STATE OF MINNESOTA
DISTRICT COURT
COUNTY OF RAMSEY
SECOND JUDICIAL DISTRICT

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,
Defendants.

Civil Case File No. C1-94-8565

November 22, 1995

REDACTED

MEMORANDUM OF PLAINTIFF STATE OF MINNESOTA IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL INITIAL DEPOSITIONS OF A LIMITED NUMBER OF MEDICAID RECIPIENTS

FILED UNDER SEAL CONFIDENTIAL:
Portions of This Document Are Subject To The Minnesota Protective Order

INTRODUCTION

The motion of the defendant tobacco companies to take depositions of Medicaid recipients is premature and legally flawed in fundamental respects. At a time when the production of documents is just beginning in the Minneapolis depository, defendants propose to proceed directly to intrusive and unnecessary depositions of individual citizens who are not parties to this litigation. With respect to timing, this proposal turns the Case Management Order and traditional concepts of case management on its head. With respect to the depositions themselves, defendants' proposal raises profound issues of privacy and confidentiality -- which defendants refuse to address.

The tobacco companies' rush to take these depositions is based upon their misguided presumption that by taking 10 to 20 depositions of individual smokers the defendants will be able to file a motion for summary judgment. This is specious. It is based upon the tobacco companies' belief that defendants -- but not plaintiffs -- are entitled to discovery prior to dispositive motions. Minnesota law requires that a summary judgment motion be decided on the entire record, not just one party's selected portion. The issues which will be raised in defendants' premature motion for summary judgment -- which defendants state may include causation, reliance, fact-of-injury, comparative fault and damages -- can only be addressed on a full record, including document discovery and expert discovery.

Moreover, a more complete record will conclusively demonstrate that the depositions of Medicaid recipients will not be necessary.

This is a direct action by the State of Minnesota, not a subrogation action. This action seeks to recover health care costs for treating a *group* of persons -- *not particular individuals*. Contrary to defendants' contention, the State has not placed at issue either (1) the medical condition or (2) conduct of *individual* smokers. Particularly where, as in the present case, there are well-established methods -- legally and scientifically -- of proof for aggregate populations, there is no necessity for depositions of individual smokers. For example, this case is especially well suited for proof through use of epidemiology, statistical modeling and survey evidence.

Moreover, as defendants know, the State plans to begin producing in the next several weeks the eligibility and claims files *for each and every Medicaid recipient in Minnesota* -- files which include health histories and disease identifications. The files are being produced on computer tapes in encrypted format to protect the privacy rights of recipients. With these files in hand, the tobacco companies cannot justify taking depositions of individual Medicaid recipients on issues relating to medical conditions.

Nor is deposition testimony necessary regarding the issue of the conduct of smokers. In fact, defendants' own internal documents offer much better evidence of the matters at issue in this litigation --

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including smoker behavior -- than would the depositions of 10-20 persons selected by the tobacco companies. This industry has devoted enormous resources to the study of why people smoke. Some of the defendants have whole research sections on "smoker psychology."

Defendants' own documents reveal -- in direct contrast to their position in the current motion -- that the questioning of individual smokers is not likely to lead to probative evidence on the issue of why they smoke. One internal tobacco company document states that [REDACTED]

Another internal document states that self reports of "naive respondents" are of little value; "[n]ot even with a computer can one make a silk purse from a sow's ear." Obviously, documents of this type -- and numerous others which the State expects will be produced in this litigation -- shed critical light on the alleged need for the depositions sought by defendants.

For these and other reasons detailed below, defendants cannot meet the stringent two-part test set forth in the Minnesota Government Data Practices Act ("Data Practices Act") for even the release of the identities of the Medicaid recipients -- let alone the other information (including complete medical records) and other procedures (including unlimited deposition questions) defendants have in mind.

The Data Practices Act two-part test is as follows:

> 1. *Is the information sought discoverable*? In this case, the answer is no, since the information sought by defendants is protected by both the physician-patient privilege and privacy statutes.
>
> 2. *If the information is discoverable does the benefit to the party seeking access to the data outweigh any harm to the confidentiality or privacy interests of individuals*? Even assuming that the information sought by defendants is discoverable, defendants completely fail to meet this second part of the analysis under the Data Practices Act -- the balancing test -- given the alternative methods of proof available in the present case, including epidemi-ology and statistical modeling.

Indeed, given the wealth of information on smokers that defendants have in their own files -- but which has not yet been produced in this case -- it is impossible to even conduct the balancing test mandated by the Data Practices Act in an informed fashion. This information should be produced prior to a ruling on this motion so that both the State and the Court are able to more fully evaluate the defendants' request for depositions.

Contrary to defendants' contentions, Medicaid recipients have not waived the protections of the Data Practices Act. In fact, the statute which defendants' reference to support their argument applies only to subrogation cases, where the Medicaid recipient is, in essence, the plaintiff -- and not to a direct action by the State, such as the present case.

In sum, the State respectfully submits that defendants have fallen far short of demonstrating the need for intruding into the personal lives of individual smokers -- particularly at the present time. At best, this issue should be re-visited at a time when there is a more complete record gained through the discovery of parties to this litigation.

ARGUMENT

I.

DEFENDANTS' MOTION IS PREMATURE.

