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.

Case No. C1 94-8565

February 21, 1995

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

I.

INTRODUCTION

Any Minnesotan who brings a claim for injuries allegedly resulting from smoking cigarettes faces a substantial hurdle: the fundamental fact that smokers have chosen to smoke even though the risks have been known for many years. As Judge Lebedoff explained in *Forster v. R.J. Reynolds Tobacco Co. et al.* No. 85 4294 (4th Dist. Hennepin County Feb. 13, 1990), *remanded on other grounds*, Order, C9-90-1276 (Minn. App. Dec. 13, 1990):

> There is no question that the health risks and addictiveness of cigarettes were, in fact, common knowledge at the time John Forster began smoking [before 1965]. "Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community...."
>
> ***
>
> Any reliance he may have placed on defendants' slogans or promotions which glamorized smoking would have been unjustified in light of the federal warning and common knowledge.

Order at 7, 11 (citation omitted).

This legal bar to recovery represents a fundamental policy decision of the State of Minnesota on the scope of a manufacturer's liability for the sale of products. As the Minnesota Supreme Court has stated, "*there must be a limit to such liability somewhere.*" *Westerberg v. School Dist. No. 772* 276 Minn. 1, 11, 148 N.W.2d 312, 318 (1967) (emphasis added). The doctrines of comparative fault and assumption of risk are central to the balance Minnesota has struck.

Another core principle of Minnesota law is that a party suffering derivative injury from payment of another's expenses may sue an alleged tortfeasor only under principles of subrogation. In such a suit, the plaintiff stands in the shoes of the injured party and is subject to all defenses the alleged tortfeasor could have asserted against the injured individual. *Allstate Insurance Co. v. Eagle-Picher Industries, Inc.,* 410 N.W. 2d 324, 328 (Minn. 1987).

The State and Blue Cross/Blue Shield of Minnesota ("BCBSM") seek to evade these fundamental requirements. They bring this action to recover the health care costs they paid to treat persons allegedly injured by smoking. Although Plaintiffs' injuries, if any, resulted from citizens' knowing decisions to smoke, and although smoker defenses plainly would be applicable to any subrogated claims brought for these injuries, Plaintiffs assert that comparative fault and assumption of risk defenses do not apply to Plaintiffs' "direct" claims. Plaintiffs have yet to explain the legal basis for this rather startling proposition. Indeed, in their brief moving papers, Plaintiffs say they need not defend the legal basis for their claims at this point, because Defendants have not yet moved for judgment on the pleadings as to all claims. (Pl. Mem. at 34.)

It is plainly premature for the Court to entertain Plaintiffs' motion to strike these affirmative defenses. As a matter of common sense, until the Court and Defendants have a more complete understanding

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of the nature of Plaintiffs' admittedly "groundbreaking" claims, they cannot definitively address what affirmative defenses may properly be asserted to those claims. Plaintiffs have offered no authority that would allow them to seek compensation for smokers' diseases without being subject to defenses based on smokers' comparative fault or assumption of risk. Indeed, the authority that exists on the question is squarely contrary to Plaintiffs' position.

A motion to strike is disfavored and may be granted only in those rare cases where "the questions of law are clear and not in dispute" and where "there are no questions of fact." *FDIC v. R-C Marketing & Leasing Inc.,* 714 F. Supp. 1535, 1541 (D. Minn. 1989). At a minimum, while no definitive decision may be made on this record, the Court clearly could not hold that the necessity of striking these defenses is "dear[ly]" correct and "not in dispute."

First, Plaintiffs have offered no authority, and Defendants are aware of none, that would afford Plaintiffs a legal remedy against Defendants independent of subrogation. Subrogation is the established procedure for an insurance company or other payor to seek recovery from an alleged tortfeasor of medical expenses paid or incurred with respect to an injured person. The subrogation doctrine has always required that the third party "stand in the shoes of" the injured party and receive no greater rights. This requirement is reflected in the Minnesota and federal statutes granting the State the right to recover Medicaid and other health care payments from third parties; indeed, the State has presumably chosen not to proceed under these statutes precisely because it would then have to "stand in the shoes of" smokers. But the legislature's decision to maintain traditional limitations on third party recovery may not be overridden by the courts; the State may proceed if at all only through the statutory scheme. In any event, because there is substantial doubt whether Plaintiffs have a direct action independent of subrogation, it would be premature to rule on what defenses would apply to such a claim.

Second, even if Plaintiffs could assert a direct action outside subrogation (which Defendants contend they cannot), defenses based on smokers' comparative fault or assumption of risk would still be applicable. There are a number of reasons -- which will be substantiated through discovery -- why Defendants would be entitled to assert these defenses if an independent claim were permitted. These include, but are not necessarily limited to, the following:

> (1) Smoker defenses are applicable to the unjust enrichment claim, both to disprove that Plaintiffs made a payment for which Defendants were liable, and to disprove that leaving the State with the loss would be "unjust."
>
> (2) The Minnesota comparative fault statute requires that individual smokers' fault be considered and assessed, whether or not smokers are parties to the lawsuit or liable to the Plaintiffs.
>
> (3) As a result of the Plaintiffs' own intimate involvement in regulation of smoking, the comparative fault of smokers may be "imputed" to Plaintiffs. As discovery will demonstrate, for example, the State has been in a position to exercise substantial control over its citizens' smoking behavior. Under Section 495 of the Restatement (Second) of Torts, smokers' contributory fault may in these circumstances be imputed to the State.
>
> (4) It is also appropriate to charge the State with its smokers' conduct because the State is an instrumentality of the people of Minnesota, suing for injuries that are derivative of injuries to the public.

Although Plaintiffs complain that the individual smoker defenses will cause discovery to become more burdensome, that is no proper basis to strike a defense. In any event, striking these defenses would not narrow the scope of discovery, since discovery relating to individual smokers will still be necessary on other issues in the case, including causation and damages.

Finally, it would be premature to strike the defense based on failure to join smokers as parties, which must await an articulation of Plaintiffs' claims and the completion of some preliminary discovery about the relationship between smokers and the State. In addition, before the Court and the parties address the joinder issue, they should have an opportunity to consider the implications of two nationwide smoker class actions that were recently certified.

II

THE MOTION IS PROCEDURALLY DEFICIENT

A. Judgment On The Pleadings Is Not Permissible Because The Relevant Facts Are In Dispute.

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Plaintiffs move this court for "judgment on the pleadings" on the ground that portions of some of Defendants' affirmative defenses are legally insufficient. Under settled law, judgment on the pleadings is appropriate only when the pleadings -- that is, the complaint and the admissions in the answer -- raise no material question of fact and the entire cause of action can be decided as a matter of law.[1] Even if Plaintiffs were successful here, no judgment could be entered, because the factual allegations of the complaint remain to be tried or otherwise disposed of. Plaintiffs' remedy, if any, is a motion to strike the allegedly insufficient defenses under Minn. R. Civ. P. 12.06.[2]

Plaintiffs erroneously rely on *Jacobson v. Rauenhorst Corp.* 301 Minn. 202, 206, 221 N.W.2d 703 (1974), and *Fagerstrom v. Rappaport,* 176 Minn. 254, 257, 223 N.W. 142 (1929), for the proposition that judgment on the pleadings is proper where an affirmative defense is legally insufficient. (Pl. Mem. at 8.) Judgment on the pleadings was granted in those cases only because the pleadings raised no factual issues. In Jacobson, the third-party defendant had *admitted* the complaint's allegations and relied solely on an affirmative defense that was insufficient as a matter of law. 301 Minn. at 206. Similarly, in *Fagerstrom,* the pleadings raised no factual issues because the *entire* answer was irrelevant as a matter of law. 176 Minn. at 256. These cases hardly support plaintiffs' position here.[3]

B. Even Construed As A Motion To Strike, Plaintiffs' Motion Would Be Legally Impermissible.

Rule 12.06 allows the court to "strike[] from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Minn. R. Civ. P. 12.06. Although there are few reported Minnesota decisions construing Rule 12.06, it is well settled that such motions are "disfavored" by the courts. 2 McFarland & Keppel, *Minnesota Civil Practice* § 1119, p. 35 (2d ed. 1990). As one court explained:

> [A] motion to strike defenses is a drastic remedy which is disfavored by the courts and is infrequently granted. [It] will be granted only where the Court is convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed.

