STATE OF MINNESOTA DISTRICT COURT
SECOND JUDICIAL DISTRICT
COUNTY OF RAMSEY

THE STATE OF MINNESOTA,
BY HUBERT H. HUMPHREY, III
ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

PHILIP MORRIS INCORPORATED;
R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION;
B.A.T. INDUSTRIES P.L.C.; LORILLARD TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY;
LIGGETT GROUP, INC.; THE COUNCIL FOR TOBACCO RESEARCH -- U.S.A., INC.; and THE TOBACCO INSTITUTE, INC.,
Defendants.

Court File No. C1-94-8565

January 26, 1995

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

The affirmative defenses at issue in this motion were asserted by defendants in an attempt to recast the complaint into an action which plaintiffs have not pled. Through these subrogation-type defenses, defendants attempt to transform this lawsuit into subrogation claims in personal injury actions, where the rights of the State and Blue Cross would be derivative of the rights of smokers.

The fundamental fallacy of defendants' tactic is that these defenses have no applicability to the action which has been pled. The State and Blue Cross have not brought this action as subrogated parties to any underlying tort claims that individual smokers may have against the cigarette industry. In a subrogation claim, one party steps into the shoes of another and asserts the rights of the other. By contrast, in the present case, the State and Blue Cross sue in their own right -- in a direct action -- to recover the enormous sums of money each spends to pay for health care for smoking-attributable diseases and to obtain equitable relief.

It is, of course, the fundamental right of plaintiffs -- and not the prerogative of defendants -- to plead their own complaint and choose the causes of action on which to proceed. In view of the extraordinary facts of this case, the State and Blue Cross choose to assert direct causes of action in their own right. This direct action is based upon a breach of the duties that defendants owe directly to the State and Blue Cross. This direct action is further based upon the commitment of the State and Blue Cross to protect the public health and upon their status as two of the largest purchasers of health care services in the state.

The State and Blue Cross choose to proceed with a direct action because from a practical perspective this is the only viable manner in which their rights can be enforced. The wrongful and intentional misconduct of the cigarette industry has resulted in an unprecedented impact on the public health and on health care costs. Each year in the State of Minnesota, thousands die from smoking-related diseases, and the health care costs run into the hundreds of millions of dollars. To attempt to litigate these claims one at a time would obviously be an impossibility -- indeed, an absurdity.

But that is exactly the posture in which defendants attempt to place this case through their assertion of subrogation defenses, including the alleged comparative fault and assumption of the risk of individual smokers. This tactic -- which lacks any legal foundation or relevance to this case -- threatens to sink this litigation in an unmanageable quagmire of discovery. Accordingly, it is imperative that these defenses be dismissed prior to the commencement of discovery.

It is important to note that plaintiffs are not seeking in this motion a ruling establishing their direct causes of action. If defendants contend that the direct causes of action pled in the complaint fail to state a claim upon which relief can be granted, then defendants can move to dismiss. In fact, defendants have indicated that they are filing a motion to dismiss at least certain of plaintiffs' claims. In response to this defense motion, plaintiffs will fully brief the issue of their right to proceed in a direct action. For purposes of this motion, it is sufficient to take the complaint as pled. Since subrogation claims were not asserted, subrogation defenses do not apply.

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STATEMENT OF FACTS

A. The Complaint

In the complaint, the State and Blue Cross have asserted nine direct causes of action, which generally may be grouped into four categories:

1. Undertaking a Special Duty -- count one.

2. Minnesota Antitrust Law -- counts two and three.

3. Minnesota Consumer Protection and Trade Practices Statutes -- counts four through seven.

4. Restitution -- counts eight and nine.

All of these counts were pled as direct causes of action stemming from defendants' breach of independent duties to the State and Blue Cross, separate and apart from any duties defendants may also owe to individual smokers.[1]

The action was pled in this fashion in response to unique and extraordinary facts. These defendants assumed a duty to render services for the protection of the public health and a duty to those who advance and protect the public health, including the State and Blue Cross. In large part, defendants assumed this duty through their public statements and representations that they would undertake to accept an interest in the public's health as a basic and paramount responsibility and that they would research the issue of smoking and health and report all facts to the public. *See, e.g*., Complaint, at ¶ 85. Instead of fulfilling their duty, defendants restrained research, concealed information on the harmful effects of smoking and suppressed the marketing of a safer cigarette. *Id*. at ¶¶ 21-70. Defendants knew that their actions would cause millions of persons to begin to smoke, primarily in their youth and adolescence: would cause adverse health effects in millions of smokers, and would cause the cost of medical care to increase dramatically. *Id*. at ¶ 75. In fact, these defendants had the intent to cause all of the above, as intent is defined by Minnesota law. *Id*. In short, defendants breached their duty -- and the State and Blue Cross were thereby damaged.