In its May 19, 1995 opinion, the Court denied plaintiffs' motion to strike defendants' affirmative defenses related to subrogation. The Court then proposed, "*subject to further argument*," that a limited number of depositions of smokers be taken. Court's Order of May 19 at 4, n.2. As the Court clearly recognized in this Order, neither the Court nor the parties had fully addressed the issues involved in the taking of Medicaid depositions -- including the substantial issues of privacy.

Nevertheless, the tobacco companies have refused to discuss these substantial issues and, instead, propose to immediately depose 10 or 20 individuals -- and then move for summary judgment. Allen Katz, counsel for defendant Philip Morris, explained the plan at the meet and confer on November 7, 1995 as follows:

> Okay. *It is our plan to take these 10 to 20 [depositions] in order to create a record. We would go to the court for a -- for the dispositive motion* we talked about at the March 10 hearing and then, depending on the court's rule on that dispositive motion, if the court ruled at

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> that time that he agreed with us that individual issues permeated the case and it could not proceed on a collective basis but had to proceed one by one, then I think the ball would be in the plaintiffs' court to say do they intend to proceed and if so, on behalf of whom? If the court reaches some other ruling, then we would abide by what the court's ruling was.

Exhibit 1 at 63 (Emphasis added).[1]

This argument is meritless. Minnesota law is clear that a summary judgment -- which is what the tobacco companies must seek to dismiss the State's direct action -- must be based on the entire record developed during discovery, not just one party's selected portion. *Wallin v. Rappaport*, No. C3-95-692, 1995 Minn. App. LEXIS 1335 (Minn. Ct. App. Oct. 31, 1995). Accordingly, the Court could not rule on defendants' "dispositive motion" until the State has had an opportunity to conduct its own discovery.[2]

The defendant tobacco companies have improperly interpreted the Court's May 19 Order to claim that they are the only ones entitled to discovery on the issue of whether the State has a direct cause of action. At the meet and confer on November 7 and in the correspondence between the parties on this issue, the tobacco companies refused even to consider the State's request that the issue of Medicaid depositions be postponed until the conclusion of document discovery. Exs. 1-5. The tobacco companies rejected the State's request for reciprocal discovery, taking the incredible position that they have the right to take discovery to prove the State does not have a direct action, but the State has no right to discovery to prove that it can maintain such an action.

The Case Management Order dated March 29, 1995, which the parties prepared after lengthy negotiations in order to manage discovery in this case, contemplates that substantive depositions should follow document discovery. *See* Section II.C. This was done for a reason. Both sides clearly recognized that a party cannot take or defend a deposition effectively without pertinent documents.

Permitting the depositions of Medicaid recipients to go forward now is fundamentally unfair to the State of Minnesota. The State has not yet had an opportunity to obtain through discovery internal memoranda of the tobacco companies which will disclose their substantial research on smokers and the information they have concealed from smokers for decades. At a minimum, the State must have documents such as these in any Medicaid deposition to demonstrate that tobacco companies lied to the public. The State must have the same factual background as the tobacco companies in order to proceed fairly with the depositions -- if the depositions are to proceed at all.[3]

II.

THE STATE'S DIRECT ACTION DOES NOT REQUIRE DEPOSITIONS OF INDIVIDUAL MEDICAID RECIPIENTS.

A. Medicaid Recipients Are Not Parties to This Action.

The instant case is not an action on behalf of individual smokers. In many respects, it is similar to *People ex rel. Hartigan v. Lann*, 587 N.E.2d 521 (Ill. Ct. App. 1992), an action by the Illinois Attorney General to seek compensation and other relief under the state's consumer fraud statute. The complaint in *Lann* was based on allegations regarding the defendant's business dealings with three consumers. *Id.* at 522. The defendant filed discovery requests, seeking various consumers to answer interrogatories and appear for discovery depositions. *Id.* at 523. The trial court imposed a duty on the Attorney General to act as counsel for individual consumers and to treat them as party plaintiffs for discovery purposes. *Id.* The Court of Appeals reversed. The Court noted that the action was a "law enforcement action designed to protect the

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[1] All exhibits to this memorandum are included in the appendix attached to the Affidavit of Thomas L. Hamlin.

[2] In effect, the tobacco companies are treating this case as a class action. The gist of their "dispositive motion" will be that individual issues predominate over aggregate or "class" issues, and therefore the State's direct action should be dismissed. This is clearly not a proper basis for a motion seeking dismissal of the State's direct action. The tobacco companies' argument applying class action principles to a case that is decidedly not a class action does, however, illustrate how desperate they are to convert this matter into an unmanageable number of individual actions, thereby destroying any chance of moving this case to trial within the timetable set by the Court.

[3] There is yet another reason for the Court to postpone ordering Medicaid depositions. The Minnesota Supreme Court is currently considering an appeal by the tobacco companies on the issue of whether Blue Cross and Blue Shield of Minnesota has a direct cause of action against the tobacco companies. The tobacco companies framed the issue as follows:

> "Does Blue Cross/Blue Shield of Minnesota have standing to bring a direct cause of action against appellants to recover any increased costs due to illnesses of its insureds allegedly caused by cigarette smoking?"

Ex. 6.