FDIC v. R-C Marketing & Leasing, Inc., 714 F. Supp. 1535, 1541 (D. Minn. 1989) (citations omitted) (construing Rule 12.06's virtually identical federal counterpart). Plaintiffs' motion fails as a motion to strike for at least two reasons.

1. There Is No Authority For "Partially" Striking A Defense.

Plaintiffs ask this court to dismiss all affirmative defenses "to the extent" that they are predicated on the idea that this is a subrogation action. (Pl. Mem. at 1, 7, 17.) But there is no legal or policy basis for "partially" dismissing or striking a defense. To the contrary, a motion to strike defenses is appropriate only where it is clear that "under no set of circumstances could the defenses succeed." *FDIC v. R-C Marketing & Leasing, Inc. supra,* 714 F. Supp. at 1541. *See also U.S. v. Walerko Tool & Engineering Corp.,* 784 F. Supp. 1385, 1388 (N.D. Ind. 1992) (defendant's equitable defenses could not be stricken because "even if [they] cannot defeat the § 107 claim, they still may be available as to the other claims in the government's complaint").

Indeed, the proposed order that the defenses are stricken "to the extent" that they apply only to subrogation claims is meaningless and question-begging. Because the requested order does not clearly specify which defenses do and do not apply only to subrogation claims, the order effectively says: the defenses do not apply to the extent they do not apply. Nothing is advanced by such a declaration, and

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[1] *State ex rel. City of Minneapolis v. Minneapolis Street Ry. Co.,* 238 Minn. 218, 227, 56 N.W.2d 564 (1952); *Chilson v. Travelers' Ins. Co.,* 180 Minn. 9, 12, 230 N.W. 118 (1930) (judgment on pleadings improper where material allegations of complaint are denied by answer or where answer alleges a proper affirmative defense). *See also* 2 McFarland & Keppel, *Minnesota Civil Practice* § 1642, p. 553 (2d ed. l990); 15A Dunnell Minn. Digest 2d Pleading § l0.01, pp. 126-27 (3d ed. 1980) ("[t]he purpose of a motion for judgment on the pleadings is not to try any issue presented by the pleadings, but to determine whether the pleadings present any issue for trial").

[2] *See, e.g.*, 2 Pirsig on Minnesota Pleading § l138, p. 580 (5th ed. l987) (proper remedy where an affirmative defense is legally insufficient is a motion to strike). *Accord* 5A Wright & Miller, *Federal Practice & Procedure,* Civil 2d § 1369, p.534 (1990) ("[i]f a plaintiff seeks to dispute the legal sufficiency of fewer than all of the defenses raised in defendant's pleading, he should proceed under [the motion to strike rule] rather than under [the motion for judgment on the pleadings rule]").

[3] Plaintiffs also refer to their motion as a "motion to dismiss." (*See, e.g.*, Pl. Mem. at l.) "A motion to dismiss is not an appropriate method by which to attack a defense raised in the defendant's answer, even though it may be legally insufficient." 2 McFarland & Keppel, *Minnesota Civil Practice* § 1116, p. 24 (2d ed. 1990). Such motions "deal[ ] only with insufficiency of a claim" while "[i]nsufficiency of a defense can be put into issue by a Rule 12.06 motion to strike." *Id*

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nothing but confusion will reign if it is entered.

2. Courts Decide Only Clear And Well-Settled Issues Of Law On A Motion To Strike.

"'[E]ven when the defense presents a purely legal question, the courts are very reluctant to determine disputed or substantial issues of law on a motion to strike; these questions quite properly are viewed as determinable only after discovery and a hearing on the merits.'" *Salcer v. Envicon Equities Corp.,* 744 F.2d 935, 939 (2d Cir. 1984), *vacated on other grounds,* 478 U.S. 1015 (1986) (quoting 5C Wright & Miller, *Federal Practice & Procedure,* Civil 2d § 1381, pp. 800-01. *See also Tonka Corp. v. Rose Art Industries. Inc.* 836 F. Supp. 200, 218 (D.N.J. 1993) (motion to strike "not meant to afford an opportunity to determine disputed and substantial questions of law"); *U.S. v. Walerko Tool & Engineering Corp.,* 784 F. Supp. 1385, 1387-88 (N.D. Ind. 1992) (where there is a "'substantial question of law, the court should refrain from acting until some later time when [such] issues can be more appropriately dealt with'") (quoting *U.S. v. Fairchild Industries,* 766 F. Supp. 405, 408 (D. Md. 1991); *In re All Maine Asbestos Litigation* 575 F. Supp. 1375, 1377 (D. Me. 1983) ("close or new questions of law… should await a full hearing on the merits").

Even if the Court were to entertain the possibility of creating an independent remedy for Plaintiffs that was unburdened by the defenses applicable to a claim in subrogation, such a decision plainly would not rest on settled and undisputed precedents. Indeed, Plaintiffs launched this case with a press release hailing the "groundbreaking" lawsuit and detailing various ways in which the claims asserted were "unique." (Ex. 82 at 1, 2, 3. Exhibits cited herein are included in the Appendix of Cases filed herewith.) For the Court adequately to assess the Plaintiffs' drastic and consequential claim, it should have at least a rudimentary factual record, so that it may consider all relevant implications. The Court plainly may not decide such an important issue on bare pleadings alone.

III.

THE MOTION IS SUBSTANTIVELY DEFICIENT

A. It Is Premature To Determine The Applicability Of Smoker Defenses to Plaintiffs' Purported "Independent" Claim, Because Plaintiffs Have Not Established That They Have Claims Apart From Subrogation Rights.

Plaintiffs cite authorities holding that, when a party has both derivative and independent claims, infirmities in the derivative claim do not prevent the party from pursuing an otherwise valid independent claim. (Pl. Mem. at 9-11.) None of the cited cases, however, establishes that Plaintiffs *do* have a valid independent claim in this case. Indeed, Plaintiffs expressly disavow any need to prove that such an independent claim is legally supportable.[4] (Pl. Mem. at 3-4.)

What Plaintiffs are asking the Court, therefore, is to strike the defenses which contend that subrogation is Plaintiffs' only remedy, but not reach the merits of whether Plaintiffs do indeed have a remedy in addition to subrogation. Defendants submit that it would be premature and unwise to try to determine that defenses do not apply to a claim before the existence of the claim has been established and its nature fully understood.

In this case, the existence of an "independent" remedy is not simply in doubt; to create such a remedy would contravene long-standing precedent. Although Defendants are waiting for further elaboration of Plaintiffs' contentions and theories before filing their own motion for summary judgment, whatever theory Plaintiffs propose will be unprecedented.

Under settled law, Plaintiffs' claims for injuries can be pursued only under principles of subrogation. Common law equitable principles have never permitted claims arising out of the payment of another's medical expenses -- derivative injuries to be pursued independent of the defenses that would bar recovery by the injured individual. When the Minnesota legislature granted the State subrogation rights for medical payments, it declined to expand the common law to create rights of recovery not limited by defenses based on the recipient's conduct, and so provided the State's sole remedy.

Although the Court need not (and Defendants submit should not) decide the merits of Plaintiffs' independent claim now, it may readily see that substantial questions about the existence of such a claim make ruling on the defenses unwise at this time.

