STATE OF MINNESOTA
IN SUPREME COURT

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiff-Respondent,

and

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

v.

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, 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-Appellants,

and

B.A.T. INDUSTRIES, P.L.C.,
Defendant.

Case No. C1-95-1324

November 17, 1995

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This action arises out of a decades-long conspiracy of intentional wrongdoing by the leading cigarette manufacturers and their trade associations. See Complaint at ¶ 1 (Appellants' Appendix, A-1-2). Blue Cross and Blue Shield of Minnesota ("Blue Cross" or "BCBSM") and the State of Minnesota ("the State"), co-plaintiffs, seek to recover the substantial sums of money each spends to pay for health care for smoking-attributable death and disease. *Id.* at ¶¶ 7-8 (A-3-9). In addition, Blue Cross and the State seek a wide range of equitable relief. *Id.* ¶ 134 (A-51-53). Blue Cross and the State do not seek to recover for the separate and distinct personal injury damages sustained by individual smokers, for example, bodily and mental harm and loss of earnings.

Blue Cross and the State have pled nine causes of action in their joint complaint: undertaking a special duty, antitrust (one count for restraint of trade and one count for monopolization), consumer fraud, unlawful trade practices, deceptive trade practices, false advertising and restitution (one count for performance of another's duty and one count for unjust enrichment). *Id.* at ¶¶ 84-129 (A-41-50). Each of these causes of action is pled as a direct claim, as opposed to a derivative claim in subrogation. *Id*.

In the trial court, defendants filed a motion under Rule 12, Minn.R.Civ.P., which challenged the standing of Blue Cross and which sought to dismiss three of the nine causes of action asserted by Blue Cross and the State (the two antitrust counts and the undertaking count) for failure to state a claim. (A-56-57, 70). (Defendants failed to move to dismiss the six other direct causes of action for failure to state a claim.) The motion was decided by the trial court prior to the commencement of discovery. See Case Management Order, March 29, 1995 at 5 (Respondent's Appendix, RA-5).

The trial court denied defendants' motion in its entirety, finding (1) that Blue Cross was not only " an appropriate party to this lawsuit" but was "the natural plaintiff best able to pursue the claim;" (2) that Blue Cross and the State properly pled antitrust claims because the Minnesota Antitrust' Law "expressly allows those injured indirectly to present their claims under the statute," and (3) that Blue Cross and the State properly pled the undertaking claim because, inter alia, " [a] legal duty… may be what is called a 'special' or 'assumed' duty (i.e., a duty, though not generally legally owed to these Plaintiffs which is undertaken or assumed by Defendants.)." District Court Order, May 18, 1995 (Chief Judge Fitzpatrick) (A-148, 151-52, 154, 155).

In this appeal, defendants challenge the trial court order only with respect to the standing of Blue Cross. See Petition for Review of Decision of Court of Appeals, August 16, 1995 (RA-14-20). Defendants have failed to challenge the trial court's denial of their motion to dismiss the antitrust and undertaking causes of action for failure to state a claim. In fact, defendants specifically stated in their Petition to the Court of Appeals that they were not seeking review of the trial court's order denying their motion to dismiss the antitrust and undertaking counts. See Petition for Discretionary Review, June 19, 1995, at 2 n. 2 (RA-24). Accordingly, issues involving whether these direct causes of action properly state a claim are not before this Court.

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Simultaneously with defendants' motion below, Blue Cross and the State filed a motion for judgment on the pleadings seeking to dismiss certain defenses such as assumption of the risk which defendants seek to impute from individual smokers, who are not parties to this action, to Blue Cross and the State. (RA-28-44). The trial court denied plaintiffs' motion as premature, a ruling which has not been appealed. (A-147-50). Accordingly, issues involving the defenses applicable in this action also are not before this Court.

STATEMENT OF FACTS

The complaint sets forth in some detail the facts which underlie this action, as summarized herein.

A. THE CONCENTRATION OF THE INDUS-TRY

Cigarette manufacturing is one of the most concentrated industries in the United States, with six manufacturers controlling virtually 100% of the market. Complaint at ¶ 18 (A-11). These six cigarette manufacturers and their two trade groups are defendants herein. *Id.* at ¶¶ 1, 9-11, 13-17 (A-1-2, 9-11).[1]

In part because of its concentration, the cigarette industry is one of this country's most profitable businesses, with profit margins in at least the 30% range. *Id.* at ¶ 19 (A-11). The industry harvests billions of dollars in profits each year from domestic sales alone. *Id*.

