STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

CASE TYPE: Civil Other

The State of Minnesota
By Hubert H. Humphrey, III,
Its Attorney General, and
Blue Cross and Blue Shield
of Minnesota,

Plaintiffs,

vs.

Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
Brown and 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.

FILE NO. C1-94-8565

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL INITIAL DEPOSITIONS
OF A LIMITED NUMBER OF MEDICAID RECIPIENTS

INTRODUCTION

On May 19, 1995, the Court denied as premature plaintiffs' motion to strike certain of defendants' defenses relating to individual Medicaid recipients: e.g., comparative fault. The Court stated that "[f]urther discovery is required," including depositions of "a limited number of individual smokers." 5/19/95 Order at 4 & n.2.

Defendants have now proposed precisely the type of initial limited discovery that the Court contemplated -- depositions of ten to twenty Medicaid recipients. (A copy of the detailed proposal, as set forth in defendants' letter of September 7, 1995, is attached as Exhibit B to the Redgrave Affidavit.) The State has refused to agree to any individual discovery, challenging the relevance of the very "limited discovery" which this Court determined was "required" to resolve these threshold issues. At the November 7, 1995, meet and confer, counsel for the State refused even to discuss the appropriate number of deponents, despite the Court's direction at the status conference that morning to do so.

As grounds for disregarding this Court's order, the State urges that they have not yet completed document discovery. But, as the Court recognized, the purpose of these depositions is to determine whether this massive litigation should go forward at all as a "direct cause of action" and, if so, how the claims and defenses in this case must be proved. If proof of any essential element at trial must be presented on an individual basis -- with respect to causation, reliance, fact-of-injury, comparative fault, or damages -- then the Court and all parties should know it now, not three years down this incredibly time-consuming and costly road.

Nor are the State's objections relating to the recipients' privacy a sufficient reason to prevent this pivotal discovery. Defendants have proposed procedures that will fully protect the recipients' privacy. It would be unfair to allow the State -- which is claiming hundreds of millions of dollars in damages based on alleged injuries to these and other recipients -- to invoke privacy in order to deny defendants any access to the allegedly injured parties. No Minnesota authority supports such an inequitable position.

STATEMENT OF FACTS

I. The Court's Prior Order.

On March 10, 1995, at the hearing before this Court on plaintiffs' motion to strike, defendants explained why plaintiffs' motion was premature: In order to determine the validity of defendants' individual defenses, it would be necessary to determine the elements of plaintiffs' claims and whether those elements could be proven on a collective basis in a direct action -- or whether individual proof for each Medicaid recipient would be required. As counsel for defendants explained, that crucial issue should be framed by limited discovery of individual recipients.

> MR. KATZ: Your Honor, the issue they have raised first is, do they have direct causes of action. That is going to need to be decided at some point.
>
> THE COURT: No question about that.
>
> MR. KATZ: Once we decide whether they have direct causes of action, it needs to be decided what are the elements of that direct cause of action, and what are the affirmative defenses for that direct cause of action.
>
> Now, I think the issue Your Honor is raising is, do we need to decide today whether those elements and those affirmative defenses can be proved both by the plaintiff and by the defendant using some kind of collective proof, or are there any elements of their claim or any elements of affirmative defenses which require case by case analysis.
>
> Now, it's our view that whether you look at the case from their -- just from the elements of their cause of action, or whether you look at our affirmative defenses, that there are components of this case that are inevitably individual. That is our position on the merits. However, we haven't brought that issue to you yet. And what we propose to do is to have a period of discovery where we could then bring that issue to you, where we would tee up for decision the question about whether this case can be proven on a collective basis, or whether it requires, either as part of the elements of some of their claims or as our proper affirmative defenses to some of their claims, analysis of each individual smoker. (3/10/95 Ct. Tr. at 136-37.)[1]

In other words, whether or not the State has a direct cause of action, the critical issue remains whether any elements of that cause of action (or any applicable defenses) can only be proved on an

[1] A copy of the cited excerpts of the transcript for the March 10, 1995 hearing before this Court is attached to the Affidavit of Jonathan M. Redgrave ("Redgrave Aff.") as Exhibit A.

individual basis. Defendants' counsel further explained that only "limited" discovery would be necessary, in the first instance, to demonstrate the pervasive individuality of plaintiffs' claims.