The magnitude of the resulting harm is unparalleled. Cigarette smoking has become the most pervasive public health issue of our time and the single most preventable cause of death in our society. *See* Complaint, at ¶ 76. In Minnesota, smoking-related diseases cause more than 6,000 deaths a year -- from diseases including cardiovascular (heart disease and stroke), cancer, emphysema, asthma, and bronchitis. *Id*. at 77. In addition to the human toll, the economic costs of health care expenditures for smoking-attributable diseases amount to more than an estimated $350 million a year each year in this state alone. *Id*. at ¶¶ 78-79.

In this action, the State and Blue Cross seek to recover the enormous sums of money spent on health care for smoking-attributable diseases. *Id*. at ¶¶ 7,8, 134. In addition, the State and Blue Cross seek a broad array of equitable relief, and the State also seeks civil penalties for statutory violations. *Id*. at ¶ 135.

B. The Answers

The eight answering defendants have asserted a multitude of affirmative defenses -- a collective total of more than 275, some overlapping and some distinct. *See* Appendix 1.[2] For purposes of this motion, plaintiffs have specified 28 affirmative defenses which, in whole or in part, are premised upon defendants' attempt to convert this case into a subrogation action. These 28 affirmative defenses, which are listed in Appendix 2, primarily relate to allegations of comparative fault or assumption of risk by individual smokers, which defendants are apparently attempting to impute to the State and Blue Cross.[3]

In addition, plaintiffs move to strike any other defense to the extent that it rests upon the assertion that this is a subrogation action. Thus, apart from the comparative fault and assumption of risk defenses. the list of 28 affirmative defenses in Appendix 2 includes those which generally reference subrogation. *See, e.g*., Philip Morris Ninth Affirmative Defense (alleging lack of authority or standing of the State, other than as subrogee); Brown & Williamson Second and Fifth Affirmative Defenses (alleging that these are subrogation claims and raising the issue of failure to

[1]The Attorney General brought this action "to protect the citizens and the public health of the State of Minnesota" and "to vindicate the State's proprietary interest. . . ." See Complaint, ¶ 7. Blue Cross brought this action "on its own behalf as a purchaser of health care services and on behalf of its fully insured groups with whom it has contracts, who have been required to pay increased premiums for health insurance and who will benefit from any recovery in this action." *Id*. at ¶ 8.

[2]B.A.T. Industries p.l.c., which has filed a motion to dismiss for lack of personal jurisdiction, has not yet answered.

[3]It should be noted that even if this were a subrogation action in the typical personal injury context, it would be difficult -- from a legal, factual and common-sense perspective to envision how smokers could have been negligent or assumed the risk. After all, smokers only use a product in a manner intended by these defendants.

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join necessary parties); Lorillard Tenth Defense (alleging the lack of authority of the plaintiffs); Counsel for Tobacco Research Thirty-Fifth Affirmative Defense (alleging failure to identify any particular subrogee).

Beyond these specified defenses, there may be other affirmative defenses which encompass principles of subrogation. However, because of ambiguities in the drafting of many of the answers, it is impossible to identify at this stage of the litigation each and every affirmative defense which may relate to subrogation. Accordingly, through this motion plaintiffs seek an order establishing the general principle that subrogation defenses fail to state a defense against the causes of action as pled. As the litigation proceeds, and the record is clarified, this general principle can be applied as warranted.[4]

ARGUMENT

A. The Affirmative Defenses at Issue in This Motion Fail to State a Legal Defense to Plaintiffs' Claims

This motion presents a pure issue of law and therefore is appropriate for resolution under Rule 12.03, Minn. R. Civ. P. As in the present case, "[j]udgment on the pleadings is proper where the defendant relies on an affirmative defense . . . which does not raise material issues of fact." *Jacobson v. Rauenhorst Corp*., 301 Minn. 202, 206, 221 N.W.2d 703, 706 (1974), *overruled on other grounds, Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate. Inc*., 281 N.W.2d 838, 842 n. 4 (Minn. 1979). Similarly, in *Fagerstrom v. Rappaport*, 176 Minn. 254, 257, 223 N.W. 142, 143 (1929), the Minnesota Supreme Court, in dismissing an answer, stated:

> An irrelevant pleading is one which has no substantial relation to the controversy between the parties to the suit.

Thus, although a motion for judgment on the pleadings is not a "favored way of testing the sufficiency of a pleading," such a motion should be granted when, as in the present case, the issue may be decided as a matter of law. *Ryan v. Lodermeier*, 387 N.W.2d 652, 653 (Minn. Ct. App. 1986).