B. THE BEGINNING OF THE INDUSTRY CONSPIRACY ON SMOKING AND HEALTH

The illegal combination and conspiracy which form the heart of this case began as early as the 1950s, when the industry was confronted with the publication of several scientific studies which sounded grave warnings on the health hazards of cigarettes. Complaint at ¶ 21 (A-12). In response, the presidents of the leading tobacco companies met at an extraordinary gathering in New York City in December 1953. *Id.* at ¶ 22 (A-12-13). A memorandum summarizing the discussions of that day noted that the companies had not met together since two previous antitrust decrees had prohibited "many group activities." *Id.* However, the companies viewed the current problem "as being extremely serious and worthy of drastic action." *Id*.

The problem was viewed entirely as an issue of public relations, as opposed to a public health concern. *Id.* at ¶ 22(c) (A-13). The company presidents believed "that the problem is one of promoting cigarettes" and that the industry "should sponsor a public relations campaign which is positive in nature and is entirely 'pro-cigarette.'" *Id.* To accomplish this end, the industry formed two trade associations, the Council for Tobacco Research ("CTR") and, later, the Tobacco Institute ("TI"). *Id.* at ¶ 23 (A-14).

C. REPRESENTATIONS AND UNDERTA-KINGS BY THE INDUSTRY

With the founding of its first trade group, the cigarette industry began to issue a series of public statements representing that it would undertake a continuing duty to protect the public health. Complaint at ¶ 24 (A-14). Over the years, the industry has repeatedly re-affirmed this commitment, stating:

> "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."
>
> "*We always have and always will cooperate closely with those whose task it is to safeguard the public health*."
>
> "We recognize that we have a special responsibility to the public -- to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use."
>
> "We shall continue all possible efforts to bring the facts to light."

Id. at ¶¶ 25, 27 and 28 (A-14-18) (emphasis added).

D. THE CAMPAIGN OF DECEIT AND MISREP RESENTATION

The industry's promises of objective scientific research and full disclosure have never been fulfilled. Complaint at ¶ 30 (A-18). Instead, the industry has undertaken research not in pursuit of the scientific truth but to aid the industry in its public relations and litigation battles. *Id.* at ¶ 30 (A-18). Research that might confirm the health risks of smoking has been concealed. *Id*.[2]

Thus, to this day, despite overwhelming scientific evidence establishing the hazards of smoking and the confirmation of this evidence by their own internal research, the cigarette manufacturers and their

[1] One parent corporation, B.A.T. Industries, P.L.C., also is a defendant. *Id.* at ¶ 12 (A-9).

[2] For example, in an internal memorandum, in-house counsel for one defendant recommended removing "deadwood" – scientific research – from company files. *Id.* at ¶ 63 (A-32).

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trade associations repeat -- over and over, in a unified stance -- that there is no proven causal connection between cigarette smoking and adverse health effects and that cigarette smoking is not addictive. *Id* at ¶ 34 (A-21).

It appears that the industry never intended to fulfill its undertaking to research and report on the health hazards of cigarettes. Instead, the industry's public pronouncements have been a part of its campaign to "create doubt about the health charge, " as the following quotations from internal documents demonstrate in the industry's own words:

> Council for Tobacco Research (CTR) "was set up as an industry 'shield' in 1954… It is very important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed."
>
> "CTR is best & cheapest insurance the tobacco industry can buy and without it the Industry would have to invent CTR or would be dead."
>
> "For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts -- litigation, politics, and public opinion.... [I]t has always been a holding strategy, consisting of… creating doubt about the health charge without actually denying it.... In the cigarette controversy, the public -- especially those who are present and potential supporters (e.g. tobacco state congressmen and heavy smokers) -- must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor."

Id. at ¶ 33 (A-19-21).

E. THE CONSPIRACY TO SUPPRESS RESEARCH AND PRODUCT DEVELOPMENT

Internal documents also begin to detail the industry's conspiracy to suppress research and product development. For example, the documents reference a "gentlemen's agreement" among the manufacturers to suppress research on smoking and health. Complaint at ¶ 36 (A-22).

