraud law, according to this view, need not and *should not* address PDCPD Schemes. Rather, harmed individuals have existing tort avenues to pursue damages.

There are at least two reasons why this view fails. First, some of the most notable purportedly viable avenues to seek redress for those harmed by PDCPD Schemes, such as negligence and nuisance, fail to compensate for the deception that caused the damages in the first place. Treating a purposeful wrong as negligence is akin to treating a premeditated killing as manslaughter rather than murder; it diminishes the wrongfulness of the act, very likely resulting in reduced culpability of, and compensation to, plaintiffs.[155] Second, in practice no other tort

[155] Of course, in a negligence claim, a plaintiff may seek punitive damages for reckless or willful conduct, but as played out in the cases actually brought—during the first and second wave of tobacco litigation, for example—it mattered little which standard was applied because liability

area has provided harmed plaintiffs adequate relief. Although some PDCPD Schemes might ostensibly fit within another tort doctrine, courts have not allowed claims against wrongdoers in any appreciable way that would justify this view.

A. *Consumer Protection Laws*

Consumer protection laws aim to protect consumers by providing an avenue to seek damages following harm caused by a business's unscrupulous or deceptive practices.[156] There are both federal and state consumer protection laws. Federal law includes, for example, the Federal Trade Commission Act, which has an unfair and deceptive practices provision that aims to prevent persons, partnerships, and corporations from using unfair or deceptive acts or practices in commerce.[157] The Lanham Act, another federal consumer protection law, "protect[s] persons engaged in commerce against false advertising."[158]

All states have their own laws aimed at protecting consumers from unfair and deceptive practices.[159] Every state's consumer protection

was rarely, if ever, imposed. *See, e.g.*, Hatfield, *supra* note 135, at 558 ("The tobacco industry has enjoyed a record of success in civil litigation unique to almost any industry, never paying one cent in settlements or awards for any injuries claimed by cigarette smokers in their civil lawsuits."); *see also* Ciresi et al., *supra* note 133, at 480–88.

156 *See, e.g.*, Elder v. Fischer, 717 N.E.2d 730, 734–37 (Ohio Ct. App. 1998) (finding that the purpose of Ohio's consumer protection act is to "protect consumers from 'unscrupulous suppliers' in a manner not afforded under the common law"); Donna S. Harkness, *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*, 11 J.L. & POL'Y 525, 542–43 (2003) ("[B]ecause consumer protection statutes are remedial in nature they can be liberally construed to promote fair dealing and effectuate the underlying consumer oriented public policy. Thus, a client consumer could potentially recover for 'immoral, unethical, oppressive or unscrupulous' activities that do not rise to the level of a tort or malpractice claim."); *see also* Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws*, 33 WM. MITCHELL L. REV. 163, 172 (2006) ("[O]ne of the central purposes of the Consumer Fraud Act is to address the unequal bargaining power that is often found in consumer transactions.") (quoting Wiegand v. Walser Auto. Grps, Inc., 683 N.W.2d 807, 812 (Minn. 2004)); Macomber v. Travelers Prop. & Cas. Corp., 804 A.2d 180, 196 (Conn. 2002) (listing as one criteria to be considered in deciding if a violation of Connecticut's consumer protection law has occurred is whether the defendant's conduct was "immoral, unethical, oppressive, or unscrupulous").

157 15 U.S.C. § 45.

158 LISA C. THOMPSON & BRENT A. OLSON, 9A ARIZ. PRAC., BUS. L. DESKBOOK § 20:3 (2020–21 ed.) (quoting Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 390 (8th Cir. 2004)); *see also* United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998); Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 796 (5th Cir. 2011).

159 *See* White v. Wyeth, 705 S.E.2d 828, 833 (W. Va. 2010) ("While all states have consumer protection laws, the provisions of the statutes among the states is far from uniform.").

legal regime is unique, and there are some important distinctions among them. For instance, although some states limit relief to acts or practices actionable at common law,[160] other states do not recognize this limitation.[161] Some states view the term unfair or deceptive acts or practices to be limited to acts or practices affecting public interest,[162] while other states impose no such requirement.[163] In general, however, the specific types of claims redressable under the unfair business practices umbrella are categorized into two groups: those that involve unfair competition and those not involving unfair competition.[164]

Washington State's consumer protection law is codified in the Consumer Protection Act (CPA).[165] To establish a violation of the CPA, "a private plaintiff must establish five elements: (1) an unfair or deceptive act or practice; (2) occurring within trade or business; (3) affecting the public interest; (4) injuring the plaintiff's business or property; and (5) a cause relation between the deceptive act and the resulting injury."[166] To prove that an act or practice is deceptive for purposes of the CPA, neither intent nor actual deception is required; the question is whether the conduct has the capacity to deceive a substantial portion of the public.[167] Thus, Washington's consumer protection law provides broader protections than common law fraud. This is true in some other states, as well.[168] Some states, however,

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160 *See, e.g.*, Moran, Shuster, Carignan & Knierim v. August, 657 A.2d 736 (Conn. Super. Ct. 1994), *aff'd*, 657 A.2d 229 (Conn. 1995); Young v. Joyce, 351 A.2d 857 (Del. 1975).

161 *See, e.g.*, Murry v. W. Am. Mortg. Co., 604 P.2d 651 (Ariz. Ct. App. 1979); Perona v. Volkswagen of Am., Inc., 684 N.E.2d 859 (Ill. App. Ct. 1997); Refuse & Env't Sys., Inc. v. Indus. Servs. of Am., 732 F. Supp. 1209 (D. Mass. 1990) (applying Mass. law); Slaney v. Westwood Auto, Inc., 322 N.E.2d 768 (Mass. 1975); State *ex rel.* Danforth v. Indep. Dodge, Inc., 494 S.W.2d 362 (Mo. Ct. App. 1973); Kugler v. Mkt. Dev. Corp., 306 A.2d 489 (N.J. Super. Ct. Ch. Div. 1973); Hyland v. Aquarian Age 2000, Inc., 372 A.2d 370 (N.J. Super. Ct. Ch. Div. 1977); Wolverton v. Stanwood, 565 P.2d 755 (Or. 1977) (recognizing view).

162 *See, e.g.*, Noble v. Marshall, 579 A.2d 594 (Conn. App. Ct. 1990); Athey Prods. Corp. v. Harris Bank Roselle, 89 F.3d 430 (7th Cir. 1996) (applying Illinois law); Hart v. Allstate Ins. Co., 608 N.Y.S.2d 241 (App. Div. 1994).