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public, not to benefit private parties." *Id.* at 524. The Illinois Consumer Fraud Act did not, in the Court's view, require the Attorney General to comply with the discovery rules "as if personally appearing" on behalf of the consumers. *Id.*

Like the *Lann* lawsuit, the State of Minnesota action was filed to protect the public interest, and not to benefit private' parties. The Minnesota Attorney General is not appearing on behalf of individual smokers.[4]

B. Direct Testimony From Smokers Is Unreliable And Not the Best Method of Proof

1. Tobacco Industry Documents Show That Direct Testimony of Smokers Is Unreliable

While discovery is only beginning in this case, internal documents from the tobacco companies which are already in the public domain, as well as certain documents produced by the tobacco companies in the limited document production in the present litigation, already begin to establish the fact that defendants themselves -- privately -- recognize the futility of deposing individual smokers about why they smoke. For example,

REDACTED

(Defendant B.A.T. has designated this document "confidential.")

REDACTED

A former head of research at Philip Morris more graphically described the uselessness of direct questioning of smokers:

> Although we can ill afford not to collect introspective reports from respondents, there is some justification for the contention that the construction of theory solely upon the self-reports of naive respondents as to why they smoke is an overly optimistic enterprise. Not even with a computer can one make a silk purse from a sow's ear.

Ex. 8 at 98-99.

Cognizant of the difficulties associated with individual smoker responses, the tobacco industry has poured enormous resources into studying the behavior of smokers to determine why they smoke.

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(Defendant B.A.T. has designated this document "confidential.") Defendant Philip Morris has an entire "Psychological Facility", which includes a "Smoker Psychology" section. Ex. 10; *See also*

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(Defendant B.A.T. has designated this document "confidential.")

The industry's own documents also provide indisputable proof of its focus on youth -- and the factors motivating youth to smoke. By the early 1960s, the industry was surveying children as young as ten years of age to determine "influences that cause young people to smoke or not smoke." Ex. 12 at 2. One impetus behind this research was the industry "dilemma" that although the industry had taken a public position that children should not smoke, it would be "disastrous" if "[t]he present drive against smoking by young people might discourage them completely from smoking. . ." *Id.*

Large-scale survey studies of youth smoking habits has continued through recent years. In 1987, for example, R.J. Reynold's Canadian affiliate launched "Youth Target 87," the "first of a planned series of research studies into the life-styles and value systems of young men and women in the *15-24 age* range. . . ." Ex. 13 (emphasis added). The purpose of the studies was to allow "better decision-making in regard to products and programs directed at youth." *Id.*

The tobacco companies' plan to depose Medicaid recipients is a cynical one. They know only too well that individual smoker responses are of little probative value. The real reasons people smoke -- including, most important, advertising and addiction - are contained in the companies' own files.

2. Minnesota Law Recognizes That Direct Testimony Is Not Necessary

[4] Defendants once again raise the specter of a due process violation if they cannot depose individual recipients. Defendants' Memorandum, at p. 8, n. 6. This is a discredited argument. *See In re Mid-Atlantic Toyota Antitrust Litigation*, 525 F.Supp. 1265, 1285 (D.Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983), infra, at 18. Defendants' reliance on *Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994) is puzzling. In that case, the United States Supreme Court ruled that an amendment to the Oregon Constitution which prohibited judicial review of punitive damages awards was unconstitutional. The case did not concern the issue of aggregate proof, and the Court certainly did not rule or suggest that a manufacturer had a constitutional right to depose each individual victimized by its product.

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The tobacco companies' contention that they are entitled to take depositions in this case to prove individual reliance has no basis in Minnesota law. Minnesota courts have long rejected the notion that direct testimony of an individual's reliance upon specific fraudulent statements is required. Indeed, the courts have found that such testimony is not even the best way to prove reliance. *Watson v. Gardner*, 183 Minn. 233, 236 N.W. 213, 215 (Minn. 1931).

In *Watson*, the plaintiff sued to recover damages for fraud surrounding her purchase of shares of stock. *Id.* at 213. Rejecting the defendant's argument that the purchaser never had a discussion with the seller, thus there could be no direct evidence of reliance, the court held that reliance need not be proved by testimony of the party defrauded. *Id.* at 215.

Indeed, the court found that there is "better" evidence of reliance than testimony of a person that she heard a certain statement and acted upon it:

> The testimony of a party that he relied upon representations made to him is, at most, only a statement as to his own mental reaction or state of mind. While he may directly so testify, such facts as intent, belief, and reliance, are perhaps more cogently shown by the facts and circumstances surrounding the transaction and the acts of the parties in relation thereto. The rule that fraud cannot be presumed does not mean that fraud may not be legitimately deduced from circumstantial evidence. . . . Fraud is frequently proved, in part at least, by circumstantial evidence.

Id.; *see also*, *Witzig v. Philips*, 274 Minn. 406, 144 N.W.2d 266, 270 (Minn. 1966) (Direct testimony of the effect of representations on an individual's mind is not the best measure of reliance, rather, "the facts and circumstances surrounding the situation are the best measure.")

This rule of law is particularly apt in this case. Cigarette smokers are unable to identify which of their actions resulted from reliance on the industry's conduct. Consumers simply underestimate the effect advertising has on their psyche and their behavior. Office on Smoking and Health, U.S. Dept. of Health and Human Services, *The Role of Advertising and Promotion in the Marketing of Tobacco Products, in Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 159 (1994) (citing R.A. Bauer and S.A. Greyser, *Advertising in America: The Consumer View* (1968)) (hereinafter "*Surgeon General's Report*"), attached as Ex. 14.