1. At Common Law, Absent A Right Of Subrogation, A Party Suffering Derivative Injury In the Form of Paving

[4]By proposing at the same time a ban on contention interrogatories and a deferral of any summary judgment motions until immediately before trial, Plaintiffs apparently hope that their novel theories can escape any scrutiny until the time of trial.

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Another's Medical Bills Had No Right Of Recovery.

Consider a simple example. Driver D speeds through an intersection and hits another car, injuring its driver P. In an action by P against D, D could assert as a defense that P was not wearing his glasses at the time and so was contributorily negligent. If instead of bringing suit P simply collects from his insurer, the insurer may bring a subrogated claim against D, but it cannot recover any more than P could have recovered in his suit against D.

The elementary rule that subjects the insurer to defenses applicable to its insured rests on a fundamental principle of the common law dating back more than a century. Under the common law, in the absence of a right of subrogation, persons who suffered indirect or derivative economic injury -- like that of Plaintiffs here or the insurer in the example -- were barred from pursuing any claims against the alleged tortfeasor.[5] That rule still represents a bedrock rule of modern common law. *See Holmes v. Securities Investor Protection Corp.* 503 U.S. 258, 112 S. Ct. 1311, 1318-21 (1992) (dismissing fraud claim brought under RICO by customers of broker defrauded by defendant because the injuries were derivative in that they flowed from injuries inflicted on the broker).

The doctrine of subrogation arose to mitigate the effects of this common law rule. As the Minnesota Supreme Court has stated, "[t]he object of subrogation is to place the charge where it ought to rest, by compelling the payment of the debt by him who ought in equity to pay it." *Westendorf v. Stassen* 320 N.W.2d 699, 703 (Minn. 1983). A critical limitation on this remedy, however, is that a subrogee "stand[ ] in the shoes," and assume all the rights and responsibilities of the subrogor. *Regie de D'assurance Automobile dur Quebec v. Jensen,* 399 N.W.2d 85, 88 (Minn. 1987). *See also St. Louis I.M. & S. Ry. Co. v. Commercial Union Ins. Co.* 139 U.S. 223, 226, 11 S. Ct. 554, 557 (1891) ("[I]n any form of remedy the insurer can take nothing by subrogation, but the rights of the assured; and if the assured has no right of action, none passes to the insurer.").

A central reason for the limitations imposed on recoveries for indirect injuries was recently emphasized by the United States Supreme Court in *Holmes.* Recognition of derivative claims outside principles of subrogation would "force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries."[6] 112 S. Ct. at 1318.

2. Minnesota Law Forbids Recoveries Independent Of Subrogation For Parties Suffering Derivative Injury.

Plaintiffs' claimed losses are indistinguishable from the types of losses incurred by insurers and employers when their insured or employee is injured by the actions of a third party. In such a case, as the Second Circuit recently explained, "the authorities and cases unanimously hold that the insurer's recovery is premised *exclusively* upon subrogation."[7] *Great American Insurance Co. v. United States.* 575 F.2d 1031, 1033-34 (2d Cir. 1978) (emphasis added).

Minnesota law is likewise clear that the insurer or employer in those cases has no independent remedy but is limited to its rights in subrogation. In *Allstate Insurance Co. v. Eagle-Picher Industries Inc.,* 410 N.W.2d 324, 327-28 (Minn. 1987), for example, the Minnesota Supreme Court held that an insurer of workers injured by asbestos products could not

[5]*See Northern States Contracting Co. v. Oakes,* l91 Minn. 88, 253 N.W. 371 (1934) (denying recovery to employer seeking workers compensation payments from tortfeasor who injured employee, on ground that employer's injuries were indirect); *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 758 (1878) (denying recovery by insurer against tortfeasor, because the injury to the insurer "was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting" from the tortfeasor's act.) (cited with approval in *Northern States* at 90); *Connecticut Mutual Life Ins. Co. v. New York & New Haven Railroad Co*., 25 Conn. 265,276 (1856) (denying recovery by insurer against tortfeasor, because insurer's injury "was a remote and indirect consequence of the misconduct of the defendants, and not actionable") (cited with approval in *Northern States)*; *Anthony v. Said,* 11 Metc. 290, 52 Mass. 290 (1846) (injury "too remote and indirect," noting that a town could not sue a tortfeasor for injury to a pauper whose support it paid) (cited with approval in *Northern States* at 91).

[6]The Minnesota Supreme Court has similarly emphasized the importance of subrogation principles in preventing multiple recoveries and protecting the parties' due process rights. *See M.W. Ettinger Transfer & Leasing Co. v. Schaper Manufacturing. Inc*., 494 N.W.2d 29 (Minn. 1992) (an employer must prove the nature and extent of its employees' injuries in its subrogation action against a third party tortfeasor in order to protect the latter's due process rights); *Carlson v. Smogard,* 298 Minn. 363 (1974) (a third party tortfeasor sued by the injured party's employer may have a due process right to a hearing to challenge the extent and measure of injured party's own fault).

[7]*See also Williams v. Globe Indemnity Co*., 507 F.2d 837, 840 (8th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975) (Insurer's rights against alleged tortfeasor "are solely derivative rights of subrogation."); *National Union Fire Insurance Co. v. Continental Illinois Corp*., 658 F. Supp. 775, 780 (N.D. Ill. 1987) ("[A]n insurer's only right [against an alleged tortfeasor] is derivative as the subrogee of its insured."); *Silva v. Home Indemnity Co*., 416 A.2d 664, 668 (R.I. 1980) (Insured's only method of recovery against alleged tortfeasor arises "if at all, on the basis of its subrogation to the rights that its insured would have had against [the tortfeasor].").

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maintain a direct action for indemnity against the manufacturers of asbestos for the insurers' workers compensation payments. The Court found that the legislature could not have intended to confer on the insurer a direct right of action for such derivative injuries. It rejected the insurers' effort to "shift the employer's obligations under the employment contract to third parties who are strangers to that contract in complete disregard of the principles of *respondeat superior*, comparative negligence, and the common law measure determinative of the nature and extent of damages recoverable in actions sounding in tort."[8] *Id*. at 328.

The claims of both Plaintiffs are accordingly subject to subrogation principles. As an insurer, BCBSM possesses equitable rights of subrogation that provide it with its exclusive remedy. *See Regie de L'assurance Auto. du Quebec v. Jensen* 399 N.W.2d 85, 88 (Minn. 1987) (noting that the equitable principle of subrogation has been recognized in Minnesota for nearly a century); *Westendorf v. Stassen*, 330 N.W.2d 699, 703 (Minn. 1983) (in insurance context, subrogation arises based on the equities of the situation alone); *Wandersee v. Brellenthin Chevrolet Co.*, 258 Minn. 19, 24-27, 102 N.W.2d 514, 518-20 (1960) (insurer has same rights given employer by Workers Compensation Act, although the Act does not expressly grant such rights).[9]

There certainly is no reason to find that the State has any greater right of recovery.[10] If anything, the State's rights have always been more limited than those afforded to a private party at common law. *See, e.g.. United States v. Standard* X, 332 U.S. 301 (1947) (declining to create a common law remedy for the government where the legislature could provide one). At a minimum, Defendants are entitled to discovery to demonstrate, among other things, the State's role in its health care programs is analogous to that of an insurer.

3. In Light Of This Background The Subrogation Remedy Provided By Statute Must Be Deemed Exclusive

Each of the three statutory schemes under which the State provided medical benefits sought to be recouped here provides the State with an express right of subrogation, to the extent of medical care furnished, which includes all causes of action belonging to the medical care recipient arising from the injury.

Under the Federal Medicaid Statute and its regulations, (1) Medicaid recipients must assign to the State any rights to payment from third parties for medical care, 42 C.F.R. §§ 433.145, 433.146; and (2) states are required to enforce and implement their rights as assignees or subrogees of the Medicaid recipients, 42 U.S.C. § 1396(a)(25); 42 C.F.R. § 433.147(a). To implement this mandate, the Minnesota Medicaid Statute expressly *subrogates* the Department of Human Services to the rights of Medicaid recipients.[11] It also grants the State a lien for the cost of medical care payments on all causes of action that accrue to a Medicaid recipient as a result of the occurrence requiring care. Minn. Stat. § 256B.042; *see also* § 256.015 (providing general public assistance lien to State).