163 *See, e.g.*, RCDI Constr., Inc. v. Spaceplan/Architecture, Plan. & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001) (applying North Carolina law).

164 Donald M. Zupanec, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R.3d 449 (1979).

165 WASH. REV. CODE §§ 19.86.010–.920 (1961).

166 Robinson v. Avis Rent A Car Sys., Inc., 22 P.3d 818, 823 (Wash. Ct. App. 2001); *see* WASH. REV. CODE §§ 19.86.010–.920.

167 WASH. REV. CODE § 19.86.080(1); State v. Kaiser, 254 P.3d 850, 858 (Wash. Ct. App. 2011).

168 *See* 815 ILL. COMP. STAT. 505/1–12 (2007); Brody v. Finch Univ. of Health Scis./The Chi. Med. Sch., 698 N.E.2d 257, 267 (Ill. App. Ct. 1998) (holding that the Illinois Consumer Fraud Act provides broader consumer protection than the common law action of fraud by prohibiting any deception or false promise, and that a party claiming statutory fraud therefore need not prove all elements of common law fraud).

explicitly limit the scope of their consumer protection law to actions that would have been redressable under common law fraud.[169]

On first blush, it would appear that consumer protection laws are perfectly positioned to address the problem of PDCPD Schemes. The schemes, after all, consist of businesses carrying out "immoral, unethical, oppressive, or unscrupulous" acts that enrich themselves at the expense of consumers and the public.[170] Yet consumer protection laws, like fraud, have largely failed to stop or even slow these schemes down. One notable exception appears to be the opioid PDCPD Scheme. In recent years, several states have, under their state consumer protection laws, prosecuted opioid companies, officers, and directors for their role in misleading the public about the dangers of opioids.[171] However, this has not been a common occurrence. Sugar, fossil fuel, pesticide, and numerous other industries faced no significant threat from consumer protection laws while carrying out their own PDCPD Schemes. Moreover, it is too early to tell whether these lawsuits by states will adequately punish, or even stop, the schemes carried out by major pharmaceutical companies misleading the public about the dangers posed by the drugs they sell. In any case, from a tort perspective, the states' lawsuits against opioid manufacturers are of limited value. Fines and jail sentences meted out by the state do little to nothing to compensate victims of the PDCPD Scheme.

Accordingly, although consumer protection laws appear, at least on paper, to address the wrongful conduct by those carrying out PDCPD Schemes, the track record proves that this is not the case. Perhaps one problem is that most PDCPD Schemes involve harms that are too attenuated or slow in developing—like cancer, global warming, or environmental damage—to allow individual plaintiffs to connect the dots between the deceptive conduct and the harm caused. Or perhaps the same limitations on fraud actions, such as reliance and intent, are the cause. These guesses are mere speculation. The question of just *why*

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169 For example, in *Schmidt Enterprises, Inc. v. State*, the court held that an Indiana statute proscribing deceptive acts in connection with consumer sales was violated by a chimney repair service whose representatives told consumers that repairs to their chimneys were necessary, when in fact such repairs were unnecessary and the representatives knew, or should reasonably have known, that repairs were not necessary. The court there stated that the statute codified the elements of common law fraud. Schmidt Enters., Inc. v. State, 354 N.E.2d 247 (Ind. Ct. App. 1976).

170 Macomber v. Travelers Prop. & Cas. Corp., 804 A.2d 180, 196 (Conn. 2002).

171 *See, e.g.*, Peter Christian, *AG Tim Fox Files Major Lawsuit Against Opioid Distributors*, NEWSTALK KGVO (Feb. 3, 2020), https://newstalkkgvo.com/ag-tim-fox-files-major-lawsuit-against-opioid-distributors [https://perma.cc/4XS2-ZF88]; Press Release, Wash. State, Off. of the Att'y Gen., Judge Rejects Opioid Distributors' Request to Dismiss AG Ferguson's Lawsuit (July 26, 2019), https://www.atg.wa.gov/news/news-releases/judge-rejects-opioid-distributors-request-dismiss-ag-ferguson-s-lawsuit [https://perma.cc/8WTC-JQMD].

consumer protection laws fail to adequately prohibit PDCPD Schemes or punish those who carry them out would require at least another article to address. The fact they fail to do so, however, is clearly shown by the repeated success of PDCPD Schemes in industry after industry.

B. *Negligence*

Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.[172] Its elements include: (1) a duty owed by the defendant to protect the plaintiff from injury; (2) a failure to perform that duty; and (3) injuries to the plaintiff which are actually and proximately caused by the defendant's failure to exercise the duty of care.[173] Negligence claims are ill-suited for claims against those who carry out PDCPD Schemes in several ways. To begin with, PDCPD Schemes are most often purposeful, wrongful conduct. They are not the result of an accident or oversight. In addition, the causation issues that plague claims against PDCPD wrongdoers are also present in negligence actions. Both actual and proximate causation are potentially problematic because of the attenuated and slow-in-developing nature of the harms like cancer, global warming, and environmental damage.[174] For instance, in *City of Oakland v. BP*, the court found that the plaintiffs were unable to establish the "but for" causation element because the rise in sea level would have likely occurred even without the defendant's involvement.[175] In claims against fossil fuel companies, tobacco companies, or other PDCPD wrongdoers, the fault often does not rest on just one company. Negligence, like consumer protection laws, has failed to prohibit PDCPD Schemes, punish those who carry them out, or provide adequate redress to those harmed by them.

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172 *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Smith v. City of Stillwater, 328 P.3d 1192, 1200 ("There are three elements to a claim for negligence: 1) a duty owed by the defendant to protect the plaintiff from injury; 2) a failure to perform that duty; and 3) injuries to the plaintiff which are proximately caused by the defendant's failure to exercise the duty of care.").

173 McMillen v. Carlinville Area Hosp., 450 N.E.2d 5, 9 (Ill. App. Ct. 1983); *Smith*, 328 P.3d at 1200.

174 For example, smoking causes cancer in many smokers, but tobacco-caused cancer takes "several years" to develop. *Lung Cancer*, CLEV. CLINIC, https://my.clevelandclinic.org/health/diseases/4375-lung-cancer [https://perma.cc/2F32-HDJB]. Mesothelioma, on the other hand, takes twenty to fifty years to develop after initial asbestos exposure. Selby, *supra* note 153; *see also* Wash. Env't Council v. Bellon, 741 F.3d 1075, 1079 n.1 (9th Cir. 2014) (Gould, J., dissenting) ("[I]t might be difficult for private plaintiffs ever to establish causation in a climate change lawsuit.").