The cigarette industry's mass advertising campaign to get its "message" across amplifies the relevance of the *Watson* and *Witzig* rule that evidence of individual reliance is simply poor proof of the issue. The industry has attempted to create a "structure of attitudes and beliefs about its product" that "will facilitate its purchase when the consumer is stimulated by a behavioral prod." *Surgeon General's Report* at 159 (citing M.L. Ray, *Advertising and Communication Management* (1982)), attached as Ex. 14. Thus, the promoters have tailored their message to capitalize on their knowledge that, in the words of Leo B. Burnett, the advertising guru responsible for Marlboro's "Marlboro Cowboy" campaign, "those who do smoke do so for various conscious *or unconscious* reasons." *Surgeon General's Report* at 171 (citing L. Burnett, *The Marlboro Story: How One of America's Most Popular Filter Cigarettes Got That Way*, The New Yorker, 1958, XXXIV (39): 41, 43), attached as Ex. 15 (emphasis added).

Obviously, when messages exploit subliminal or unconscious associations, the individual subjected to that message cannot consciously describe its impact. The impact of the message is not susceptible to individual proof because, as noted in *Philip Morris, Inc. v. Star Tobacco Corp.*, 879 F. Supp. 379, 384 (S.D.N.Y. 1995), "the consumer may not be fully aware of the effect of these efforts upon him . . . ."

Any showing of reliance that is required can be established circumstantially. For example, evidence that the statements of the defendants had a substantial effect on the behavior of recipients of the statements is sufficient to prove reliance under Minnesota law. *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 149 N.W.2d 37 (Minn. 1967).

In *Davis*, the plaintiff accepted a sales position in a particular territory based upon the defendant's misrepresentation of past income and profits. The court found that the plaintiff did not specifically condition his acceptance of the employment on the truth of the representation. *Id.* at 39. This lack of proof did not, however, "negative reliance" because "this element of the tort can be inferred from the conduct of the plaintiff". *Id.* (emphasis added). The court found that evidence that the plaintiff had quit his previous job to accept the defendant's offered position was sufficient to create an inference of reliance. *Id.*[5]

[5] This "behavior" evidence can also take the form of expert testimony concerning group behavior. *Resorts International Inc. v. Greate Bay Hotel and Casino, Inc.*, 830 F. Supp. (D.N.J.

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Similarly, in *Financial Timing Publications Inc. v. Compugraphic Corporation*, 893 F. 2d 936 (8th Cir. 1990), the Eighth Circuit relied on conduct, rather than testimony, to show reliance. In that case, buyers of computerized typesetting equipment asserted claims of fraud alleging that the sellers had misrepresented the system's capabilities. *Id.* at 938. The sellers moved for summary judgment, arguing that plaintiffs presented no credible evidence showing that the persons who purchased the machine actually heard or relied upon the defendant's misrepresentations. *Id.* at 942. Rejecting the requirement of "direct testimony" of reliance, the court reasserted the rule that the reliance element of fraud can be inferred from the conduct of plaintiffs. *Id.* at 943. Proof of two facts was sufficient to give rise to this inference: Evidence that intentional misrepresentations were made, coupled with the fact that those receiving the representations actually made purchases of the product, created the inference of reliance. *Id.* Thus, under Minnesota law, evidence of intentional misrepresentations by the cigarette industry, coupled with evidence that the cigarette companies' sales continued, *i.e.*, that individuals continued to smoke, would be sufficient to satisfy any reliance element, even under common law fraud as considered in *Financial Timing Publications*.[6]

C. This Case Is Well Suited For Proof Through The Use of Epidemiology And Statistics.

1. The Use Of Epidemiology To Prove Group Injury.

It is well established that epidemiology is the most appropriate method of proving the incidence and cause of disease in groups (as opposed to individuals). *The Reference Manual on Scientific Evidence*, published in 1994 by the Federal Judicial Center, devotes an entire Reference Guide to the use of epidemiological studies in the courtroom. Linda A. Bailey et al., *Reference Guide on Epidemiology*, *in* Federal Judicial Center, *Moore's Federal Practice Reference Manual on Scientific Evidence* 121 (Matthew Bender 1994), Ex. 16. The Manual defines epidemiology as follows:

> the field of public health that studies the *incidence*, distribution and etiology of disease in human populations and applies the findings to alleviate health problems. The purpose of epidemiology is to better understand disease causation and to prevent disease in groups of individuals.

Id. at 125 (emphasis in original). Epidemiology focuses on causation in groups, not in separate individuals. *Id.* at 126.

Accordingly, epidemiologic studies are particularly well suited to proving causation in this case, which concerns smokers as a group.

Over the past fifteen years courts have recognized the value of epidemiological evidence in proving causation. *Id.* at 128. In *DeLuca v. Merrell Dow Pharmaceuticals, Inc*., 911 F.2d 941 (3d. Cir. 1990), the Third Circuit observed that:

> The reliability of expert testimony founded on reasoning from epidemiological data is generally a fit subject for judicial notice; epidemiology is a well-established branch of science and medicine, and epidemiological evidence has been accepted in numerous cases.