> MR. KATZ: So it was our thought that the way we would proceed is that we would go through a limited period of discovery. Included in that would be a limited, a limited number of individual smoker depositions. And obviously Your Honor would be involved in setting those limits for the case. We would then take the record of that limited period of discovery and present a motion to Your Honor which teed up the issue of can this case be processed on a collective basis, or are there in fact individual issues that require that, in effect, their right to reimbursement for any particular smoker's medical costs depends on some facts unique to that smoker. (3/10/95 Ct. Tr. at 139- 40.)
>
> * * *
>
> It's our plan to take sufficient depositions to demonstrate to Your Honor that the differences among smokers, their illnesses, what they saw and read, the extent to which they saw, read or relied on anything from the tobacco companies, the factors other than smoking that may have contributed to their illnesses, such as heart disease, overweight, poor diet, lack of exercise, alcohol consumption and abuse. That all of these differences are so profound that it is simply not legally proper to have a single action to determine whether we have to pay for all of that medical cost. (3/10/95 Ct. Tr. at 156.)

On May 19, 1995, the Court denied plaintiffs' motion to strike as premature. The Court's Order expressly provided for the type of initial "limited discovery" that defendants requested:

> Further discovery is required. If discovery reveals, for example, that Plaintiffs have no direct cause of action, the case could be converted to one involving issues of subrogation. . . . This court will aggressively assert necessary control over discovery to avoid expenditure of excessive time and expense . . . . This court will not permit, for example, depositions of thousands of smokers throughout the state. Subject to further argument, the court's position is that it proposes depositions be restricted to a limited number of individual smokers (absent agreement of counsel, that limit shall be court imposed) selected by some means of computerized random selection. (5/19/95 Order at 4 & n.2.)

Defendants have formulated and offered to the State a proposal that they believe comports with the Court's ruling.

II. The Defendants' Proposal.

Over the past two months, defendants have sought to reach agreement with the State as to how to proceed with the Court-approved discovery. In a September 7, 1995, letter to the State's counsel, defendants proposed a procedure for selecting ten to twenty Medicaid recipients for deposition.[2]

The State responded on September 29, 1995.[3] Instead of addressing how the discovery contemplated by the Court's Order should be conducted, the State disputed whether this discovery should occur at all. The State questioned the relevance of even a single deposition of any Medicaid recipient, and demanded that defendants articulate what the scope of discovery relating to these recipients would be.

On October 6, 1995, defendants responded to the State's queries.[4] Once again, defendants invited the State to communicate any constructive comments or suggestions that it might have to defendants' proposed procedure.

In a reply dated October 17, 1995, the State again questioned the relevance of this discovery.[5] The State also raised two new objections: First, the State took issue with the proposed timing of the recipient depositions, arguing that the depositions should be deferred until the completion of document production. Second, the State claimed that the proposed depositions would impermissibly invade the recipients' privacy rights.

At a meet and confer conference on November 7, 1995, counsel for the State made clear that the State would not agree to any individual discovery at this time and, on that basis, refused even to discuss the appropriate number of recipient depositions.

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[2] A copy of defendants' September 7, 1995, letter is attached to the Redgrave Aff. as Exhibit B.

[3] A copy of plaintiffs' September 29, 1995, letter is attached to the Redgrave Aff. as Exhibit C.

[4] A copy of defendants' October 6, 1995, letter is attached to the Redgrave Aff. as Exhibit D.

[5] A copy of plaintiffs' October 17, 1995, letter is attached to the Redgrave Aff. as Exhibit E.