175 City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

C. *Strict Products Liability*

Strict products liability is another tort area that seems, on its face, to provide an avenue for harmed plaintiffs to seek redress against PDCPD wrongdoers. Strict products liability deals with products that are either distributed or manufactured defectively, enter the stream of commerce, and cause harm to consumers.[176] For example, in Illinois, to successfully recover under a claim of strict products liability, a plaintiff must prove there is a defect in the product resulting from manufacturing or design that made the product unreasonably dangerous at the time the product left the defendant's control, which ultimately caused injury to the plaintiff.[177] Unlike negligence, strict product liability does not require the plaintiff to prove foreseeability.[178]

However, this kind of claim—like consumer protection laws and negligence—is not well suited to address PDCPD Schemes. Like negligence, it ignores the wrongful nature of the conduct perpetrated by PDCPD wrongdoers. Accordingly, even if a plaintiff were to prevail, the harm redressed would not have been caused by the conduct at issue here, which is the deception carried out by the defendant. In addition, plaintiffs would likely face enormous obstacles in proving that the product in question was "unreasonably dangerous," a required element.[179] Regardless of which test is applied—consumer expectation or risk-utility[180]—a defendant would be able to make use of bought-and-paid-for science generated by industry-funded scientists to argue that the product was not unreasonably dangerous.

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176 *See, e.g.*, Bifolck v. Philip Morris, Inc., 152 A.3d 1183, 1202 (Conn. 2016) ("All such claims, whether alleging a design defect, manufacturing defect or failure to warn defect, are governed by the same elements that this court has applied since it adopted § 402A: '(1) the defendant was engaged in the business of selling the product; (2) the product was in a defective condition unreasonably dangerous to the consumer or user; (3) the defect caused the injury for which compensation was sought; (4) the defect existed at the time of the sale; and (5) the product was expected to and did reach the consumer without substantial change in condition.'"); Bragg v. Hi-Ranger, Inc., 462 S.E.2d 321, 328 (S.C. Ct. App. 1995) ("In order to recover under a strict liability theory, the plaintiff must establish that: (1) the defendant's product was in a defective condition unreasonably dangerous for its intended use; (2) the defect existed when the product left the defendant's control; and (3) the defect was the proximate cause of the injury sustained.").

177 Walker v. Macy's Merch. Grp., Inc., 288 F. Supp. 3d 840, 855 (N.D. Ill. 2017).

178 Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 759 (Wis. 2001).

179 Ray *ex rel.* Holman v. BIC Corp., 925 S.W.2d 527, 530 (Tenn. 1996).

180 *Id.*

D. *Other Intentional Torts*

Fraud law, as discussed above, fails to provide an adequate remedy to plaintiffs harmed by PDCPD Schemes. No other intentional tort fills the gap, either. The other intentional torts include assault, battery, false imprisonment, intentional infliction of emotional distress, trespass to land, and trespass to chattel.[181] None of these provide an avenue for redress of the harm caused to plaintiffs by PDCPD wrongdoers, such as the sugar industry's purposeful deception of the public regarding the health dangers of sugar or the fossil fuel industry's purposeful deception of the public regarding the causes of global warming. Fraud is the tort that best fits the mold, but as discussed above, it has developed in a way that effectively guarantees victory for defendants in any fraud case brought against a PDCPD wrongdoer.

E. *Nuisance*

For those harmed by most species of PDCPD Schemes—say, by a smoker who developed lung cancer caused by tobacco smoke—nuisance is not a viable avenue for relief. However, in the case of the fossil fuel industry's deception of the public with regard to global warming, nuisance is at least ostensibly one available option. Yet, although several plaintiffs have sued fossil fuel companies and greenhouse gas (GHG) emitters, "[n]o plaintiff has ever succeeded in bringing a nuisance claim based on global warming."[182] At least not yet.

One plaintiff has, however, achieved at least some success in a nuisance claim against the largest GHG emitter in Europe. Saúl Luciano Lliuya sued the German energy firm RWE AG to recover damages to compensate him and his community for the harm caused by the threat from Lake Palcacocha.[183] The case is called *Lliuya v. RWE AG*.[184] In his lawsuit, Saúl brought a nuisance claim against RWE, which is responsible for 0.5% of all CO_2 ever emitted by humans,[185] and alleged

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181 *See* Peter B. Kutner, *The Prosser Myth of Transferred Intent*, 91 IND. L.J. 1105, 1113 (2016) (listing the modern intentional torts); Eleanor L. Grossman, David J. Lanciotti & Caralyn M. Ross, 52 OHIO JURIS. 3D GOV'T TORT LIAB. § 93 (same).

182 City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1023 (N.D. Cal. 2018).

183 Amtsgericht Essen [AG] [District Court Essen] Dec. 15, 2016, 2 O 285/15 (Ger.); *see also* Henricksen, *supra* note 14, at 738–42, 745, 755–57 (providing a more extensive discussion of Saúl Lliuya's case against RWE); SABIN CTR. FOR CLIMATE CHANGE L., *Luciano Lliuya v. RWE AG*, CLIMATE CHANGE LITIG. DATABASE, http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag [https://perma.cc/KEA7-5G3X].

184 2 O 285/15 (Ger.).

185 *Id.*; *see also* SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 183.

that the company should pay for 0.5% of the cost of making safe a glacial lake that has swollen to a dangerous volume as a result of anthropogenic CO_2-induced global warming.[186] Saúl's nuisance claim was made under German Civil Code Section 1004, which, like American nuisance law, prohibits using one's own property in a way that impairs someone else's use of her property.[187] The trial court dismissed the case, holding that no causal connection could be made by the plaintiff between CO_2 emissions in Europe and the melting of glaciers in the Andes Mountains of South America.[188] The appellate court reversed, holding that Saúl could prevail in his nuisance claim if he proved the causal connection in court.[189] The court ruled that he must be given the chance to do so.[190] As of this writing, the case is still pending.

Nuisance, however, suffers from the same deficiency as negligence and strict products liability in that it fails to even acknowledge, let alone address, the purposeful deception of PDCPD Schemes. Moreover, it has no applicability whatsoever to any of the vast majority of PDCPD Schemes.