Id. at 954; *See also Richardson v. Richardson-Merrell Inc*., 857 F.2d 823, 830 (D.C. Cir. 1988) (epidemiology more probative than other forms of scientific studies), *cert. denied*, 493 U.S. 882 (1989); *Conde v. Velsicol Chem. Corp*., 804 F. Supp. 972, 1025-26 (S.D. Ohio 1992) ("Epidemiologic studies are the primary generally accepted methodology for demonstrating a causal relation between a chemical compound and a set of symptoms or disease."), *aff'd*, 24 F. 3d 809 (6th Cir. 1994).

There is a wealth of epidemiologic information establishing a causal link between smoking and disease. Voluminous studies have been done on cigarette smoking, making it one of the most studied subjects in epidemiology. Office on Smoking and Health, U.S. Dept. of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General*, 38, 43, 102-116 (1989), attached as Ex. 17. Since 1964, the Surgeon General of the United States has published periodic reports documenting the causal relationship between smoking and such diseases as lung cancer, esophageal cancer, laryngeal cancer, oral cancer, coronary heart disease, cerebrovascular disease,

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1992); *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 486 F. Supp. 414 (S.D.N.Y. 1980).

[6] Moreover, the complaint in the present case pleads not common law fraud but several causes of action under the Minnesota consumer protection and deceptive trade practices statutes. It is well established that these statutes require lesser showings of proof in certain respects than common law fraud. *See State v. Alpine Air Prod.*, 500 N.W.2d 788, 790 (Minn. 1993) ("In passing consumer fraud statutes, the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law.").

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atherosclerosis and emphysema. *Id.* at 98-99, table 13, attached as Ex. 18. These and other epidemiologic studies are more than sufficient to establish the causal link between smoking and disease in this case.

Indeed, the science of epidemiology makes the depositions of individual Medicaid recipients unnecessary. Because this case involves a large population of smokers, the tobacco companies must also make use of epidemiology to contradict the connection between smoking and disease -- if they can.

2. The Use Of Statistical Modeling To Prove Group Damages.

The use of statistics to prove damages is widely accepted and constitutionally sound. In *In re Mid-Atlantic Toyota Antitrust Litigation, supra*, 525 F. Supp. at 1285, the court articulated the general rule that forms the basis for the use of statistical modeling to prove damages: once the fact of injury has been proved, the amount of damages may be established by a "just and reasonable estimate . . . based on relevant data." (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)); *accord, Leoni v. Bemis*, 255 N.W.2d 824, 826 (Minn. 1977). The *Toyota* court approved the use of statistics in calculating damages:

> Plaintiffs may be able to prove damages by statistical or sampling methods. As discovery progresses and plaintiffs' methods of proving damages becomes clearer, the Court will be able to rule on the constitutionality of the specific method chosen. *For the present, such methods of proof are commonly accepted and constitutionally sound*.

525 F. Supp. at 1285 (emphasis added).

Similarly, the Court in *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), praised the use of statistical modeling:

> Statistics, of course "are not irrefutable," but when a plaintiff's statistical methodology [generates statistically significant evidence], no sound policy reason exists for subjecting the plaintiff to the additional requirement of either providing anecdotal evidence or showing gross disparities. Such a rule would reflect little more than a superstitious hostility to statistical proof, a preference for the intuitionistic and individualistic over the scientific and systemic.

Id. at 1278, (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977)), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985). In addition, the Supreme Court of Minnesota has stated that a reasonable inference established by calculation can support an award of damages. *B&Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 817 (Minn. 1979).

The *Reference Manual on Scientific Evidence* explains how multiple regression analysis can be used to calculate damages in complex cases. Daniel L. Rubinfeld, *Reference Guide on Multiple Regression, in* Federal Judicial Center, *Moore's Federal Practice Reference Manual on Scientific Evidence* 415. Multiple regression analysis is "a statistical tool for understanding the relationship between two or more variables." *Id.* at 419. The Manual states that:

> Multiple regression involves a variable to be explained -- called the *dependent variable* -- and additional *explanatory variables* that are thought to produce or be associated with changes in the dependent variable.

Id. (emphasis in original). The Manual gives an example:

> [A] multiple regression analysis might estimate the effect of the number of years of work on salary. Salary would be the dependent variable to be explained; years of experience would be the explanatory variable.

Id.

Multiple regression can be used (1) to determine whether or not a particular effect is present; (2) to measure the magnitude of a particular effect; and (3) to forecast "what a particular effect would be, but for an intervening effect." *Id.* at 420. Multiple regression is particularly well suited to determining a dependent variable like health care costs of smoking related diseases in a group, since it can take into account such explanatory variables as age and smoking history.

Statistical models have been used to calculate the cost of treating diseases caused by smoking. *See, e.g.*, SAMMEC II, attached as Ex. 19; *Medical Care Expenditures Attributable to Cigarette Smoking -- United States 1993*, 43 Morbidity and Mortality Weekly Report 469-472 (July 8, 1994), attached as Ex. 20.

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3. The State Is Providing To The Tobacco Companies Medicaid Files Containing Medical Information.