Likewise, the Minnesota General Assistance Medical Care and Minnesota Care Statutes provide that the State is subrogated to the rights of the recipient, and give the State a lien upon any causes of action accruing to the recipient. Minn. Stat. §§ 256D.03, subd. 8(c); 256.015 (general assistance); §§ 256.9353, subd. 8; 256.015 (Minnesota Care).

Significantly, these provisions created a cause of action for the State where none previously existed.[12]

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[8] *See also M.W. Ettinger Transfer and Leasing Co. v. Schaper Manufacturing. Inc*., 494 N.W.2d 29, 33 (Minn. 1992) (employer may not recover amounts paid for workers compensation from third party tortfeasor causing the injury without proof that the third party would have been liable "in a common law negligence action" brought by the employee); *Illinois Farmers Insurance Co. v. Brekka Fireplace Shoppe, Inc.*, 495 N.W.2d 216, 219-20 (Minn. App. 1993) (insurer cannot pursue claim under consumer protection statutes after insured enters settlement; instead, insurer proceeds "solely in its role as subrogee").

[9] Discovery may reveal that BCBSM has express rights of subrogation under its insurance contracts with the medical care recipients. These contractual rights of subrogation are specifically contemplated by the statute authorizing creation of BCBSM as a nonprofit corporation. Minn. Stat. § 62C.14, subd. 2. No defenses should be stricken until Defendants have an opportunity to determine through discovery the scope of such subrogation rights.

[10] Why should it matter, to use our example, whether P was reimbursed by private or public insurance? In either case, D should not pay the insurer more than P himself could recover in an action against D.

[11] 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 the medical care furnished, *to any rights the person may have* under the terms of the coverage or *under the cause of action.*

Minn. Stat. § 256B.37, subd. l (emphasis added)

[12] *See In re Estate of Turner,* 391 N.W.2d 767,768 (Minn. 1986) ("At common law, a governmental unit that furnished some form of governmental assistance to an individual had no

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It is well settled that, when a statute grants rights not provided at common law and a remedy to enforce them, the remedy is deemed exclusive.[13] *See Allstate Insurance Co. v. Eagle-Picher Industries, Inc.* 410 N.W.2d 324, 328 (Minn. 1987) (legislature did not intend to confer direct right of action on insurers for indirect losses). In light of this settled rule of construction and this historical background, it is inconceivable that the legislature intended to permit the State to assert an unprecedented independent remedy that violates one hundred years of precedent.

The opposite rule urged by Plaintiffs -- that "[u]nless there is clear statutory language making the statutory remedy exclusive, it is uniquely the plaintiff's privilege to elect which remedy to enforce" (Pl. Mem. at 10) -- finds support only in a single sentence taken badly out of context. The very next sentences in that case state that, "in those cases where a right, not existing at common law, is created by statute, and a remedy for its enforcement is also provided," then "the remedy so prescribed *is generally held exclusive*." *Davis & Michel v. Great Northern Ry.*, 128 Minn. 354, 358, 151 N.W. 128, 129 (1915) (emphasis added).

* * * * *

Once Defendants have established through discovery the precise nature of Plaintiffs' purported independent theory of recovery, and have created an adequate factual record, they will bring a motion for summary judgment on Plaintiffs' alleged nonsubrogation remedy. This is when the issue should be decided. Striking defenses now without full briefing on the merits of the claim to which they apply would be premature and counterproductive.

B. To The Extent Plaintiffs Do Have Independent Claims They Are Subject To Defenses Arising From Smokers' Comparative Fault Or Assumption Of Risk.

The Defendants have not misconstrued Plaintiffs' complaint. Defendants understand that Plaintiffs have elected not to pursue whatever subrogation claims Plaintiffs may have. Although Defendants do contend that subrogation is Plaintiffs' exclusive remedy, that is simply another way of saying that Plaintiffs have no claim here. The only claim they could assert would be in subrogation; because they have foresworn such a remedy, they have no valid "independent" claim remaining.

Even if Plaintiffs had an independent claim, it would be subject to defenses based on smoker comparative fault or assumption of risk. Under four separate theories, these defenses would be fully applicable to any "direct" action Plaintiffs could persuade this Court to create.

First, the defenses are applicable to the unjust enrichment claim, both to disprove that Plaintiffs made a payment for which Defendants were liable, and to disprove that leaving the State with the loss would be "unjust."

Second, the responsibility of smokers must be considered under the Minnesota comparative fault statute, and the recovery against Defendants potentially capped whether or not smokers are parties to the lawsuit or liable to the Plaintiff.

Third because the Plaintiffs exercised control over various aspects of smoking, they are properly chargeable with smoker defenses under Restatement § 445 and related principles.

Fourth, the formal distinction between the State and its citizens cannot be used to thwart defenses that in equity should be applied. Because the State is the instrumentality of the citizens of Minnesota, by asserting claims through their agent, the State, citizens cannot shed defenses that otherwise would bar their recovery.

1. Defenses Based On Smoker Fault Or Assumption Of Risk Are Applicable To The Unjust Enrichment Claim.

Defendants' affirmative defenses are relevant to Plaintiffs' unjust enrichment claim for two independent reasons. To establish an unjust enrichment claim, a person must show *both* (1) that he has conferred a benefit on another, *and* (2) that it would be inequitable for that person to retain the benefit without compensating him for its value. *First National Bank of St. Paul v. Ramier,* 311 N.W.2d 502, 504 (Minn. 1981); *Southtown Plumbing Inc. v. Har-Ned Lumber Co.,* 493 N.W.2d 137, 140 (Minn. App. 1992); Restatement, Restitution § 1, comment a (1937). The defenses applicable to smokers are properly pleaded as to each of these elements.

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inherent authority to recover that assistance from the individual or the individual's estate."); *See, also In re Dufek's Estate,* 164 Minn. 55, 56, 204 N.W. 469, 469 (1925).

[13] *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1978) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *Fleischmann Distilling Corp. v. Maier Brewing Co*., 386 U.S. 714, 720 (1967) ("When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied.").

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a. Whether Defendants Were Liable To Smokers Is Relevant To Whether Plaintiffs' Payment Of Their Medical Expenses Conferred A "Benefit" On Defendants.

A person benefits another if he adds to the other's property or saves the other from expense or loss, such as by satisfying the other's debt or duty. Restatement, Restitution § 1, comment b (1937). Plaintiffs allege that their health care expenditures for Minnesota residents benefited Defendants by satisfying Defendants' own duty to pay for smokers' health care. (Complaint ¶¶ 126-29.) To show this alleged benefit, Plaintiffs must establish that Defendants were legally liable to pay for smokers' health care.

Minnesota courts consistently have rejected unjust enrichment claims where the plaintiff has failed to show that the defendant received a benefit.[14] *See. e.g.. Shair-A-Plane v. Harrison,* 291 Minn. 500, 503, 189 N.W.2d 25 (1971) (no unjust enrichment where helicopter owner failed to show that county employee's use of helicopter benefited county); *Galante v. Oz Inc.,* 379 N.W.2d 723, 726 (Minn. App. 1986) (no unjust enrichment where plaintiff failed to show that his management services benefited defendant's nightclub); *Marking v. Marking,* 366 N.W.2d 386, 387 (Minn. App. 1985) (no unjust enrichment where tenants failed to establish that their "improvements" increased the value of their landlords' property). A smoker's fault or assumption of the risk is relevant to these issues, because it establishes that Defendants were not liable to the smoker in tort.

b. Even If A Benefit Were Conferred, The Smoker Defenses Would Be Relevant To Whether Retention Of The Benefit Would Be "Unjust".