Accordingly, the idea that fraud law should not address PDCPD Schemes because such schemes fall within the purview of one or more other tort doctrines is not supported by the current tort law or by the track record of such schemes failing to be adequately prohibited or punished under any tort doctrine. There is no non-fraud-based tort that gives harmed plaintiffs a viable avenue to pursue damages against PDCPD wrongdoers. Accordingly, PDCPD wrongdoers profit immensely off of the schemes while victims of the schemes continue to suffer economic and physical harm, and in many cases death, as a result of the deceptive schemes.

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186 2 O 285/15 (Ger.).

187 *See* Andreas Rahmatian, *A Comparison of German Moveable Property Law and English Personal Property Law*, 3 J. COMPAR. L. 197, 215–16 (2008) ("The owner has especially two claims which result from his real right of ownership: (i) the action of delivery of the *res* against the possessor, whereby the possessor has not or no longer a right to possession vis-à-vis the owner (*Eigentumsherausgabeanspruch, rei vindicatio*, § 985 BGB); and (ii) a claim against interference with the enjoyment of the ownership right, whereby the interference does not amount to a dispossession of the owner. This latter claim against interference with ownership (*Eigentumsstörungsanspruch, actio negatoria*, § 1004 BGB), thus something which English lawyers would associate with a kind of owner's remedy against nuisance or trespass, is particularly important in respect of land, but also applies to moveables.").

188 2 O 285/15 (Ger.).

189 SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 183.

190 *Id.*

III. SECURITIES FRAUD WAS ALSO INADEQUATELY ADDRESSED BY TORT LAW A CENTURY AGO, AND THE STATES AND CONGRESS CLOSED THE LOOPHOLE BY PASSING SECURITIES FRAUD STATUTES

For hundreds of years, securities fraud claims under American and English law had to be brought under the common law fraud doctrine.[191] If an investor was defrauded in connection with the purchase or sale of a security, the remedy was common law fraud. This changed in the United States in the early 1900s. First, between 1911 and 1931, all but one of the states passed blue skies laws to combat securities fraud.[192] These were state securities laws that addressed a number of issues that had arisen with the offering, issuing, purchasing, and selling of securities.[193] One thing these laws did, however, was to provide for a new statute-based fraud claim aimed directly at those who carried out fraudulent schemes in the purchase and sale of securities.[194] Then, in 1934, Congress passed the Securities Exchange Act of 1934 (the Act).[195] Section 10(b) of the Act addressed securities fraud.[196] Upon the passage of that law, and clarified later upon adoption of Rule 10b-5 that same year,[197] securities fraud in the federal courts was from there on addressed under Section 10(b). Accordingly, in a span of less than twenty-five years, securities fraud under American law was removed completely from the common law fraud realm and placed into the new state and federal securities fraud statutory frameworks.

This astounding shift in the law was in response to an astounding gap in the law. Common law fraud had, throughout its centuries of covering securities fraud, failed to protect investors.[198] It had failed to

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191 *See supra* note 101.

192 Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 229 (2003) ("Between 1911 and 1931, 47 of the 48 states adopted statutes that regulated the sale of securities.").

193 *See* Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 348–49 (1991).

194 *See* RONALD E. MALLEN, 2 LEGAL MALPRACTICE § 13:163 (2021 ed.) (noting that New York's blue sky law "empowers the Attorney General to investigate and enjoin fraudulent practices in the marketing of securities" but does not eliminate common-law causes of action, and that "[a]s is true of the federal securities acts, a variety of theories can be stated under the blue-sky laws"); *see also* Mahoney, *supra* note 192, at 229; Macey & Miller, *supra* note 193, at 348.

195 15 U.S.C. § 78a.

196 *Id.* § 78j(b).

197 Codified at 17 C.F.R. § 240.10b-5.

198 Paul N. Edwards, *Compelled Termination and Corporate Governance: The Big Picture*, 10 J. CORP. L. 373, 427 (1985) (noting that "Section 10(b) was enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions"); *see also* Henricksen, *supra* note 95, at 29 n.85 (unpublished manuscript) (discussing the growth of securities fraud cases brought under common law doctrine at the end of the 1800s and beginning of the 1900s).

protect the victims of securities fraud, a shortcoming that became even more evident at the beginning of the twentieth century on account of the great growth, and great failure, of the securities markets. This justification for the passage of securities fraud laws has been noted previously with regard to both the federal and state laws. On the federal side, "[s]ection 10(b) was enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions."[199] The state blue sky laws were likewise passed "to prevent the sale of fraudulent securities, particularly to unsophisticated investors."[200] In fact, the state securities laws became known as "blue sky" laws because one supporter claimed many securities salesmen were so dishonest that they would sell "building lots in the blue sky."[201]

Authors have posited competing hypotheses for why the states and Congress passed securities law statutes during the period of 1911 to 1934. For example, Dean Paul G. Mahoney, in his article *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, explores three theoretical justifications of the passage of blue sky laws between 1911 and 1931.[202] The first is a public interest hypothesis: "securities fraud increased in the early twentieth century, and the blue-sky laws were a reaction."[203] The second is "a public choice story in which small banks agitated for blue-sky laws as a means of reducing competition for depositors' funds from securities firms."[204] The third is a political hypothesis: "blue-sky laws were adopted at the behest of agrarian and progressive lobbies to curtail the power of financiers."[205]

Mahoney and other authors have focused these explanations on why the securities laws were passed,[206] yet none of the scholarship on this issue has adequately explained why common law fraud, and tort law generally, were so inadequate in the first place as to force securities law into being. This question remains unanswered.

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199 Edwards, *supra* note 198, at 427.

200 Mahoney, *supra* note 192, at 229.

201 *Id.*; *see also* Amanda J. Kiefer, *Kansas Blue Sky Is Not on the Market: The Deconstruction of Public Choice Theory Through the Lens of the Kansas Blue Sky Law*, 42 WASHBURN L.J. 281, 281 (2003) ("The state security regulation is so named because the law was 'aimed at "speculative schemes which have no more basis than so many feet of blue sky."'") (internal citations omitted); Phillip Tocker, *The Texas Blue Sky Law*, 11 TEX. L. REV. 102, 102 (1932) (noting that the first blue sky law "was designed primarily to protect purchasers of fraudulent securities from dishonest promoters who would sell shares in 'the bright blue sky itself'").

202 Mahoney, *supra* note 192, at 229–30.

203 *Id.* at 229.

204 *Id.* at 229–30; *see also* Macey & Miller, *supra* note 193, at 350–51.

205 Mahoney, *supra* note 192, at 230.

206 *See also* Tocker, *supra* note 201, at 102–03 (discussing the origin of Texas's blue sky law).