The industry also suppressed development and marketing of a safer cigarette. At least one defendant -- Liggett Group, Inc. ("Liggett") -- successfully developed a safer cigarette which "eliminated carcinogenic activity" and which "was commercially acceptable." *Id.* at ¶¶ 38-40, 42 (A-23-25). But Liggett decided not to market this product after an apparent threat of retaliation by industry leader Philip Morris Incorporated (to "clobber" Liggett) and after Liggett executives expressed concern that marketing a safer cigarette would imply that traditional cigarettes were not safe ("[a]ny domestic activity will increase risk of cancer litigation on existing products."). *Id.* at ¶¶ 41-42 (A-23-25).

F. INDUSTRY CONTROL OF NICOTINE LEVELS

In public statements, the cigarette industry emphatically denies that cigarettes are addictive. Complaint at ¶ 34 (A-21). However, in internal memoranda, the industry extols the addictive properties of cigarettes and explicitly characterizes the cigarette as a nicotine delivery system. For example, as early as the 1960s, a scientist at one cigarette company stated that "[n]icotine is a very fine drug" and that the company "is in the nicotine rather than the tobacco industry." *Id.* at ¶ 55(a) (A-28-29); see also *Id.* at ¶ 57 (A-30) ("We are then in the business of selling nicotine, an addictive drug."). Similarly, an internal report on a 1972 CTR conference stated:

> "The cigarette should be conceived not as a product but as a package. The product is nicotine."
>
> "Think of the cigarette pack as a storage container for a day's supply of nicotine… Think of the cigarette as a dispenser for a dose unit of nicotine."

Id. at ¶ 65 (A-33).

Accordingly, the industry has developed sophisticated technology to manipulate nicotine levels and to manipulate the rate at which nicotine is delivered. *Id.* at ¶ 66 (A-33-34). The industry also can add nicotine to any part of the cigarette. *Id*.

As a result of the industry's actions, as many as 74% to 90% of smokers are addicted. *Id.* at ¶ 69 (A-35). Eight out of 10 smokers say they wish they had never started smoking. *Id.* Two-thirds of adults who smoke say they wish they could quit. *Id.* Seventeen million try to quit each year, but fewer than one out of ten succeed. *Id*.

G. MAINTAINING THE MARKET THROUGH SALES TO MINORS

In addition to ensuring a captive market through addiction, the cigarette industry has maintained its sales by exploiting the knowing

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attraction of youth to its products. Complaint at ¶ 71 (A-36). Smoking begins primarily during childhood and adolescence. *Id.* at ¶ 72 (A-36). Ninety percent of male smokers begin smoking before age 18, and nearly all first use of tobacco occurs before high school graduation. *Id.* Each day more than 3,000 American teenagers start smoking. *Id.* An example of the industry's targeting of minors is the Joe Camel advertising campaign. *Id.* at 73 (A-37). A recent survey of six-year-olds found that 91% could correctly match Joe Camel with a picture of a cigarette and that both the silhouette of Mickey Mouse and the face of Joe Camel were equally well recognized by almost all children. *Id*.

H. THE EFFECT OF THE INDUSTRY'S UNLAWFUL CONDUCT

As a direct result of the unlawful conduct of the cigarette industry, cigarette smoking has become the most pervasive public health issue of our time and the single most preventable cause of death in the United States. Complaint at ¶ 76 (A-38). Cigarettes kill when used as intended. *Id.* At least one out of every four regular cigarette smokers dies of smoking-related disease. *Id.* at ¶ 77 (A-38). The number of premature deaths caused by smoking -- more than 400,000 each year in the United States -- surpasses the combined totals for alcohol, suicide, homicide, AIDs, cocaine, heroine and motor vehicles. *Id.* at 77 (A-38). The death toll in one year alone from smoking equals the number of American lives lost in battles in all the wars this country has fought this century. *Id.* at ¶ 3 (A-2). In Minnesota, smoking-related diseases cause more than 6,000 deaths a year. *Id.* at ¶ 77 (A-38).[3]

The expenditures for treating these diseases is extraordinary. The State of Minnesota has developed a statistical model to measure these expenditures, which has been updated and distributed worldwide by the federal Centers for Disease Control ("CDC"). *Id.* at 79 (A-38-39). In Minnesota, the data show that more than $350 million is spent each year for health care expenses for cigarette-caused death and disease. *Id.* Nationwide, CDC data shows that the estimated health care costs for smoking-attributable diseases are $50 billion. *Id*.