Even if Plaintiffs could show that Defendants benefited from the health care expenditures, Plaintiffs must show that it would be "unjust" to let Defendants retain that benefit. "[T]he term 'unjust enrichment' is used in the sense that the benefit has been gained illegally or unlawfully." *First National Bank of St. Paul v. Ramier,* 311 N.W.2d 502, 504 (Minn. 1981). *See also Holman v. CPT Corp.,* 457 NW.2d 740, 745 (Minn. App. 1990). Such claim may be based upon "failure of consideration, fraud, mistake, and situations where it would be morally wrong for one party to enrich himself at the expense of another." *Anderson v. DeLisle,* 352 N.W.2d 794, 796 (Minn. App. 1984) (citations omitted). *See also Holman,* at 745.

A smoker's fault or assumption of the risk is unquestionably relevant to weighing the equities of whether Defendants wrongfully benefited from being relieved of a "duty" to pay smokers' health care expenditures and, if so, the amount of that alleged unjust benefit. Defendants must be permitted to put on their whole case if the amorphous issue of "unjustness" is decided: that they marketed a lawful product, that any smokers suffering injuries did so in full knowledge of the risks, that Defendants were not liable to smokers for harm they suffered, that the State itself facilitated and profited from the sale of cigarettes, etc. Litigating the unjustness issue without permitting the jury to consider that Defendants were not liable to individual smokers would be like playing *Hamlet* without the Prince.

2. The Minnesota Comparative Fault Statute Requires That The Factfinder Assess The Fault Of All Involved Parties Whether Or Not They Are Parties To The Lawsuit.

The Minnesota comparative fault statute requires that the factfinder consider and apportion the fault of all parties contributing to the damage, whether or not that person is a party to the lawsuit. Minn. Stat. § 604.01; *see Johnson v. Niagara Machine & Tool Works* 666 F.2d 1223, 1226 (8th Cir. 1981) (applying Minnesota law).

> [W]hen apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.

Lines v. Ryan, 272 N.W.2d 896, 902-03 (Minn. 1978).

Any fault that is "attributable to the person recovering" shall proportionately reduce the amount of damages. Minn. Stat. § 604.01. For example, in *Employers' Mutual lns. Co. v. Oakes Manufacturing Co.,* 356 N.W.2d 719 (Minn. App. 1984), an insurer brought a subrogated claim against a tortfeasor for payments the insurer had made for injuries to the insured. The court held that the jury should have been instructed to consider evidence about the comparative

[14]Although Defendants do not know what cases Plaintiffs have held for their reply, the Court should be careful to distinguish between cases that discuss the benefit requirement and cases that discuss the unjustness requirement. A broad range of considerations may bear on the second point (which is why, as discussed shortly, the smoker defenses also are relevant). These cases, however, have no bearing on the requirement of a benefit.

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negligence of the injured party. *Id*. at 722.

When the negligence of a nonparty is *not* attributable to the plaintiff, the defendant may still be jointly and severally liable with absent parties. Such a defendant still is entitled to a determination of the negligent nonparty's share of fault. If Defendants' total share of fault is less than 15%, they may be liable for no more than four times the percentage of fault. Minn. Stat. § 604.02. Therefore, whether or not it is "attributable" to Plaintiffs, the fault of smokers is a valid defense to liability that must be adjudicated, whether or not it could affect the amount Plaintiffs might collect.

3. Plaintiffs' Own Conduct Justifies Consideration Of Smokers' Assump-tion of Risk and Comparative Fault.

a. Under Restatement Section 495 A Plaintiff Cannot Recover For A Loss Caused By The Actions Of A Third Party Over Whom Plaintiff Had Control.

Plaintiffs argue that smokers' fault may not be "imputed" to them through the doctrine of imputed contributory negligence.[15] Under this doctrine, the negligence of a third party will be ascribed to a plaintiff so as to bar (or reduce) his recovery for damages when a relationship exists between the plaintiff and the third party that would result in the plaintiff being charged with the third party's negligence if he were a defendant. *See* Prosser & Keeton, *The Law Of Torts* § 74 (5th ed. 1984). Thus, if an employer would be vicariously liable for injuries caused by an employee's negligence, the employee's negligence is imputed to the employer when he sues as a plaintiff.

Imputing contributory negligence is permitted when the plaintiff and third party are in certain kinds of relationships that would justify holding the former responsible for the latter's conduct. Although Minnesota courts have eliminated some of the relationships that triggered the doctrine at common law,[16] those that still give rise to imputed contributory negligence are master-servant, joint enterprise, and more generally when plaintiff exercised some control over the third party. *See generally* Restatement (Second) of Torts §§ 486, 491, 495 (1965); *e.g., Jepson v. Noren,* 308 NW.2d 812, 816 (Minn. 1981) (master-servant).

Because of Plaintiffs' own conduct relating to smoking, smokers' comparative fault may bar Plaintiffs' recovery to the extent that smokers' fault contributed to the alleged injuries. Section 495 of the Restatement (Second) of Torts provides that "[a] plaintiff is barred from recovery if the negligence of a third person is a legally contributing cause of his harm, and the plaintiff has been negligent in failing to control the conduct of such person."

Therefore, if Defendants can establish that actions or omissions by the State or BCBSM to control smoking contributed to the loss, the assumption of risk and comparative fault of smokers may be "imputed" to the Plaintiffs under Restatement section 495 or related doctrines.[17] Numerous facts have already come to light showing Plaintiffs' substantial involvement in smoking, as set forth below, and discovery is plainly necessary to fill out the record.

b. The Facts Will Show That Plaintiffs Themselves Bear Enor-mous Responsibility For Any Injury They Have Suffered From Alleged Excess

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[15]As just shown, because the defenses must be litigated under the comparative fault statute, and are relevant to the unjust enrichment claim elements in any event they are properly asserted even if not "imputed" to Plaintiffs.

[16]Most states no longer recognize the driver-passenger or parent-child relationships as bases for imputed contributory negligence. *See Id.* § 485. In Minnesota, the doctrine of imputed negligence is generally not applicable in driver-passenger cases involving personal injuries. *See Weber v. Stokely-Van Camp. Inc.,* 274 Minn. 482, 144 N.W.2d 540 (1966); *Pierson v. Edstrom,* 286 Minn. 164, 174 N.W.2d 712 (1970). The *Weber* line of cases, however, is irrelevant to this case, which obviously does not involve automobile accidents and, insofar as Plaintiffs' claims are concerned, involves economic damages only. *See Weber*, 274 Minn. at 491 ("We limit this decision to automobile negligence."); *Pierson,* 286 Minn. at 171 ("In accordance with *Weber,* this holding is limited to automobile negligence cases.") (citation omitted); *Weckerly v. Abear*, 256 N.W.2d 79 (Minn. 1977) (refusing to extend *Weber* doctrine to claims for property damage).

[17]Under the joint enterprise of Restatement section 491(1), for example, the negligence of one member of a "joint enterprise" bars recovery by another. Restatement (Second) of Torts § 491(1). The relationship between the State and its citizens resembles in many ways that of a joint enterprise. As the comment explains:

> A "joint enterprise" is in the nature of a partnership, but is a broader and more inclusive term.... It includes an undertaking to carry out a small number of activities or objectives, or a single one, entered into by members of the group under such circumstances that all have a voice in directing the conduct of the enterprise.

Id. comment b. On its face, the State of Minnesota, which is controlled by the public with equal rights of all citizens to participate in governance, would seem to satisfy all the elements of a joint enterprise. See Id. comment c (listing factors relating to equal participation). "Whether these elements exist is frequently a question for the jury, under proper direction from the court." Id.

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Medical Costs Resulting From Smoking.