Section III of this Article attempts to answer this question. It does so by reviewing the legislative history of Section 10(b) of the Act, and Rule 10b-5 promulgated under it, as well as the case law discussing and interpreting the securities fraud aspects of the Act and the state blue sky laws. In addition, however, Section III will focus on how the nature of securities fraud makes common law fraud ill-equipped to address it, because to adequately answer the question of why common law fraud was inadequate, one must look at the ways in which it fell short, long before the securities laws were passed.

As discussed above, common law fraud developed to address primarily personal deceptions.[207] It focuses on one-on-one deceptions.[208] Securities fraud, however, rarely involves personal deception. For example, although securities fraud schemes such as insider trading and misleading statements in a prospectus are deceptive devices intended to defraud and do, indeed, defraud individuals, they are significantly different in important ways from the one-on-one schemes traditionally addressed by common law fraud. It is not surprising, then, that under the common law framework, "the unique factual circumstances of securities fraud made it difficult for plaintiffs to show the elements of reliance and intent."[209]

Prior to the enactment of Section 10(b) of the Act, which covers securities fraud, there was section 9(c) of House Bill 9323, which attempted to cure the defect in which harmed stockholders had no cause of action against issuers for deceptive practices in the purchase and sale of securities.[210] The bill proposed to fix this problem by creating a "catch-all clause" intended to stop "cunning or manipulative devices," such as insider trading.[211] However, while it is clear the legislative intent included the prevention of securities manipulation,[212] it also aimed to repair the public's damaged confidence in the security market to assure "straight shooting" for a "more moderate, more honest, and more justifiably self-trusting" economy.[213] After the stock market crash of 1929, Congress identified a need to protect and restore investor

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207 *See supra* Section I.A.

208 *See supra* Section I.A.

209 Ethan H. Townsend, Note, *One Nation, Under Securities Fraud? The Third Circuit Notches a Win for Federalism in* In Re Lord Abbett Mutual Funds Fee Litigation, 55 VILL. L. REV. 1059, 1062 (2010).

210 Gordon Shneider, Chiarella v. United States*: An Analysis of Judicial Approaches to the Regulation of Business Conduct*, 17 NEW ENG. L. REV. 61, 85 (1981).

211 *Id.*

212 78 CONG. REC. 7869 (1934).

213 John H. Walsh, *A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry*, 29 HOFSTRA L. REV. 1015, 1049–50 (2001) (citing H.R. REP. NO. 73-1383, at 5 (1934)); *see also* Aaron v. SEC, 446 U.S. 680, 705–06 (1980).

confidence.[214] In other words, common law fraud's failure to stop securities fraud was so great that it threatened the structural integrity of the securities markets.

The Act, passed in response:

> was intended as a comprehensive scheme to produce the necessary flow of accurate information concerning securities traded in the secondary market. . . . Thus, when the SEC promulgated rule 10b-5 to define deceptive or manipulative devices, it included acts, practices, and courses of dealing in business, which would operate as deceit as well as communicational misconduct.[215]

This relaxed the strict common law fraud elements in important ways, allowing harmed investors to seek redress, even where they could not satisfy all of the fraud elements.[216] Congress and the Supreme Court have both recognized that securities fraud was born long ago within the common law, and still closely resembles common law fraud in important ways.[217] However, courts have consistently held that Section 10(b)'s general purpose was to provide relief for victims that otherwise had no remedy at common law. The Seventh Circuit, for example, noted that "[i]t is clear from such examination that the statute was meant to cover more than deliberately and dishonestly misrepresenting or omitting material facts which ordinarily are badges of fraud and deceit."[218] Knowledge of falsity or misleading character of statement and bad faith intent to mislead or misrepresent are not required to prove violation of Section 10(b), which prohibits manipulative and deceptive devices.[219]

In one early case decided by the U.S. District Court for the District of Columbia, the court clarified that securities fraud under the Act was not equivalent to common law fraud. There, the court held:

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214 S. REP. NO. 73-47, at 2 (1933) (describing how "billions of dollars" of valueless securities created "dire national distress" that needed to be addressed).

215 Shneider, *supra* note 210, at 87.

216 *See* Townsend, *supra* note 209, at 1062.

217 Brandon C. Helms, Note, *The Supreme Court's* Dura *Decision Unfortunately Secures a Brighter Future for 10b-5 Defendants*, 56 DEPAUL L. REV. 189, 203–04 (2006); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 744 (1975) ("[I]t is not inappropriate to advert briefly to the tort of misrepresentation and deceit, to which a claim under Rule 10b-5 certainly has some relationship.").

218 Kohler v. Kohler Co., 319 F.2d 634, 637 (7th Cir. 1963).

219 *Id.*; The court there went on to state that "[s]tate court decisions involving fraud and misrepresentation are applicable only indirectly as supplementary aids in establishing standards of diligence. Congress has established its own standard which is to be measured by federal law interpreting the statute and the rule unhindered by restrictive applications of state common law." *Id.* at 642.

> [P]etitioner's argument in this court with all its many facets amounts to no more than a claim that common law fraud has not been proven and that the registration cannot be revoked without such proof. We must reject such a claim. To accept it would be to adopt the fallacious theory that Congress enacted existing securities legislation for the protection of the broker-dealer rather than for the protection of the public. To say, as petitioner does, that every element of common law fraud must be proven in order to validate the revocation of a broker-dealer registration is to say that Congress had no purpose in enacting regulatory statutes in this field and that its legislation in the field is meaningless. On the contrary, it has long been recognized by the federal courts that the investing and usually naive public needs special protection in this specialized field. We believe that the Securities Act and the Securities Exchange Act were designed to prevent, among other things, just such practices and business methods as have been shown to have been indulged in by the petitioner in this case. Those practices described above when viewed in the setting portrayed in this record can only be described as manipulative, deceptive, and fraudulent.[220]

Courts have now repeatedly held that proof of common law fraud is not required to sustain cause of action under Section 10(b).[221]

The Act's preamble states its purpose is "to prevent inequitable and unfair practices in securities transactions generally."[222] One of its primary objectives was to restore and maintain investor confidence in the capital markets of the United States.[223] At the time of the Act's passage, the Senate Committee on Banking and Currency stated:

> The concept of a free and open market for securities necessarily implies that the buyer and seller are acting in the exercise of an enlightened judgment as to what constitutes a fair price. Insofar as the judgment of either is warped by false, inaccurate, or incomplete information regarding the corporation, the market price fails to reflect the normal operation of supply and demand.[224]

Under common law fraud, corporate insiders, broker-dealers, and others with greater information than the investing public could easily use that information, or put out false information contrary to the true information, to deceive investors, yet these deceptive practices did not run afoul of common law fraud. Thus, when the new securities fraud

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220 Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228, 233 (D.C. Cir. 1949) (footnotes omitted).