B. Plaintiffs -- Not Defendants -- Have the Right To Plead Their Own Complaint

It is axiomatic that it is the right of the plaintiffs -- not defendants -- to choose the manner in which they will seek to enforce their legal rights. Indeed, the Minnesota Supreme Court recognized long ago that to allow a defendant to dictate a plaintiff's theory of the case may "result[ ] in the deprivation of a right." That is precisely the situation in the present case, where defendants' efforts to convert this action into tens of thousands of subrogation claims would result, as a practical matter, in the inability of the State and Blue Cross to vindicate their rights under the law.

Thus, in *Corey v. Corey*, 120 Minn. 304, 139 N.W. 509 (1913), the wife of a decedent petitioned to challenge transfers made by the executor of a will. The executor argued that the sole ground on which the wife had a right to institute an action was in her own name and not in the name of the estate. This, of course, is similar to the defendants' attempt in the present case to dictate the capacity in which the plaintiffs sue. In *Corey*, the Minnesota Supreme Court soundly rejected this argument, stating:

> [W]e are averse to holding that a person shall be deprived of a remedy because perchance a different one may also exist. . . . The denial of a remedy, because it is claimed another and more appropriate one exists, frequently results in the deprivation of a right.

120 Minn. at 312, 139 N.W. at 512 (emphasis added); *see also Monroe v. Thulin*, 181 Minn. 496, 499, 233 N.W. 241, 242 (1930) ("It is not for the wrongdoer to dictate the remedy to be pursued by his victim in order to seek redress."); *Tysk v. Griggs*, 253 Minn. 86, 98, 91 N.W.2d 127, 136 (1958) (citing *Monroe*); 1 Dunnell Minn. Dig., *Actions and Claims for Relief* § 2.06 "Cumulative Remedies" at 144 (4th ed. 1989) ("A party should not be deprived of a remedy simply because he may also have another. The denial of a remedy because it is claimed that another and more appropriate one exists frequently results in deprivation of a right.")

Even the presence of a statutory cause of action generally will not preclude the plaintiff from

[4]The defendants also have alleged a number of affirmative defenses against the State and Blue Cross directly, including comparative fault and assumption of the risk. In some answers, the alleged fault of the smokers and the State and Blue Cross have been pled in the same affirmative defense. *See, e.g.,* Philip Morris Fifty-Fifth Affirmative Defense; R.J. Reynolds Twentieth Affirmative Defense. In this motion, plaintiffs seek only to strike those portions of the affirmative defenses that relate to the conduct of the smokers -- and not to the State and Blue Cross. Suffice it to say, however, that it is doubtful that comparative fault and assumption of risk are appropriate as to the State and Blue Cross for a variety of reasons, including the lack of a factual basis. In addition, comparative fault and assumption of risk are inapplicable to a number of plaintiffs' causes of action, including, for example, antitrust, consumer protection and intentional wrongdoing.

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choosing to proceed in an action at common law. Unless there is clear statutory language making the statutory remedy exclusive, it is uniquely the plaintiff's privilege to elect which remedy to enforce. As the Minnesota Supreme Court stated in *Davis & Michel v. Great Northern Great Northern Ry*., 128 Minn. 354, 358, 151 N.W. 128, 129 (1915):

> It is well settled in this state, as well as in all states where the common-law distinction between forms of action have been abolished, that a complaining party may resort to any judicial remedy for the enforcement of his rights, legal or equitable, which is adequate and appropriate to the relief sought.

151 N.W. at 129. Accordingly, the Supreme Court held in *Davis* that an attorney seeking to recover attorney's fees "may elect whether to proceed by independent action, or in the original suit." *Id*.[5]

Interestingly, one of the defendants in the present action, The American Tobacco Company, also attempted -- unsuccessfully-- to redefine a plaintiff's claim in a recent personal injury action. *In The American Tobacco Co. v. Evans*, 508 So.2d 1057 (Miss. 1987), a dispute over the nature of the claim arose in the context of a discovery dispute. In rejecting the argument of American Tobacco, the Mississippi Supreme Court stated:

> American attempts forcefully though speciously to redefine that claim and to do so quite restrictively….
>
> It requires little imagination to see the mischief that might result from allowing a party to define the contours of his adversaries' claim…. Within the limits of stating a claim upon which relief may be granted, it is the plaintiff's prerogative to define his claim.

508 So.2d at 1060 (citations and footnote omitted).

In the present case, no imagination at all is needed to see "the mischief" that would result from allowing defendants to redefine the claims. The State and Blue Cross would undeniably suffer a deprivation of their rights.