Suppose that Minnesota permitted the operation of casinos for forty years, subject to a requirement that operators secure licenses and pay appropriate taxes and fees. Could the State then sue casino operators for the damages it suffered from forty years of citizens who assumed the risks of gambling, lost all their money, and were forced to go on welfare? Defendants submit that the answer is no. In establishing a scheme that permitted citizens to choose for themselves whether to gamble, and having diverted some of the resulting revenues to the state treasury, the State would be stuck with both the benefits and burdens of its citizens' decisions. It certainly could not burst in indignantly after the fact, like the complicit Captain Renaud in *Casablanca,* and claim that it was shocked (yes, shocked!) to find that there was gambling going on in the state.

The State is in a similar position here. The policy of the State, as enacted into law by the legislature and signed by the Governor, has for decades been to permit, facilitate, and profit from the sale and use of cigarettes in Minnesota; indeed, in some cases the State actually distributes cigarettes. This conduct establishes the predicate for application of Restatement § 495. That is, because Plaintiffs bear some responsibility for the extent of smoking in Minnesota, the resulting assumption of risk and comparative fault of Minnesota smokers is properly considered to bar or reduce any recovery by Plaintiffs. Whether a plaintiff was negligent in exercising control over a third party is a factual question that must be resolved by the jury.[18]The facts they may consider are numerous, and discovery will surely uncover more.

Minnesota not only permits the sale of cigarettes. In addition, the State protects the right of individuals to smoke if they want to, in part through rules that prohibit recovery by smokers who knowingly assume the risks, and in part through additional regulations.[19]

The State has long benefited from, and has authorized localities to benefit from, the sale of tobacco products through fees for licenses. *Id*. §§ 297.04, 461.12 - 461.15. In addition, the State has taxed the sale of tobacco products since 1947. *Id*. § 297.02 (cigarette tax); §§ 297.21 - 297.26 (tax on other tobacco products). The State quickly found that "taxation of tobacco products has proved to be an excellent revenue source, collectible with little resistance from those who pay the tax." *Report of the Governor's Minnesota Tax Study Committee* 382 (1956). In 1993, the cigarette tax generated net revenues to the State of $173 million. Ex. 87.

In addition, Minnesota law authorizes the State itself, including its agencies, instrumentalities, and political subdivisions, to *sell* cigarettes.[20] Minn. Stat. sec. 297.02 subd. 6. The only limitation is that the State, like all other distributors, must pay the required taxes. *Id*.

As for alleged excess medical costs resulting from the smoking of public aid recipients, that is only one of many factors the State may take into account in setting the cigarette tax rate. Other considerations include the regressive nature of the tax; the effects on the economy of the state, including employment in tobacco-related businesses; the possibility that buyers would simply go to neighboring states; and so forth.[21]

Significantly, one of the factors legislators consider in setting a cigarette tax rate is what effects tax increases might have on the number of people who smoke. Indeed, advocates have claimed as one of the benefits of cigarette tax increases a corresponding decrease in smoking and associated medical costs.[22] To

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[18]It is settled in Minnesota that contributory negligence is a jury question. *Pluwak v. Lindberg,* 268 Minn. 524, 528, 130 N.W. 134, 138 (1964). Other jurisdictions have specifically held that the negligent control issue under section 495 is a jury question. *See Scott v. McGaugh,* 211 Kan. 323, 506 P.2d 1155 (1973); *Mitchell v. Colquette,* 93 Ariz. 211, 214, 379 P.2d 757 (1963); *Otterbeck v. Lamb,* 85 Nev. 456, 559, 456 P.2d 855 (1969).

[19]For example, the State forbids employers from discriminating against employees on the ground that they smoke. Minn. Stat. § 181.938. Although certain smoke-free areas are required, the law also authorizes businesses to establish smoking areas. Minn. Stat. §§ 144.415 - 144.416. The State has authorized small cities to own and operate their own liquor stores that sell tobacco. *Id.* § 340A.601. It also authorizes blind persons to operate vending stands that sell tobacco, among other products, in state buildings. *Id.* § 248.07.

[20]Discovery is needed to determine the extent to which the State sells cigarettes to prison inmates, patients at state hospitals, and so forth. Moreover, even if it did not sell cigarettes, it has the ability to exercise extensive control over smoking by these groups as well as by others, such as state employees, students at public schools and colleges, etc.

[21]*E.g.*, *Star Tribune,* Jan. 25, 1994, at 1B (House speaker opposes increases in Minnesota -cigarette tax because it is more burdensome on the poor, it would hurt Minnesota retailers, and it would simply cause smokers to buy cigarettes in neighboring states).

[22]*St. Paul Pioneer Press,* Jan. 25, 1994, at 1A (Chairman of Minnesota Health Care Commission "predicted the [proposed] $2 [per-pack] tax would cause some smokers to quit and deter young people from starting the habit."); *Star Tribune,* Jan. 25, 1994, 1B ("Projections released by the [Minnesota Health Care Commission] suggest that the current consumption of 336 million packs a year in Minnesota could be cut to 282 million by 1998 if taxes were raised 40 cents per pack in each of the next five years.").

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the extent this is true, the State has always affected the level of smoking in Minnesota by the level at which it set the tax. This tool alone would establish the "control" over smokers that gives rise to imputed contributory negligence under Restatement section 495,[23] and discovery is plainly needed to explore this and other methods of control.

4. The Citizens Of Minnesota And The State Of Minnesota Cannot Equitably Be Considered As Unrelated "Third Parties."

Plaintiffs' assumption that the State is an entity wholly apart from its citizens, and so not burdened with smokers' defenses unless they are arbitrarily "imputed," breaks down under closer scrutiny. The State is the instrumentality of the people of Minnesota, who are the true "plaintiffs" behind this action.[24] Even if it has an independent source of rights, the State's alleged *injury* is purely derivative of any injury to the public. Moreover, the State's own conduct in this case was ultimately controlled by the Minnesota electorate, the alleged harm was to Minnesota taxpayers, and the benefits of any recovery would inure to Minnesota taxpayers -- many of whom are or were smokers.[25] For all of these reasons, Minnesota smokers cannot shed their defenses to liability by having the "State" bring their claims for them.

The relationship between a state and its citizens is, in many important ways, analogous to that between a corporation and its shareholders. The shareholders are the ultimate authority in the corporation, just as citizens are the ultimate authority in the state. The corporation exists to benefit the shareholders, just as the state exists to benefit the citizens. *See, e.g.,* Minn. Const. art. I, § 1 ("Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent. ") .

A corporation, like a state, is a separate legal entity. It may, among other things, sue in its own name to recover for its own injuries. But a corporation may be prevented from suing for *its* injuries in circumstances where its shareholders could not sue for *their* injuries arising out of the same events.

This rule is reflected in *Bangor Punta Operations Inc. v. Bangor & Arrostook R.R.,* 417 U.S. 703 (1974). There, a corporation sought to sue its former majority shareholders for allegedly mismanaging the corporation. The current shareholders, who had bought their shares at a price that reflected the alleged wrongdoing, were precluded from suing. *See Id.* at 710.

The Supreme Court then held that the corporation itself likewise could not sue. "[W]here equity would preclude the shareholders from maintaining an action in their own right, the corporation would also be precluded." *Id.* at 713. The Court held that shareholders "cannot avoid the command of equity through the guise of proceeding in the name of [the corporation]," where the shareholders themselves were "estopped from complaining of [the defendant's] alleged wrongs." *Id.*[26]

Minnesota has adopted the principles of *Bangor Punta*. *See Transamerica Insurance Co. v. FDIC,* 465 N.W.2d 713, 716 (Minn. App. 1991), *aff'd in part on other grounds,* 489 Minn. 224 (1992). More generally, it is well established that "although a corporation should never be regarded as a fiction and although the corporate entity should never be disregarded, yet the court will not let interposition of corporate entity or action prevent a judgment otherwise required." *General Underwriters v. Kline,* 233 Minn. 345, 46 N.W.2d 794, 797 (1951); *see also Reserve Mining Co. v. EPA,* 380 F. Supp. 11, 27 (D. Minn. 1974) (citing *General Underwriters), aff'd in material part and modified,* 514 F.2d 492 (8th Cir.