ARGUMENT

The defendants' proposal to depose ten to twenty Medicaid recipients is designed to produce evidence that will "narrow and clarify the basic issues between the parties" and thereby shape the future development of this case. See Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649, 652 (1955) (quoting Hickman v. Taylor, 329 U.S. 495, 500 (1947) (discovery is proper to "narrow and clarify" issues)); accord Nutt v. Black Hills Stage Lines Inc., 452 F.2d 480, 483 (8th Cir. 1971) (articulating same principle under Federal Rules). As fully addressed at the March 10, 1995, hearing and as reflected in the Court's subsequent Order, such "further discovery" is required to determine whether this litigation may proceed at all as a direct action (and, if so, how) -- the most critical threshold issue that this court will address.

Notwithstanding the Court's Order, the State has refused to agree to any individual discovery or even to discuss the appropriate number of individual depositions. The State's reasons are wholly without merit.

I. Defendants Should Be Allowed To Proceed At This Time With The Depositions Of The 10-20 Recipients.

The State has urged that the depositions of the ten to twenty Medicaid recipients be deferred until the parties have completed document discovery and agreed to a comprehensive plan for fact witness depositions. The State's position is contrary to efficient case management, as well as to this Court's own orders, and is unsupported by the Minnesota Rules of Civil Procedure.

The proposed individual recipient depositions are an integral part of the "further discovery" that the Court has decided is necessary before it can rule on the most significant threshold legal issues in this case. 5/19/95 Order at 4. As the Court observed, discovery might reveal "that plaintiffs have no direct cause of action." Id. If that is the case, the State must proceed by individual proof. Such a ruling would shape the course of all future discovery (each individual recipient's behavior would be implicated) -- if plaintiffs choose to proceed at all. Deferring individual depositions until some later stage would

therefore be massively inefficient and burdensome to the parties and the Court.

Nor is there any support in Minnesota law for the State's suggestion that one side should not be allowed to commence depositions until the other side has completed document discovery. Indeed, the Minnesota Rules contemplate a contrary approach:

> Unless the court . . . orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Minn. R. Civ. P. 26.04. Here, the Court has not "order[ed] otherwise." Just the opposite is true. The Court has ordered that a limited number of individual depositions be taken prior to its ruling on threshold legal issues.

Finally, while the State complains that it would be "unfair" for defendants to conduct the ten to twenty recipient depositions at this time (Redgrave Aff. Ex. E at 2), the real unfairness would be to allow the State to dictate the sequence of discovery in this case. That would deny defendants their equal discovery rights under Minnesota law. Sandberg v. Commissioner of Revenue, 383 N.W.2d 277, 281 (Minn. 1986) (recognizing that each litigant has equal discovery rights).[6]

II. Defendants' Proposed Procedure Respects The Privacy Interests Of The Medicaid Recipients.

The State has asserted only one objection to defendants' proposed procedure for selecting the ten to twenty recipients for deposition: that the procedure would violate the recipients' "privacy rights" in some unspecified way. Redgrave Aff. Ex. E at 2. Defendants' procedure was carefully designed, however, to respect the recipients' privacy. If the State has specific objections to the procedure, defendants stand willing to consider and, if appropriate, to modify it.

Only two provisions in defendants' proposal even arguably raise privacy concerns. Both involve the production of medical records. First, since the State apparently cannot identify whether any

[6] If defendants were prevented from deposing any of the individual recipients whose alleged injuries are at issue here, defendants would be deprived of one of our judicial system's well-established protections against the arbitrary and inaccurate imposition of liability. This would constitute a violation of defendants' rights to due process under the United States and Minnesota Constitutions. See Honda Motor Co. v. Oberg, 114 S.Ct. 2331 (1994).

Medicaid recipient is or was a smoker, defendants have proposed that redacted copies of the hospital admitting histories of 100 recipients be produced for the sole purpose of determining which are current or former smokers. Redgrave Aff. Ex. B at 2. Second, defendants have proposed that the ten to twenty recipients who are to be deposed execute authorizations sufficient to permit defendants to collect their medical records prior to their depositions. Id. at 3.