In response to the tobacco companies' discovery requests, the State is about to produce to the tobacco companies comprehensive claims and eligibility files for each and every Medicaid recipient in Minnesota. The information will be produced on computer data tapes. These files include medical histories, as well as diseases for which the recipient and her family received treatment, the cost of the treatment, the date of treatment, and the provider of treatment. The State has encrypted or redacted identifying information for both recipients and providers. Ex. 21.

The State has confirmed to the tobacco companies that:

> patients will be assigned the same ID number in each set of data files that . . . the State of Minnesota produce[s] in the above-referenced matter. *This will allow defendants to track an individual's health history over time*.

Ex. 22 (emphasis added).

With this information, the tobacco companies will be able to examine medical histories and aggregate population data by disease, age and gender. This information will allow the tobacco companies to create their own statistical models. And all of this can be done without invading the privacy of a single Medicaid recipient.

4. Tobacco Industry Surveys Contain Information Regarding The Behavior Of Smokers.

The tobacco industry has based many of its advertising campaigns on consumer surveys. *See, e.g.*, *Philip Morris Inc. v. Loew's Theatres, Inc*., 511 F. Supp. 855, 856 (S.D.N.Y. 1980). The tobacco companies have also used consumer surveys in Lanham Act cases where the issue often is whether consumers have been misled. *R.J. Reynolds Tobacco Co. v. Loew's Theatres, Inc*., 511 F. Supp. 867 (S.D.N.Y. 1980). In addition, the State expects to discover through documents produced in this litigation extensive survey evidence regarding smoker behavior conducted by the tobacco companies, and the State has served specific discovery requests in this respect.

The tobacco companies' surveys will be a rich source of information on a variety of topics related to this litigation, including what factors cause people to smoke. The *Reference Manual On Scientific Evidence* devotes an entire Reference Guide to survey research. Shari Siedman Diamond, *Reference Guide on Scientific Evidence*, *in* Federal Judicial Center, *Moore's Federal Practice Reference Manual on Scientific Evidence* 221. The manual extols the value of survey information:

> Although surveys are not the only means to demonstrate particular facts, the testimony of an expert describing the results of a well-done survey is an efficient way to inform the trier of fact about a large and representative group of potential witnesses. *In some cases courts have described surveys as the most direct form of evidence that can be offered*.

Id. at 229 (emphasis added) (citations omitted). The Reference Manual observes that courts have used surveys to replace interrogatories *and depositions*, thus resulting in a substantial savings in both time and costs. *Id.* at 228 (citing *Wilhoite v. Olin Corp*., No. CV-83-C-5021-NE (N.D. Ala. filed Jan. 11, 1983)).[7] It is only appropriate that the tobacco companies produce their survey information as a first step in this litigation. At a minimum, this must be done before the tobacco companies are allowed to obtain information of questionable accuracy from Medicaid recipients, who will undoubtedly be intimidated by the prospect of answering questions under oath in a room filled with lawyers aggressively seeking admissions to support their own adversarial agendas.

III.

DEFENDANTS MAY NOT INVADE THE PRIVACY OF NON-PARTY MEDICAID RECIPIENTS.

A. Minnesota Law Extends Substantial Privacy Protection To Individuals

Defendant tobacco companies seek wholesale, unfettered access to the private lives of 10-20 Medicaid recipients. This proposed invasion of the privacy of these individuals is unprecedented under the law. Not only do the defendants ask the State to

[7] The *Wilhoite* case was a mass tort case, where the central legal and factual issues were related to causation -- whether DDT caused personal injury to any given individual. The survey was designed to obtain information on issues related to causation. *See* Francis E. McGovern & E. Allen Lind, *The Discovery Survey*, 51 Law & Contemp. Probs., 41, 43, 60-61 (1988).

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disclose the identity of these individuals, they ask the State to coerce those individuals to execute medical authorizations which will provide the entire tobacco industry with a full set of all of their medical records since birth. Armed with these medical records, the industry then seeks to subject them to depositions which can explore all facets of their personal lives.

These Minnesota welfare recipients are not parties to this litigation, have no personal interest or gain in the outcome of this litigation and have a justifiable expectation of privacy.

Furthermore, the only procedural means by which these individuals can be deposed is to be subpoenaed as non-parties to this litigation. At such time as they are subpoenaed, they are entitled to representation of counsel and the opportunity to argue on their own behalf for the integrity of their rights of privacy and freedom from this unwarranted invasion of those rights under the law.

The courts and the legislature of the State of Minnesota have extended substantial privacy protection to individuals and have raised formidable obstacles to prevent third parties from obtaining private medical records. The physician-patient privilege protects confidential communications made for the purpose of obtaining medical treatment and intimate matters discussed in medical records. Additional statutory safeguards protect the confidentiality of medical records. Further, the law recognizes a right of informational privacy which derives from the independent right of privacy articulated in Article I of the Minnesota Constitution.

The physician-patient privilege is specifically codified in the Minnesota statutes to protect confidential communications made for the purpose of obtaining medical treatment. Minn. Stat. § 595.02, Subd. l(d). This privilege belongs to the patient alone, and can only be waived by the patient. *Wenninger v. Muesing*, 240 N.W.2d 333,335 (Minn. 1976). The Minnesota Supreme Court further articulated the theory underlying the privilege as follows:

> The theory underlying this privilege is that a patient's fear of an unwarranted, embarrassing and detrimental disclosure in court of information given to his doctor would deter the patient 'from freely disclosing his symptoms to the detriment of his health.'