I. THE NEED FOR A REMEDY

Despite the egregiousness of their conduct and the toll -- human and economic -- wreaked by the cigarette manufacturers and their trade associations, the industry has enjoyed virtual immunity from regulation and successful litigation. Complaint at ¶ 80 (A-39). In the courts, the industry has not paid any damages. *Id.* at ¶ 81 (A-39). In large part, the success of the industry has been founded on the industry's aggressive litigation tactics. As one industry lawyer wrote:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [R.J. Reynolds]'s money, but by making that other son of a bitch spend all of his.

Id. at ¶ 81 (A-39-40) (emphasis added).

INTRODUCTION AND SUMMARY OF ARGUMENT

Blue Cross -- which has a unique statutory mandate to advance the public health -- brings this direct action against the industry which is responsible for the most pervasive public health issue of our time. This action is founded upon the wrongful and intentional misconduct of the industry, and not merely the product -- cigarettes -- itself. This action is founded upon nine causes of action -- based upon common law tort, statute and equity -- specifically calibrated to correspond to the extraordinary facts of this case. This action seeks to recover increased health care expenditures, with the premise being that it is the wrongdoers who should pay for the staggering health care costs caused by their unlawful actions. This action also seeks a wide range of equitable relief which has the potential to change the course of conduct of this industry.

The legal argument in this brief is divided into two major sections:

1. *Blue Cross Has Standing to Maintain This Action*: Standing is a specific doctrine under Minnesota law -- and a threshold inquiry -- which focuses on the issue of "injury-in-fact." (By contrast, as detailed below, the issue of whether subrogation is exclusive focuses on the legal sufficiency of the direct causes of action pled in the complaint.)

Blue Cross has standing to maintain this direct action for damages because Blue Cross -- as a direct purchaser of health care -- has suffered injury-in-fact. Despite defendants' contentions, the standing analysis is not affected by the fact that Blue Cross. as a nonprofit corporation, "passes on" costs (and

[3] One internal memorandum admits, "Most Philip Morris products both tobacco and non-tobacco are *directly related* to the health field." *Id.* at ¶ 36 (A-22) (emphasis added).

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benefits) to its subscribers. Indeed, United States Supreme Court decisions conclusively reject this type of "pass on" defense. In one decision, decades ago, Justice Holmes set forth the basic principle that courts will not inquire into whether there has been a "pass on" of damages by a direct purchaser. Several years ago, the Court reaffirmed this general rule in a case involving a regulated utility which was required by law to "pass on" all damages. Other courts -- including Judge Posner writing two months ago for the United States Court of Appeals for the Seventh Circuit -- have specifically applied this doctrine to Blue Cross corporations in other states. In large part, these decisions are premised upon a desire by the courts to streamline litigation and to avoid unnecessarily complicated proceedings to determine and apportion damages.

In addition, Blue Cross has standing to seek equitable relief (1) on its own behalf, pursuant to its statutory mandate and its status as a direct purchaser of health care, and (2) on behalf of its group subscribers, pursuant to well-established principles of associational standing.

2. *Subrogation Is Not the Exclusive Remedy in This Case*: Contrary to defendants' hyperbole, subrogation -- although common -- is not an exclusive remedy in all cases. The primary decision upon which defendants rely, *Northern States Contracting Co. v. Oakes*, 191 Minn. 88, 253 N.W. 371 (1934), does not establish a *per se* rule of exclusivity. In fact, to the extent that Northern States relies on a proximate cause analysis, this Court has sharply distinguished that decision -- and eviscerated defendants' arguments -- in a subsequent case which specifically found that an employer's payment of workers' compensation benefits "results directly and proximately from the wrong of another." *City of St. Paul v. Sorenson*, 283 Minn. 158. 161, 167 N.W.2d 17, 19 (1969).

Nor do other cases cited by defendants stand under scrutiny for the proposition that subrogation is the exclusive remedy in all circumstances. In fact, one case relied on by defendants was expressly overruled years ago.

In addition, the United States Supreme Court has held that subrogation is not exclusive and that a direct action may be asserted to recover benefits paid to a third party. *In Federal Marine Term., Inc. v. Burnside Ship Co*., 394 U.S. 404 (1969), the Court rejected contentions, similar to those raised by defendants in the present case, that such a right did not exist at common law. In a two-step analysis, the Court first analyzed whether any statute mandated subrogation as an exclusive remedy. Second, the Court analyzed the availability of a direct action based upon the specific facts and all of the specific causes of action in the case. The Court in *Burnside* held that an employer could maintain a direct action in tort, based not upon the tortfeasor's breach of duty to the employee but upon the tortfeasor's breach of an independent duty owed to the employer. In addition, because the record was incomplete, the Court remanded the case for a further analysis of other potential causes of action.