C. The State and Blue Cross Chose to File A Direct Action Because of the Breach of Independent Duties Owed To Them by Defendants

In this action, the State and Blue Cross sue in their own right and seek redress for the cigarette industry's breach of independent duties which flowed directly to them as purchasers of health care. In this direct action, the duty flows directly to the State and Blue Cross -- not to the smokers.[6]

In *Pelowski v. Frederickson*, 263 Minn. 371, 116 N.W.2d 701 (1962), the Minnesota Supreme Court faced -- and rejected -- arguments similar to those asserted in the present case where a defendant attempted to define a party's cause of action as subrogation. *Pelowski* involved an action by the passenger of an automobile driven by her husband against the owners and driver of the truck which collided with their vehicle. The owners and driver of the truck, in turn, filed a third-party complaint in contribution and indemnity against the estate of the husband, who had died in the collision. The estate sought to have the third-party complaint dismissed by arguing that it was, in essence, an action in subrogation to the wife's claim against her husband and that such an action was barred by the doctrine of marital immunity.

The Supreme Court held that the third-party action was not a derivative, subrogation action. Instead, the claim was brought on a theory of breach of an independent duty owed by the decedent to the truck owner and driver -- not to the wife. The Supreme Court stated:

> This cause of action is not dependent upon subrogation to the rights of decedent's surviving spouse, but rather upon a claim of breach of decedent's duty to third-party plaintiffs.

263 Minn. at 375-76, 116 N.W. at 704. The Supreme Court further stated:

> [T]he third-party plaintiffs… have a

[5]Thus, in the present case, even though certain rights are afforded to the State pursuant to federal and state statutes for the recovery of monies paid for Medicaid, the State has the right to proceed outside of this nonexclusive statutory framework. *See* 42 U.S.C. §§ 1396 *et seq*.; Minn.Stat. §§ 256B *et seq*.

[6]By contrast, in a subrogation case, one party steps into the shoes of another. Accordingly, the claims -- and the duty -- are derivative instead of direct. *See, e.g.,* George J. Couch, *Cyclopedia of Insurance Law* (2d ed. 1983), § 61.1, at 75 ("Subrogation is the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer."); *Id*. § 61.37 at 121 ("[t]he right of subrogation is purely derivative.").

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> sufficient basis for their action because of the breach of an independent duty owing to them by the decedent and hence need not base it upon any theory of subrogation to any cause of action of plaintiff against decedent.

263 Minn. at 376, 116 N.W. at 704.

As in *Pelowski*, the action of the State and Blue Cross in this litigation is based on the cigarette industry's breach of an independent duty owing to them and is not based on a claim derivative of the breach of duty that the industry may owe to smokers.

D. In a Direct Action, Affirmative Defenses May Not Be Imputed From a Third Party to the Plaintiff

It is well established as a general rule that a defendant may not impute defenses from one person to another, in this case, from the smokers to the State and Blue Cross. As stated in *Prosser and Keeton on Torts*:

> Ordinarily the plaintiff's action for his damages will not be barred by the negligence of any third person who may have contributed to them…. Except for vestigial remnants which are at most moribund historical survivals, "imputed contributory negligence" in its own right has now disappeared.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 74, at 529-30 (5th ed. 1984).

The policy underlying the refusal of courts to impute negligence is that a plaintiff should not be made to account for the alleged fault of a third party in a manner which would benefit the wrongdoer. Thus, in *Weber v. Stokely-Van Camp. Inc*., 274 Minn. 482, 144 N.W.2d 540 (1966), the Supreme Court of Minnesota noted the "illogic" of imputation and stated:

> If negligence is based on fault, it is difficult to rationalize imputed negligence where the party seeking recovery is without fault…. Why should the negligent third person escape liability under these circumstances?

274 Minn. at 486-87, 144 N.W.2d at 542.

Similarly, in *Pierson v. Edstrom*, 286 Minn. 164, 170, 174 N.W.2d 712, 716 (1970), the Supreme Court stated:

> [T]he imputed contributory negligence rule… frees from liability a third party who has been at fault even though the person denied recovery is blameless.
>
> Most text writers are in agreement that the rule of imputed contributory negligence is unsound.

See also *Christensen v. Hennepin Transp. Co*., 215 Minn. 394, 412, 10 N.W.2d 406, 417 (1943) ("Liability for a wrong should be borne by the party who caused it.").