To be sure, Medicaid recipients, like all Minnesota citizens, have privacy rights in their medical records. But these records are not absolutely protected. As Minnesota law recognizes, those records may be disclosed if the patient consents, if a court so orders, or if disclosure is authorized by law. See Minn. Stat. § 13.42, subd. 3; § 13.46, Subd. 2; Minn. Stat § 595.02; Minn. Stat. § 144.335, Subd. 3(a). It is entirely appropriate for this Court to order the production of the recipients' medical records to the limited extent requested by defendants.

Medicaid recipients, by statute and regulation, have already consented to provide information, including medical records, in lawsuits brought by the State to obtain payments from third parties. See, e.g., 42 U.S.C. § 1396a(25); 42 C.F.R. § 433.147; Minn. Stat. § 256B.056, Subd. 8; and Minn. Rules 9505.0071. For example, the Minnesota legislature has provided that:

> To be eligible for medical assistance, applicants and recipients: must . . . assist the state in obtaining third-party payments. . . . "Cooperation" includes providing relevant information to assist the state in pursuing a potentially liable third party.

Minn. Stat. § 256B.056, Subd. 8.

The duty of cooperation owed by Medicaid recipients is further specified in federal and state regulations. The federal regulations provide:

> (b) Essentials of cooperation. As part of cooperation, the agency may require an individual to --
>
> (2) Appear as a witness at a court or other proceeding;
>
> (3) Provide information, or attest to lack of information under penalty of perjury;

. . .

(5) Take any other reasonable steps to assist in . . . identifying and providing information to assist the state in pursuing any liable third party.

42 C.F.R. § 433.147.

The Minnesota regulations echo these requirements:

> cooperation includes . . . appearing as a witness at a court or other proceeding, . . . providing information or attesting to lack of information under penalty of perjury, and taking other reasonable steps to obtain medical support.

Minn. Rules 9505.0071, Subp. 3.

The Minnesota Rules of Civil Procedure also authorize the Court to order the disclosure of medical records. According to Rule 35.03, 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. P. 35.03.

These requirements are met here. This lawsuit seeks to recover Medicaid payments to treat illnesses that the State attributes to recipients' smoking defendants' cigarettes. It places in controversy the medical condition of Medicaid recipients who smoked and who have a so-called "smoking-related" disease. The Medicaid recipients are "under the control" of the State for purposes of this action. This is the necessary consequence of the statutory and regulatory provisions requiring the recipients to assign to the State their claims against third parties, see 42 C.F.R. § 433.146; Minn. Rules 9505.0071, Subp. 2, and to cooperate with the State in pursuing such claims.

In short, the State's privacy objection to defendants' proposed procedure for early depositions of ten to twenty Medicaid recipients is meritless. The Minnesota courts have repeatedly recognized that, where non-parties' privacy can be adequately safeguarded by a protective order, discovery regarding those non-parties should not be denied on privacy grounds. See, e.g., Gunnufson v. Onan Corp., 450 N.W.2d 179, 181 (Minn. Ct. App. 1990); Ciriacy v. Ciriacy, 431 N.W.2d 596, 599-600 (Minn. Ct. App. 1988). It would be unfair and unwarranted under Minnesota law to allow the State --

which itself placed at issue the Medicaid recipients' medical condition, their use of defendants' products, their reliance on defendants' statements, and so on -- to hide behind privacy concerns in order to thwart defendants' discovery of these and other issues. The limited number of depositions of Medicaid recipients should go forward at this time in accordance with defendants' proposal.

CONCLUSION

For the foregoing reasons, defendants, all of whom join in this Memorandum, ask the Court to grant their motion to compel and order the depositions of ten to twenty Medicaid recipients in accordance with defendants' September 7, 1995, proposal.

Dated: November 8, 1995

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.