State v. Staat, 192 N.W.2d 192, 195 (Minn. 1971). The Patient's Bill of Rights prohibits health care providers from releasing medical records without the consent of the patient. Minn. Stat. § 144.651, Subd. 16. Other statutory safeguards to a patient's right of privacy include protections under Minn. Stat. § 72A.502 (creating confidentiality obligations under the Minnesota Insurance Fair Information Reporting Act); Minn. Stat. § 147.091, Subd. l(m) (governing licensure of physicians and surgeons and creating a professional obligation to maintain confidentiality); and Minn. Stat. § 144.335, subd 3(a) (prohibiting health care providers from releasing health records without consent from the patient).

Finally, Minnesota courts recognize a right of informational privacy, grounded in the independent right to privacy articulated in Article I, 55 1, 2 and 10 of the Minnesota Constitution. *Matter of Agerter*, 353 N.W.2d 908 (Minn. 1984); *Teachers Local 59 v. Special School D.1*, 512 N.W.2d 107 (Minn. App. 1994). The privacy right is two-faceted: "the right not to disclose private information to the government and the right to prevent the government from disclosing private information". *Teachers Local 59*, 512 N.W.2d at 110. The Minnesota Supreme Court has noted that:

> Our democratic society rightly prizes individual freedoms and resists prying by the state into the personal, private affairs of the individual. Thus the law recognizes a right of informational privacy, which has two aspects: the right not to divulge private information to the government and the right to prevent the government from disclosing private information.

Matter of Agerter, 353 N.W.2d at 913. Where there is a legitimate need demonstrated to obtain the information, the court must balance this need against the "protectable right of informational privacy" of the individual in "keeping his or her intimate affairs private."

Id. In the present case, the tobacco companies have failed to meet this test.

B. Defendants Have Failed To Make A Sufficient Showing Under The Data Practices Act To Justify Deposing Medicaid Recipients.

The Minnesota Government Data Practices Act ("Data Practices Act"), Minn. Stat. §§ 13.01-13.90, protects the identities and medical records of Medicaid recipients from disclosure. The Data Practices Act provides that "data on individuals collected, maintained, used or disseminated by the welfare

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system *is private data on individuals, and shall not be disclosed*" subject to certain exceptions.[8] Minn. Stat. 5 13.46, Subd. 2(a) (emphasis added). The Act defines the "welfare system" to include:

> [T]he department of human services, county welfare boards, county welfare agencies, human services boards, community mental health center boards, state hospitals, state nursing homes, the ombudsman for mental health and mental retardation, and persons, agencies, institutions, organizations, and other entities under contract to any of the above agencies to the extent specified in the contract.

Minn. Stat. § 13.46, Subd. l(c). Minnesota's Medicaid program falls within the "welfare system," as defined by the Act.

The Data Practices Act provides for a special two-part test when discovery disputes occur. The test is as follows:

> The presiding officer shall first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action.
>
> If the data are discoverable the presiding officer shall decide whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data.

Minn. Stat. § 13.03, Subd. 6. "There is nothing in the statute that suggests that this two-part analysis is optional." *Montgomery Ward & Co., Inc. v. Cty. of Hennepin*, 450 N.W.2d 299, 306 (Minn. 1990).

With respect to the first prong of the test, Rule 26.02(a) of the Minnesota Rules of Civil Procedure provides that: "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." *Id.* Here, the patient-physician privilege applies to prohibit discovery of the medical histories, including medical records, of Medicaid recipients.

Even assuming, *arguendo*, that certain information sought by defendants is discoverable or releasable under the first part of the test, defendants cannot meet the second prong of the test under the Data Practices Act. Defendant tobacco companies have offered no explanation why the benefit to them outweighs the harm to the confidentiality interests of the Medicaid recipients.[9]

In fact, given the fact that this case puts at issue groups of persons, and not *individuals*, there are alternative -- and preferable -- methods of proof, such as epidemiology, statistical modeling and survey evidence. In fact, as noted above, the State is producing comprehensive eligibility and claims files for each and every Medicaid recipient in Minnesota. In sum, the State will soon produce to defendants the medical information they are seeking but in a form that protects the confidentiality interests of the individual Medicaid recipients.

In addition, the procedures defendants propose for the depositions raise particular concerns regarding the privacy rights of Medicaid recipients. For example, defendants propose that they be given authorizations to collect all of the medical records of each recipient prior to deposition, presumably so defense counsel can grill each individual at length about her medical history. Defendants' proposed order contains no limitation on the length of each deposition. Defendants have declined to identify with any specificity the issues which they propose to cover in these depositions. Exs. 2 and 4. Defendants also have declined to answer the State's question as to whether defendants also intend to use the medical records to depose each individual's treating physician.

Id. Finally, defendants' proposal is to compel "initial" depositions of Medicaid recipients. See Defendants' Memorandum, at 1. Defendants have declined to answer the State's question as to how many depositions defendants ultimately seek. Exs. 2, 3, 4 and 5.