221 Baumel v. Rosen, 283 F. Supp. 128, 140 (D. Md. 1968), *aff'd in part, rev'd in part*, 412 F.2d 571 (4th Cir. 1969).

222 Faberge, Inc., Exchange Act Release No. 10174, 45 S.E.C. 249, 254 (May 25, 1973).

223 *Id.*

224 S. REP. NO. 73-1455, at 68 (1934); *see also id.* at 55–68; S. REP. NO. 73-792, at 3 (1934); H.R. REP. NO. 73-1383, at 11 (1934); *Faberge, Inc.*, 45 S.E.C. at 254.

laws were passed, although the new statutory securities fraud cause of action was similar to common law fraud in many ways,[225] it differed in important ways as well. The unique aspects of the capital markets caused different weight to be given to each fraud element as they were transferred into the world of securities fraud.[226] For instance, "[m]ateriality substitutes for justifiability."[227] "The two torts, however, have different standards for reliance, which have vast ramifications."[228] Reliance on a misrepresentation for liability in common law deceit must be actual and justifiable; by contrast, liability in securities fraud may arise under presumed reliance according to the fraud-on-the-market theory, provided the misrepresentation is material.[229]

Thus, although deceptive practices in the securities markets were redressable under common law fraud for well over a century as of the early 1900s, common law fraud had failed to provide an adequate remedy to injured plaintiffs. This failure of the common law was so great it threatened the stability of the capital markets and undermined the public's faith in them. This led, at least in part, to the stock market crash of 1929. It also led states and Congress to pass statutes to prohibit deceptive practices in the purchase and sale of securities.[230] The failure of common law fraud was a result of the doctrine being ill-suited to address deceptive practices in the purchase and sale of securities because such deceptive practices did not conform to the one-on-one deception paradigm that common law fraud developed primarily to address. This gap in the law was filled by state legislatures passing state blue sky laws and by Congress passing Section 10(b) of the Act. These provided a more applicable fraud standard to address the particular

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225 The torts of deceit and securities fraud are very similar, as is apparent in their shared elements. Both require (1) a misrepresentation, (2) the appropriate state of mind (scienter, i.e., knowledge of falsity and intent to deceive), (3) reliance on the misrepresentation, and (4) injury (5) caused by actions taken in reliance on the misrepresentation.

Nicholas L. Georgakopoulos, *Frauds, Markets, and Fraud-on-the-Market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud*, 49 U. MIA. L. REV. 671, 673 (1995).

226 *Id.* at 673 n.5.

227 *Id.*; *see also* Huddleston v. Herman & MacLean, 640 F.2d 534, 543 (5th Cir. 1981) (listing elements of private action in direct and personal transactions as "(1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury"); 3 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD AND COMMODITIES FRAUD 195 (categorizing private action elements in open market impersonal transactions into misrepresentation and nondisclosure, materiality, scienter, privity, reliance, causation, and closed transaction).

228 Georgakopoulos, *supra* note 225, at 673.

229 *Id.*

230 *See, e.g.*, *supra* notes 192, 196.

deceptive practices carried out in the purchase and sale of securities,[231] and set up enforcement agencies to investigate and prosecute securities fraud claims.[232]

IV. THE GAP IN THE LAW COULD BE CLOSED BY LEGISLATION ESTABLISHING A NEW FRAUD-BASED CAUSE OF ACTION PROVIDING INJURED PARTIES AN AVENUE TO SEEK REDRESS AGAINST PDCPD WRONGDOERS

Like deceptive schemes involving the purchase or sale of securities prior to the passage of the blue sky laws and Section 10(b) (collectively, the "securities fraud laws"), PDCPD Schemes are impersonal deceptions of the public that, although fraudulent in nature, are not adequately addressed by existing fraud law. However, those injured by PDCPD Schemes are in many ways worse off, from a tort law perspective, than those injured by securities fraud under the common law. Because while some plaintiffs harmed by deceptive acts today falling within the purview of securities fraud law succeeded in obtaining damages from defendants under the common law,[233] those injured by PDCPD Schemes today have nearly no chance of success in court under a common law fraud theory.

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231 *See supra* note 194.

232 *See* Michael L. D'Ambrosio, *Virtual Currency Regulation: From the Shadows of the Internet to the Floor of Congress*, 19 WAKE FOREST J. BUS. & INTELL. PROP. L. 249, 255 (2019) ("Over the course of history, federal agencies have been established out of necessity, whether based on innovation or catastrophic events. Take for example the establishment of the U.S. Securities Exchange Commission (SEC) in 1934 following the stock market crash of 1929 . . . .") (footnote omitted); *see, e.g.*, *Division of Securities: What We Do*, FLA. OFF. OF FIN. REGUL., https://www.flofr.com/sitePages/DivisionOfSecurities.htm [https://perma.cc/BC95-6NGD] (noting that, in Florida, the Division of Securities within the Office of Financial Regulation "administers and enforces compliance with the Florida Securities and Investor Protection Act, designed to protect the investing public and promote economic growth").

233 *See* WILLIAM T. ALLEN, REINIER H. KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 616 (3d ed. 2009) (stating that majority rule at common law was that directors only owed duty to corporation and did not have duty of disclosure to "those with whom [they] traded shares"). The Supreme Court, however, also applied an "intermediate" rule: where special facts existed, directors had a "disclose or refrain" duty. *See id.* (citing Strong v. Repide, 213 U.S. 419 (1909)) (explaining attempt of Supreme Court to alleviate problems of common law fraud claims); *see also The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 YALE L.J. 1120, 1125–26 (1950) (noting that court waived fiduciary duty rule when "crucial facts were concealed," but explaining that plaintiffs still rarely brought suit because it was not "financially feasible" to assemble proof of this concealment).