[23]Although information about BCBSM is less readily available from public sources, and Defendants have not yet begun discovery, there is evidence that BCBSM bears responsibility for any medical costs associated with smoking that it failed to recoup fully from its insureds. BCBSM has long been free to set higher rates for smokers to the extent they required greater medical care. *See* Minn. Stat. §§ 61A.255; 62A.31 subd. lr(3); 62L.08, subd. 2; 62A.65, subd. 3(a). If it failed to set high enough premiums, BCBSM alone is responsible.

[24]*See* Minn. Const., preamb. ("We, the people of the state of Minnesota... ordain and establish this Constitution"); *Id.* § 1 ("Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent."); *Humphrey ex rel. State v. McLaren,* 402 N.W.2d 535, 543 (Minn. 1987) ("[The government attorney] has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies."); *McQuay v. International Union*, 245 Minn. 274, 281, 72 N.W.2d 81 (1955) ("state has the primary responsibility for the protection of its citizens"), *aff'd,* 351 U.S. 959 (1956).

[25]When the alleged conspiracy among Defendants allegedly began in the 1950s, over half of adult male Minnesotans smoked cigarettes. As of 1981, 62% of adult male Minnesotans and 47% of adult female Minnesotans were either current or former smokers. Minnesota Plan for Nonsmoking and Health (Minn. Dept. of Health, Sept. 1984), at 28-32.

[26]These principles have been applied not only to private corporations, but to government corporations. In *First National City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 103 S. Ct. 2591 (1983), a U.S. bank was sued by a bank that was the creature of the Cuban government, which would have been the "real beneficiary of such an action." *Id.* at 632. The Court held that the U.S. bank could assert any counterclaims against the Cuban bank that it could have asserted against the Cuban government, citing *Bangor Punta*.

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1975).[27]

Although the facts must still be developed, these principles appear to preclude the State's attempt here to divorce itself from the consequences of smokers' choices. The smokers themselves could not recover for their alleged smoking-related injuries -- whether physical injuries or an increased tax burden -- because they "participated or acquiesced" in the alleged wrongdoing. *Bangor Punta,* 417 U.S. at 710. They did so either by smoking themselves or by adopting, through their elected officials, state policies that protected smoker choice, afforded too generous state health care, or imposed too little taxation of tobacco. The citizens of Minnesota are the "real beneficiar[ies]" of this suit. *First National,* 462 U.S. at 632. They "cannot avoid the command of equity through the guise of proceeding in the name of [the State]." *Bangor Punta,* 417 U.S. at 713.

The State cannot have its cake and eat it too. If the State is simply suing as a proprietary insurer, there is no reason why different rules should govern its claim than those that have governed other insurers for a century -- that is, the requirement that they proceed by subrogation and be bound by all defenses applicable to their insureds. On the other hand, if the State claims the benefit of a special rule based on the State's quasi-sovereign interest in the health of its citizens, then it cannot fairly shed the defenses applicable to those citizens' claims, on the ground that it is really just suing for injury to itself.

In short, there are numerous legal theories that must be sorted out, contentions that must be clarified, and facts that must be established before this Court will be in a position to rule whether the citizens of Minnesota may shed their defenses by having their creation, the State, bring the suit instead. The Court should therefore deny this motion and defer decision until the parties bring an appropriate summary judgment motion.

C. Granting Plaintiffs' Motion Would Not Narrow The Scope Of Discovery, Even If That Were A Valid Consideration For Ruling On The Legal Merits Of A Defense.

Plaintiffs argue that, from a "practical perspective," the defenses should be dismissed because this is "the only viable manner in which [Plaintiffs'] rights can be enforced." (P1. Mem. at 3.) "To attempt to litigate these [individual smoker] claims one at a time would obviously be an impossibility -- indeed, an absurdity." (*Id*.) If evidence were introduced about the comparative fault of or assumption of risk by individual smokers, Plaintiffs contend, it would "sink the litigation in an unmanageable quagmire of discovery." (*Id*.) To cut off this entire area of discovery from Defendants, Plaintiffs urge that all subrogation defenses "be dismissed prior to the commencement of discovery." (a.)

In the first place, Plaintiffs cite no authority for the proposition that the legal merits of a defense are governed by the practicalities of discovery -- a notion that seems to have it backwards. Once a defense is determined to have been properly pleaded, an appropriate discovery plan is devised, not the other way around. To attempt to curb discovery abuses by restricting relevant defenses, rather than regulating the discovery itself, would be to let the tail wag the dog.

Even if discovery considerations were relevant, however, Plaintiffs' argument rests on a false premise. Plaintiffs assume that discovery of individual smokers would be permitted in this case only to the extent that Defendants may rely on affirmative subrogation defenses. In fact, discovery about individual smokers will be necessary whether or not the defenses are stricken.

As conceded in their moving papers, the premise of Plaintiffs' case is that the tobacco industry, in violation of an alleged duty to act in the interest of public health, instead "restrained research, concealed information on the harmful effects of smoking and suppressed the marketing of a safer cigarette." (Pl. Mem. at 5.) They continue: "Defendants knew that their actions would *cause* millions of persons to begin to smoke, primarily in their youth and adolescence." (*Id*. (emphasis added).) *Accord* Complaint ¶ 75 ("cause millions of persons to begin to smoke . . . [and] to continue to smoke"); *see also Id.* ¶¶ 3, 4, 7(a)-(f), 8(d)-(e); 92, 98, 123.

It is only because the tobacco industry's conduct allegedly caused individuals to take up or continue smoking that the Plaintiffs claim harm here. Plaintiffs do not claim that the sale of cigarettes itself is wrongful. Plaintiffs seek recovery for the health care expenditures of only those smokers who started or continued smoking *because of* something wrongful

[27]When the State "institutes an equitable action, whatever may properly affect the relief demanded may be urged against it, and in an action brought by it for the recovery of money the defendant may in defense assert any claims which are connected with and arise out of the same transaction ...." *State ex rel. Young v. Holgate,* 107 Minn. 71, 73, 119 N.W. 792 (1909). Plainly, the conduct of individual smokers is closely connected with and arises out of the claim that Defendants misled those smokers and caused them to incur extra medical expenses paid by the State.

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that the Defendants said or did, and not for some other reason.[28] (*See Complaint* ¶¶ 7, 8 (plaintiffs seek damages for "increased expenditures" resulting from defendants' conduct).) Apart from any defenses that must be overcome, therefore, Plaintiffs must prove as part of their affirmative case that the Defendants' allegedly wrongful conduct caused people to smoke, and that they in turn sought health care they would not have required absent the alleged misconduct.[29]

How Plaintiffs intend to prove causation without taking testimony from actual smokers is intriguing to say the least; apparently they hope to rely on presumptions dragged from other areas of the law, such as securities class actions. Even if such presumptions could establish the causation requirement of Plaintiffs' *prima facie* case, however, which Defendants strongly deny, any presumptions would be rebuttable. Deposition testimony of smokers would be relevant to deciding whether to overcome any presumptions.[30] Even if Plaintiffs could make a *prima facie* case without introducing testimony from smokers, Defendants plainly have the right to take their own discovery to refute the allegation that any substantial number of Minnesota smokers based their decisions to smoke on statements or other conduct by the tobacco industry.