The rule against imputation of defenses was adopted around the turn of the century during the era of contributory negligence, when even the slightest percentage of contributory negligence extinguished any right to recovery. *See Christensen*, 215 Minn. 394, 10 N.W.2d 406; *Lammers v. Great Northern Ry*., 82 Minn. 120, 84 N.W. 728 (1901). However, the Minnesota Supreme Court has re-affirmed the principle in the modern era of comparative fault, under the Minnesota comparative fault statute. *See Smedsrud v. Brown*, 303 Minn. 330, 332, 227 N.W.2d 572, 574 (1975).[7]

In addition, the general principle that defenses do not transfer from a third party to the plaintiff has been recognized in a variety of contexts. For example, in *City of Willmar v. Short-Elliott-Hendrickson. Inc*., 512 N.W.2d 872 (Minn. 1994), the Minnesota Supreme Court held that a defendant's cross claim for indemnity and contribution against a codefendant was not barred even though the plaintiff's cause of action against the codefendant was barred by statute of limitations. The Court based its ruling, in part, on the fact that the defendant's contribution and indemnity claims "are independent causes of action…." 512 N.W.2d at 874. Similarly, in *Pelowski, supra*, the Minnesota Supreme Court refused to impute the doctrine of marital immunity because the third-party plaintiff was not suing in subrogation but on "the breach of an independent duty…." 263 Minn. at 375, 116 N.W.2d at 704.[8]

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[7]In fact, the comparative fault statute itself specifically states that contributory fault diminishes damages only "in proportion to the amount of fault *attributable to the person recovering*." Minn. Stat. § 604.01, subd. 1. (Emphasis added). In the present case, the persons recovering are the State and Blue Cross, and the fault of the smokers, if any, would not be "attributable to" the State and Blue Cross.

[8]In the present case, in addition to comparative negligence, defendants also have pled assumption of the risk. Minnesota recognizes two types of assumption of the risk. Secondary assumption of the risk is a form of comparative fault. *Iepson v. Noren*, 308 N.W.2d 812, 816 (Minn. 1981); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826, 827 (1971); *see also* Minn. Stat. § 604.01 subd. la. Accordingly, in the present case, secondary assumption of the risk by individual smokers cannot be imputed to the State and Blue Cross for the same reasons

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Generally, the only exceptions to the rule against imputation are in certain actions involving derivative claims, master/servant relationships or joint enterprises. *See generally* Restatement (Second) of Torts §§ 485, 486, 491 and 494. In derivative actions at common law, of course, the plaintiff stands in the shoes of the third party whose negligence is at issue, and therefore the imputation of comparative fault may follow. *See O'Neil v. Wells Concrete Prod. Co*., 477 N.W.2d 534, 537 (Minn. Ct. App. 1991) (imputation in derivative loss of consortium claim); Restatement (Second) of Torts § 494 (imputation in derivative claims for death or loss of services). In cases involving a master/servant relationship or joint enterprise, the situation "is the reverse of respondeat superior" and therefore the negligence of the servant is sometimes imputed to the master. *See Weckerly v. Abear*, 256 N.W.2d 79, 81 (Minn. 1977); *Thomas Oil. Inc. v. Onsgaard*, 298 Minn. 465, 215 N.W.2d 793 (1974); *see also* Restatement (Second) of Torts § 491 (in joint enterprise, "each is the agent or servant of the others. . . ."). The general rule against imputation, however, is firmly embedded in Minnesota law. As the Supreme Court stated in *Weber*:

> [T]here is just no way to rationalize the rule of imputed contributory negligence.

274 Minn. at 487, 144 N.W.2d at 543.

In sum, in the present case involving direct claims, the imputation of affirmative defenses from the smokers to the State and Blue Cross is clearly impermissible as a matter of law under long-standing and well-established principles of Minnesota law.

CONCLUSION

At issue in this motion is the fundamental right of plaintiffs to choose the manner in which to vindicate their rights. The State and Blue Cross elected to sue in their own right -- in a direct action. Accordingly, the State and Blue Cross respectfully request that this Court enter an order dismissing all affirmative defenses to the extent that such defenses are predicated upon defendants' assertion that this is a subrogation action.

Respectfully Submitted,
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that other types of comparative fault cannot be imputed. Primary assumption of the risk "relates to the initial issue of whether a defendant was negligent at all -- that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not, therefore, an affirmative defense." *Iepson*, 308 N.W.2d at 815 (Minn. 1981), *quoting, Springrose*, 192 N.W.2d at 827. In the present case, since the State and Blue Cross base their claims upon a direct duty owed by the defendants to the State and Blue Cross, any duty the defendants may or may not have with respect to the smokers is not relevant. Accordingly, any claim of primary assumption of the risk by smokers is not appropriate in this action.

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