Take, for instance, the case of *City of New York v. BP P.L.C.*[234] There, the City of New York filed a lawsuit against oil and gas companies seeking damages for climate change harms.[235] No fraud claim was included in the complaint. Instead, the City alleged three torts: public nuisance, private nuisance, and trespass.[236] The disposition of the case at the trial court level gives valuable insight into why no fraud claim was alleged. There, the U.S. District Court for the Southern District of New York granted the defendants' motion to dismiss.[237] In its opinion, the court held that federal common law governed the City's claims because the claims were "ultimately based on the 'transboundary' emission of greenhouse" gas emissions, and required a uniform standard of decision.[238] The court further concluded that the Clean Air Act displaced any federal common law claims.[239] The court said Congress had "expressly delegated to the EPA the determination as to what constitutes a reasonable amount of greenhouse gas emission under the Clean Air Act."[240]

The court there also rejected the City's argument that if the Clean Air Act displaced their federal common laws claims, state law claims should become available.[241] The court said such a result would be "illogical."[242] The court noted that the Clean Air Act regulates only domestic emissions but ruled that "to the extent that the City seeks to hold Defendants liable for damages stemming from foreign greenhouse gas emissions, the City's claims are barred by the presumption against extraterritoriality and the need for judicial caution in the face of 'serious foreign policy consequences.'"[243] The court said litigating an action for injuries from foreign greenhouse gas emissions in federal court would "severely infringe" upon matters "within the purview of the political branches."[244]

As of this writing, the case is currently on appeal to the U.S. Court of Appeals for the Second Circuit.[245]

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234 City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

235 *See generally* Amended Complaint, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18-cv-182-JFK).

236 *Id.* at 68–73 (detailing the City's theory of each of the three causes of action within the Amended Complaint).

237 *BP P.L.C.*, 325 F. Supp. 3d at 468.

238 *Id.* at 472.

239 *Id.* at 472–75.

240 *Id.* at 473 (citing Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428–29 (2011)).

241 *Id.* at 474.

242 *Id.*

243 *Id.* at 475 (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018)).

244 *Id.* at 476.

245 Notice of Appeal, *City of New York*, 325 F. Supp. 3d 466 (No. 18-cv-182-JFK).

The City's lawsuit, and its fate in the Southern District of New York, are instructive. The City was suing fossil fuel companies for causing sea level rise, which has damaged and is damaging New York City.[246] The damage from sea level rise will increase in coming years.[247] The causal connection between fossil fuel emissions and the current sea level rise is scientific fact. This has been shown by myriad studies and reports.[248] This causal connection was the impetus for the City to sue the fossil fuel companies most responsible for the damage. However, major fossil fuel companies like ExxonMobil are responsible not only for the CO_2 emissions from the oil and gas they extract, process, and sell—causing sea level rise—but also for the deception of the public that permitted the extraction, processing, and selling of those same fossil fuels.[249] The fossil fuel companies and their collaborators misled the public, creating a false "debate" on the question of anthropogenic global warming.[250] This "debate" resulted in fossil fuels not only being permitted to be extracted, sold, and burned, but justified billions of dollars in subsidies to the fossil fuel industry in the process.[251] Regulators refused to take action. As a result—once again, as a result of fossil fuel companies misleading the public—CO_2 emissions continue

246 *See* Amended Complaint, *City of New York*, 325 F. Supp. 3d 466 (No. 18-cv-182-JFK).

247 *See, e.g.*, Andra J. Garner, Michael E. Mann, Kerry A. Emanuel, Robert E. Kopp, Ning Lin, Richard B. Alley, Benjamin P. Horton, Robert M. DeConto, Jeffrey P. Donnelly & David Pollard, *Impact of Climate Change on New York City's Coastal Flood Hazard: Increasing Flood Heights from the Preindustrial to 2300 CE*, 114 PROC. NAT'L ACAD. SCIS. 11861 (2017); Jie Yin, Dapeng Yu, Ning Lin & Robert L. Wilby, *Evaluating the Cascading Impacts of Sea Level Rise and Coastal Flooding on Emergency Response Spatial Accessibility in Lower Manhattan, New York City*, 555 J. HYDROLOGY 648 (2017).

248 *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE (2019); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT (2014).

249 *See* James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 342–45 (2018).

250 Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 723 (2008) (noting that the plaintiff in the *Kivalina* case filed a public nuisance complaint against ExxonMobil and others for, among other things, participating in a conspiracy to "create a false scientific debate about global warming to deceive the public").

251 *See* Sharon Anglin Treat, *Fixing A Broken System that Promotes Climate Change and Depletion of Global Fisheries: WTO Subsidy Reform Is Just the Tip of the (Melting) Iceberg*, 49 ENV'T L. REP. NEWS & ANALYSIS 10755, 10755–56, 10756 n.9 (2019); Christopher Riti, *Three Sheets to the Wind: The Renewable Energy Production Tax Credit, Congressional Political Posturing, and an Unsustainable Energy Policy*, 27 PACE ENV'T L. REV. 783, 796 (2010).

to increase, global temperatures continue to rise, and sea level rise is accelerating.[252]

Sea level rise, more frequent and destructive extreme weather events, and other negative effects are caused by global warming. Global warming is caused by CO_2 emissions. These emissions are caused by burning fossil fuels. The burning of fossil fuels is caused by ExxonMobil and other companies extracting, refining, and selling those fossil fuels, which are then burned in industry, transportation, energy production, and for other uses. Fossil fuel use is caused by the profitability of fossil fuels, which gives a pecuniary incentive to extract and sell them, as well as the permission of governments that have, to date, refused to prohibit, limit, or cap fossil fuel use, and imposed no liability on those whose actions and deceptive actions and practices cause the damage.

The question of whether ExxonMobil and other fossil fuel companies should be held liable for climate disruption damages is an open one. Perhaps, as many have held, the question of climate disruption liability rests on the shoulders of regulators and legislators and is therefore not properly addressed by private causes of action in court.[253] This was the District Court's holding in *City of New York*.[254] On the other hand, there are others who advocate that damages caused by those who mislead the public, like those in the fossil fuel industry, *should* be recoverable against those whose deceptive acts and practices caused the damage.[255]

Climate change fraud, like all PDCPD Schemes, occupies a place along the very outer edge of what is considered illegal fraudulent conduct. This is as true with regard to the tobacco, sugar, and opioid industries' misrepresentations as it is with regard to those disseminated by the fossil fuel industry. PDCPD Schemes, while clearly involving deceptive behavior that purposefully misleads others for profit, while causing immense harm, fall outside the current common law fraud law. This is so clearly the case that most lawsuits against PDCPD

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252 Katie Weeman & Patrick Lynch, *New Study Finds Sea Level Rise Accelerating*, NASA (Feb. 13, 2018), https://climate.nasa.gov/news/2680/new-study-finds-sea-level-rise-accelerating [https://perma.cc/T6FH-GD92]; Sönke Dangendorf, Carling Hay, Francisco M. Calafat, Marta Marcos, Christopher G. Piecuch, Kevin Berk & Jürgen Jensen, *Persistent Acceleration in Global Sea-Level Rise Since the 1960s*, 9 NATURE CLIMATE CHANGE 705 (2019).