By_____
James S. Simonson (Bar No. 10133)
Jonathan M. Redgrave (Bar No. 221922)
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402-3796
(612) 343-2800

JONES, DAY, REAVIS & POGUE
Robert F. McDermott, Jr. (pro hac)
Barbara McDowell (pro hac)
Metropolitan Square
1450 G Street
Washington, D.C. 20005-2088
(202) 879-3939

Jeffrey J. Jones (pro hac)
1900 Huntington Center
Columbus, Ohio 43215
(614) 469-3939

On Behalf of R.J. REYNOLDS TOBACCO COMPANY And Counsel For The Other Moving Defendants (See Appendix of Counsel)

CERTIFICATION OF COMPLIANCE WITH RULE 115.10

Defendants hereby certify that they have initiated both written discussions and face-to-face discussions with plaintiffs in an effort to resolve their differences, as discussed more fully supra, in compliance with Minn. Gen. R. Prac. 115.10.

Dated: November 8, 1995

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.

By_____
James S. Simonson (#101333)
Jonathan M. Redgrave (#221922)

GP:236399 v1

APPENDIX OF COUNSEL
(National and Local Counsels)

American Tobacco
Garyowen P. Morrisroe, Esq.
Chadbourne & Parke
30 Rockefeller Plaza
New York, NY 10112

Byron E. Starns, Jr., Esq.
Leonard, Street & Deinard
2270 Minnesota World Trade Center
30 East Seventh Street
St. Paul, MN 55101

John W. Getsinger, Esq.
Leonard, Street & Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

B.A.T. Industries
Michael V. Corrigan, Esq.
Simpson, Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017-3954

Gerald L. Svoboda, Esq.
Fabyanske, Svoboda, Westra,
Davis & Hart
1100 Minneapolis Centre
920 Second Avenue South
Minneapolis, MN 55402

Brown & Williamson
William E. Hoffman, Jr. , Esq.
Richard A. Schneider, Esq.
King & Spalding
2500 Trust Company Tower
191 Peachtree Street, N.E.
Atlanta, GA 30303-1763

Steven D. McCormick, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601

Jack M. Fribley, Esq.
Faegre & Benson
200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-3901

Council for Tobacco Research
Joseph P. Moodhe, Esq.
Rodney W. Ott, Esq.
Debevoise & Plimpton
875 Third Avenue
New York, NY 10022

Gary J. Haugen, Esq.
Maslon, Edelman, Borman & Brand
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4140

Liggett Group
James O. Copley, Esq.
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022

Robert V. Atmore, Esq.
Lindquist & Vennum
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2205

Lorillard Tobacco
William J. Crampton, Esq.
Gene E. Voights, Esq.
Shook, Hardy & Bacon
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

David G. Martin, Esq.
Doherty, Rumble & Butler
2800 Minnesota World Trade Center
30 East Seventh Street
St. Paul, MN 55101

Philip Morris Incorporated
Thomas E. Silfin, Esq.
Arnold & Porter
555 - 12th Street, N.W.
Washington, D.C. 20004-1202

Mark B. Helm, Esq.
Allen M. Katz, Esq.
Munger, Tolles & Olson
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560

Peter Sipkins, Esq.
Michael A. Lindsay
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402-1498
GP:236399 v1

R.J. Reynolds Tobacco Company
Robert F. McDermott, Jr., Esq.
Barbara McDowell, Esq.
Jones, Day, Reavis & Pogue
Metropolitan Square
1450 "G" Street, N.W.
Washington, D.C. 20005

James S. Simonson, Esq.
Jonathan M. Redgrave, Esq.
Gray, Plant, Mooty, Mooty & Bennett, P.A.
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402

Tobacco Institute
Paul R. Duke, Esq.
John Vanderstar, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566

George W. Flynn, Esq.
Cosgrove, Flynn,
Gaskins & O'Connor
29th Floor, Lincoln Centre
333 South Seventh Street
Minneapolis, MN 55402