In addition to the element of causation, Plaintiffs also attempt to quantify the damages resulting from the Defendants' alleged misconduct. According to a "statistical model" the State has developed, "more than $350 million a year is spent [in Minnesota] . . . to pay the health care expenses for [diseases allegedly caused by smoking]." (Complaint ¶ 79.) Here too, Defendants will require access to records about individual smokers to test and refute the validity of the statistical model.[31]

In the meantime, given that Defendants have yet to serve any discovery, Plaintiffs' predictions about quagmires and morasses are premature to say the least. It would be totally inappropriate for the Court to jettison legitimate defenses, or otherwise forbid legitimate avenues of discovery, simply because the Plaintiffs believe it would be "impractical" to permit discovery of all information potentially relevant to their unprecedented claim.

D. The Failure To Join Defense Is Appropriate, Because Duplicative Recoveries May Result If Plaintiffs Are Permitted To Sue Without Joining Individual Smokers.

One of the defenses Plaintiffs seek to "dismiss" asserts that the action is barred by Plaintiffs' failure to join necessary parties. The joinder defense plainly may not be dismissed at this stage on the pleadings alone. If Plaintiffs do not join individual smokers as parties, those smokers may not be bound by any judgment here. Defendants would then face the possibility of a later suit by smokers for additional damages such as pain and suffering. To avoid this unjust result, Plaintiffs should not be allowed to proceed on any claim for damages in which the individual smoker is not joined as a party.[32]/

Minnesota Rule of Civil Procedure 19.01 provides in relevant part:

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[28]Plaintiffs will face an uphill battle showing that any substantial portion of Minnesota smokers took up the product because of the tobacco industry's pronouncements beginning in the 1950s. The percentage of all Minnesotans who smoked has dropped steadily since the time of the alleged conspiracy, from approximately 40% in 1950s, to 30% in 1980, and to below 25% in 1990. *See* Minnesota Plan for Nonsmoking and Health, *supra* note 25, at 28.

[29]*See Lyons v. SCNEI. Inc.,* 262 N.W.2d 169, 170 (Minn. 1978) ("Plaintiff... had the burden of proving that the injury resulted from the negligence of the defendant rather than some other cause." "Negligence and causation are discrete elements of the tort and both elements must be pleaded and proved."); *Abbett v. County of St. Louis,* 474 N.W.2d 431, 434 (Minn. App. 1991) ("The plaintiff must show more than a mere possibility that the injury resulted from the defendant's act. A causal connection between the alleged negligence and the injury must be established beyond the point of speculation or conjecture." (citations omitted)); *Stewart v. Frisch,* 381 N.W.2d 1, 3 (Minn. App. 1986) (Even when the defendant's negligence is established, "the jury must still determine whether the [defendant's] negligence was a direct cause of the injury.").

[30]*See Koenig v. Benson,* 17 F.R.D. 330, 338, 339 (E.D.N.Y. 1987) (fraud-on-market presumption overcome for two of three proposed class representatives, who are dismissed based on review of deposition testimony showing no reliance); *Margolis v. Caterpillar, Inc.,* 815 F. Supp. 1150, 1156-57 (C.D. Ill. 1991) (after ordering deposition of class representative retaken to address reliance issue, court finds defendant did not overcome fraud-on-market presumption).

[31]For example, whatever model is used will have to make assumptions about the rates of smoking among State and BCBSM recipients, about the amount of medical care that the smoker recipients use, and so forth. Because the data will almost certainly be from some national study population, Defendants will need access to the actual records of Minnesota benefit recipients to determine whether the recipients' smoking, medical care use, and other characteristics are like those in the State's model.

[32]The argument in text assumes that Plaintiffs can establish a claim independent of subrogation. To the extent Plaintiffs assert claims as partial subrogee of smokers (*i.e.*, for their medical expenses but not their pain and suffering), the insured subrogors indisputably would be necessary parties. *See United States v. Aetna Casualty & Surety Co.,* 338 U.S. 366, 381, 70 S. Ct. 207 (1949) (insured subrogor is a necessary party under FRCP 17(A)). *Compare Braniff Airways. Inc. v. Falkingham*, 20 F.R.D. 141, 144 (D. Minn. 1957) (distinguishing action brought by *subrogor*, where joinder of subrogee is discretionary, not compulsory).

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> A person who is subject to service of process *shall* be joined as a party in the action if… (b) the *person claims an interest relating to the subject of the action* and is so situated that the disposition of the action in the person's absence may… (2) leave any one already a party subject to a *substantial risk of incurring double, multiple, or otherwise inconsistent obligations* by reason of the person's claimed interest.

(Emphasis added.) Failure to join individual smokers as parties would expose Defendants to the very risk of multiple recoveries that requires joinder under the rule.

Suppose that this case proceeds to trial, after two years or more of discovery, and Plaintiffs lose. If individual smokers were not parties, they may not be barred by the prior adjudication. *See Kohler v. State Farm Mutual Automobile Insurance Co.*, 416 N.W.2d 469, 472 (Minn. App. 1987). The Defendants could then be hauled into court again by individual smokers, who could relitigate the identical allegations in their claim for pain and suffering or any other damages other than reimbursed medical costs. On the other hand, if the State collects a judgment against Defendants, individual smokers once again could file another suit for their injuries other than medical expenses, such as pain and suffering.

Because Plaintiffs are bringing their action for only a portion of the full alleged injuries arising from the same events, they are violating the rule against claim splitting. As the Minnesota Supreme Court recently stated:

> This court has long followed the general rule that a party to court litigation may not split a cause of action. *Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978). This rule applies equally to bringing two lawsuits with slightly different theories of recovery (e.g., negligence and breach of warranty) and to alleging different damages. *Myhra v. Park*, 193 Minn. 290, 258 N.W.2d 515 (1935).

Charboneau v. American Family Ins. Co., 481 N.W.2d 19, 21 (Minn. 1992). The rule "is intended to avoid a multiplicity of lawsuits and wasteful litigation." *Id*.

The risk of multiple assertion of the same claim is not a hypothetical one. On October 28, 1994 (order entered on October 31, 1994), a Florida court certified a national plaintiff class of allegedly injured smokers. *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 (11th Cir. F1.) Order Granting Motion for Class Certification. On February 17, 1995, a federal district court in New Orleans certified another national class of allegedly injured smokers. *Castano v. American Tobacco Co.*, Civ. No. 94-1044S (E.D. La. Feb. 17, 1995). One or both of these classes may include those for whose benefit the Plaintiffs incurred expenses.

Defendants will appeal both these rulings. If the classes ultimately are certified, however, and if Plaintiffs' claims here also proceed, Defendants will be forced to defend split claims for the same injuries in two or more different forums. Dismissal of this action in favor of having Plaintiffs participate in the class actions is a possibility the Court will seriously want to consider, so it is obviously premature to strike the joinder defense.[33]

Far from being unsupportable under any set of facts, the failure to join defense is properly pleaded and should certainly not be dismissed unless the Court takes some other appropriate action to avoid split claims and double recoveries.

IV.

CONCLUSION

Plaintiffs' motion is premature and should be denied. Before the Court can assess the applicability of defenses to the State's "independent" claim, it should first have full briefing on whether such a claim exists and if so what its precise nature is. It also should not decide the important issues presented without some factual record to give the Court a fuller appreciation of what is involved. Contrary to Plaintiffs' assertion, the comparative fault and assumption of risk defenses would be applicable to any independent claim, not only under conceivable but under actual facts. They should not be stricken at any time, and certainly not before the record is adequate for decision.

DORSEY & WHITNEY

Peter W. Sipkins (# 1540)
Michael A. Lindsay (#163466)

On Behalf of PHILIP MORRIS

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[33]Alternatively, rather than dismiss all Plaintiffs' claims here for failure to join necessary parties, the Court could stay this action, in favor of having Plaintiffs either intervene in or simply file a lien against any judgment from the class actions. This would ensure that any recoveries for injuries to Minnesota indigents would be subject to the State's subrogation rights, and would relieve Defendants of a duplicative and wasteful second or third front of litigation on the same facts.

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INCORPORATED And Counsel For The
Other Answering Defendants (See Appendix
Of Counsel)

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