253 *See, e.g.*, Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 857–58 (9th Cir. 2012) (holding that the Clean Air Act displaced public nuisance claims pertaining to sea level rise from global warming).

254 City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018); *see also Kivalina*, 696 F.3d at 857–58.

255 *See, e.g.*, Parker-Flynn, *supra* note 37, at 11099 (noting the inadequacy of current fraud law, and positing that "the United States should adopt a narrowly tailored civil cause of action for the fraudulent misrepresentation of climate science").

wrongdoers, like the one filed by the City of New York, do not even allege a cause of action for fraud.

Accordingly, PDCPD Schemes remain profitable and destructive, much as fraudulent securities schemes prior to the passage of the securities fraud laws. This shortcoming of the law could be remedied by passage of legislation specifically targeted at prohibiting PDCPD Schemes and providing civil redress and criminal penalties against PDCPD wrongdoers.

This statutory framework could borrow from that passed by Congress in addressing the shortcoming of the law with regard to fraudulent schemes involving the purchase and sale of securities. This Article does not propose to put forth a perfect statutory scheme. Nevertheless, any legislative act aimed at prohibiting and punishing PDCPD Schemes would clearly need to define the parameters of what PDCPD Schemes are,[256] and provide civil remedies to plaintiffs harmed by them.

Closing this gap in the law would further numerous tort policy goals. First, it would shift the loss to those responsible for causing it.[257] The plaintiffs harmed by consumption of sugar, tobacco products, and opioid painkillers, as well as those harmed by sea level rise and other global warming-caused effects, are members of the public who did not profit off of the dangerous product. Instead, it is the companies marketing and selling the toxic products whose deception of the public caused the products to be sold and used, who cause the harm. Passing a PDCPD Scheme liability act would shift the loss to the ones responsible for causing it: the PDCPD wrongdoers.

The second policy aim that would be furthered by passing a PDCPD Scheme liability act is that it would expand the scope of liability for those who commit intentional, wrongful conduct.[258] The Restatement (Third) of Torts states:

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256 My proposed definition, as discussed in the Introduction, is as follows: Every PDCPD Scheme has three elements: (1) a company sells a deceptively dangerous product; (2) the company knows or has reason to know that the product causes harm to human health, life, or the environment; and (3) the company purposefully misleads the public about the dangers posed by the product.

257 *See, e.g.*, Siegel v. Howell, No. CV 980409394S, 1999 WL 966540, at *4 (Conn. Super. Ct. Oct. 13, 1999) (noting "[t]he policy purpose of shifting the loss to responsible parties"); Cetkovic, *supra* note 40, at 88 (discussing "the policy aim of shifting the total loss to the party responsible for the creation of the risk").

258 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 33 cmt. c (AM. L. INST. 2010) (discussing "expanding the scope of liability for intentional tortfeasors beyond that which the risk standard might impose"); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmt. b (AM. L. INST., Tentative Draft No. 1, 2015) (noting that "the principle that scope of liability should be expanded in the case of intentional torts is also

> If [the actor's] fault lies in his intent and his act rather than in identification of a particular victim, then liability for the intent and the act seems perfectly appropriate even if the particular victim was not the intended one. . . . In addition, it can be said that an intentional aggressor should bear the risk that his aggression will lead to unintended injury or that the aggressor should be subjected to appropriate incentives to deter the aggression.[259]

Thus, just as transferred intent has been applied to intentional torts where it was determined wrongdoers should not evade liability for those harmed even if the victims were not personally targeted, so too should those harmed by PDCPD Schemes be permitted to seek damages against the companies whose deceptions caused their toxic products to enter the stream of commerce and cause the resulting harm.

CONCLUSION

If a used car salesman fails to disclose that a car for sale has been in an accident or misstates the mileage on its odometer, this deceptive conduct is labeled "fraud" and punished under the law. A person harmed by the deception can seek damages against the salesman or the automobile dealership. However, when an opioid manufacturer claims its pain pills are totally safe and not addictive, and further hides studies demonstrating the falsity of both statements, the deceptive conduct is not called fraud. Instead, it is allowed.

The used car salesman's misrepresentation has a small effect on one individual, the buyer. If his lies are believed, the buyer loses money. The opioid manufacturer's misrepresentation has a far greater effect on a far greater number of people. Addiction, suffering, and death not only could result from this lie, but did result from it, and continue to happen every day.

Yet today the law condemns the former deception while permitting the latter. One-on-one deception is prohibited and punished. Deception of the public by way of a PDCPD Scheme, which has a far greater effect

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a potent one, at least for those intentional tortfeasors who display significant culpability"); *see also* Andrew L. Merritt, *A Consistent Model of Loss Causation in Securities Fraud Litigation: Suiting the Remedy to the Wrong*, 66 TEX. L. REV. 469, 502 (1988) (noting that "courts have not hesitated to expand the scope of liability for intentional wrongdoers"); Seidel v. Greenberg, 260 A.2d 863, 871 (N.J. Super. Ct. 1969) ("It is well settled that where the acts of a defendant constitute an intentional tort or reckless misconduct, as distinguished from mere negligence, the aggravated nature of his acts is a matter to be taken into account in determining whether there is a sufficient causal relation to plaintiff's harm to make the actor liable therefor.").

259 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmt. b (AM. L. INST., Tentative Draft No. 1, 2015) (quoting DAN B. DOBBS, THE LAW OF TORTS § 46 (2000)).

on a far greater number of people, continues to be legal and, therefore, highly profitable.

PDCPD Schemes do not fit into any existing tort framework. Accordingly, those harmed by such schemes are too often left with no way to seek redress against the wrongdoer. Companies profit immensely from such schemes, in part because they avoid liability to those harmed. This gap in the law could be closed by legislation aimed at closing the PDCPD Scheme tort loophole, much in the same way state blue sky laws and Section 10(b) closed the loophole in fraud law that allowed those committing securities fraud to evade liability. Closing this gap would further tort policy goals, such as shifting the loss to those responsible for causing it and expanding the scope of liability for those who commit intentional, wrongful conduct. This should be done now before the problem of PDCPD Schemes grows even larger.