Under these circumstances, the tobacco

[8] *E.g.*, pursuant to a court order, pursuant to a statute specifically authorizing access to the private data; to an agent of the welfare system because of investigations relating to enforcement of rules or law; to personnel of the welfare system who require the data to determine eligibility; to administer federal funds or programs. *See* Minn. Stat. § 13.46, Subd. 2(a) (1) - (10).

[9] Although defendants cite to the Data Practices Act in their memorandum, *see* Defendants' Memorandum at 9, defendants omit any reference to the two-part test for resolving discovery disputes under the Data Practices Act.

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companies have made no showing under the Data Practices Act that the benefit to them outweighs the harm to the confidentiality interests of Medicaid recipients. Accordingly, their motion for depositions should be denied.[10]

C. Subrogation Statutes Do Not Apply.

Defendant tobacco companies claim that Medicaid recipients must produce their medical records and appear for deposition as a condition of accepting government assistance. Specifically, defendants rely on 42 U.S.C. § 1396a(25); 42 C.F.R. § 433.147; Minn. Stat. § 256B. 056, Subd. 8 and Minn. Rules 9505.0071. Defendants' Memorandum at 10.

The tobacco companies' reliance on these provisions is misplaced. In fact, 42 U.S.C. § 1396a(25) authorizes the State to pursue subrogation against third parties who have legal liability to make payment for services provided to a Medicaid recipient. The legislative history of that provision describes its purpose as "subrogation":

> (c) State right to subrogation -- The Committee bill provides that, in any case where a third party has a legal liability to make payment for services provided to a Medicaid beneficiary, a State is subrogated to the right of any other party to payment for such services to the extent that payment has been made by the Medicaid program.

H. Rep. No. 111, 103d Cong., 1st Sess. 210 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 537 (emphasis added).[11] The State has made clear in its complaint and in numerous subsequent pleadings that it is not proceeding in this action by subrogation. Accordingly, the federal subrogation statute -- and any obligation on the part of Medicaid recipients to cooperate in subrogation actions -- has no application here and is no basis for invading the privacy of recipients.

Defendants' argument is pure bootstrapping. On the one hand, defendants claim that further discovery is necessary to determine if the State must proceed by subrogation. On the other hand, they are asking this Court to assume that this matter is a subrogation action, in order to force recipients to appear for depositions under the federal subrogation statute, 42 U.S.C. § 1396a(25). In short, the defendants are asking the Court to assume at the outset the very point these depositions are intended to prove: that this is a subrogation action. The Court should not be misled by this sophistry.

Defendants' contention that Rule 35.03, Minn.R.Civ.P., requires Medicaid depositions is also flatly wrong. Defendants' Memorandum, at 11. Rule 35.03 states that if a party voluntarily puts at issue the physical condition of "a person under that party's control," the party waives any physician-patient privilege with respect to that person. Minn. R. Civ. Pro. 35.03. Rule 35.03 does not apply here for two reasons. First, Medicaid recipients are not parties to this action, and therefore have not placed their own physical conditions at issue.

Second, the State has not placed the physical conditions of *individual* Medicaid recipients at issue. Instead, the State has brought this matter to protect the public from the fraud and deception perpetrated by the tobacco industry. The State does not represent Medicaid recipients, and has no control over them for purposes of this lawsuit. *See* discussion of *State ex rel. Hartigan v. Lann, supra*, at 8-9. The defendants claim that the State has "control" over recipients by virtue of the federal subrogation statute and state implementing legislation, which requires an individual recipient to cooperate in a subrogation action; Defendants' Memorandum, at 10. As the State has indicated on numerous occasions, this is not a subrogation action -- despite the insistence of the defendants to label it as such. Accordingly, the federal subrogation statute has no application here, and certainly cannot be used to force Medicaid recipients to appear for depositions in this case.

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[10] Another basis for denying defendants' motion is Minn.R.Civ.P. 26.03, which provides for the issuance of a protective order to prevent discovery for good cause shown. The analysis under Rule 26.03 is similar to the above analysis under the Data Practices Act.

[11] 42 C.F.R. § 433.147 is part of the federal regulatory structure implementing the subrogation plan outlined in 42 U.S.C. S 1396a(25). See 42 C.F.R. § 433.135 implementing section 1902(a)(25) [1396a(25)]. Minn. Stat. § 256B.056, Subd. 8 and Minn. Rules 9505.0071 further implement the federal subrogation plan. Minn. Stat. § 256B. 37, Subd. 1 provides that:

> Upon furnishing medical assistance to any person having private accident or health care coverage, or having a cause of action arising out of an occurrence that necessitated the payment of medical assistance, the state agency shall be subrogated, to the extent of the cost of medical care furnished, to any rights the person may have under the terms of the coverage or under the cause of action.

The defendants have previously acknowledged that these federal and state provisions are subrogation statutes. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings, of February 21, 1995, at 14-15.

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CONCLUSION

For all of the foregoing reasons, the State of Minnesota respectfully requests that defendants' motion be denied. With respect to information on the medical histories of Medicaid recipients, the State is producing to defendants computer tapes with information -- on every Medicaid recipient -- in redacted form to protect the privacy of individuals. With respect to information on the behavior of smokers, defendants' own files and research contain much more probative information than could ever be discovered through the depositions of 10 to 20 individuals.

Respectfully Submitted,

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