In the present case, as in Burnside, there is no statute which mandates exclusivity. Thus, to determine whether Blue Cross may assert a direct cause of action, the analysis must turn -- as Burnside instructs -- to the specific facts of this case and to each cause of action.

Yet defendants have presented this case in a legal and factual vacuum. With respect to the facts, defendants propound flippant hypotheticals -- involving cheeseburgers and flowers -- in an attempt to shift the focus away from the facts of this case and defendants' own intentional wrongdoing. With respect to the law, defendants substantively address only limited aspects of tort law, and even in this respect fail to move beyond rote, simplistic -- and erroneous -- incantations.

Defendants cite no authority for their centerpiece argument that duty extends to one person -- *"and that person alone."* See Appellants' Brief at 13. In fact, this pronouncement is directly contradicted by Minnesota law (and by the Supreme Court in Burnside). There is no "bright line" test for duty. Duty is a fact-intensive analysis, and, as this Court has stated, the "special facts" of the case must be considered. Foreseeability of harm extends duty. The magnitude of the harm extends duty. Intentional misconduct extends duty.

Moreover, in this case Blue Cross has pled not merely a general duty but a specific undertaking of duty based upon defendants' representations that they would undertake a continuing duty to protect the public health and to cooperate closely with those who safeguard the public health. It is well established that such an undertaking also extends the scope of duty.

Defendants also repeatedly denounce the fact that third parties stand in the causal chain -- *"BCBSM's own theory of recovery asserts the injuries of individual smokers as necessary and antecedent steps in the chain leading to its claimed harm"* -- as if this fact were unprecedented. Appellants' Brief at 14. However, it is a fundamental principle of Minnesota law, as recognized by this Court in City of St. Paul, that

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proximate cause includes injuries caused through a natural sequence of events set in motion by defendants' wrongdoing. In the present case, where smokers purchase and smoke cigarettes in a manner not only foreseeable but precisely intended by defendants, there is no break in the causal connection.

Defendants also disregard the eight non-tort counts pled by Blue Cross. Yet these causes of action -- statutory and equitable -- expand traditional tort principles. Defendants limit their discussion of these non-tort causes of action to a fleeting comment in one footnote of their brief. Appellants' Brief at 9 n.4. In this footnote, defendants assert -- in a one-sentence analysis -- that Blue Cross's antitrust claims "fail." *Id.* Defendants neglect to note that they specifically moved in the trial court to dismiss the antitrust claims for failure to state a claim, that their motion was denied because the Minnesota antitrust statute expressly encompasses any person "injured directly or indirectly" -- and that this ruling has not been appealed. Clearly, subrogation cannot be an exclusive remedy when specific claims stand uncontested in this appeal.

In sum, fundamental principles of law squarely support the decision of the trial court, which merely denied defendants' preliminary motion to prematurely resolve this action. For a plethora of reasons -- substantive and procedural -- it is respectfully submitted that the trial court order should be affirmed.

ARGUMENT

A. STANDARD OF REVIEW

A preliminary motion under Rule 12, Minn.R.Civ.P. -- decided prior to the commencement of discovery -- is a drastic and disfavored procedure. In the district court, defendants designated their Blue Cross motion as "a motion to dismiss," without specifying either Rule 12.02(e) (failure to state a claim) or Rule 12.03 (motion for judgment on the pleadings). (A-56-57, 70). In any event, the standard is virtually identical. At this stage, the facts as pled in the complaint must be accepted as true, and all fact inferences also must be drawn in favor of the plaintiff. *Grier v. Grier's Estate*, 252 Minn. 143, 89 N.W.2d 398, 401 (1958); *see also Herr and Haydock*, Minnesota Practice § 12.9 at 260, § 12.11 at 273-74 (1985). The "limited function" of the court is to determine whether the complaint sets forth a legally sufficient claim for relief. *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980). The complaint will be dismissed "only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support the relief demanded." *Northern States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26, 29 (1963) (emphasis added).

In the present case, the facts as pled in the complaint clearly support the legal claims of Blue Cross. Moreover, Blue Cross's claims are particularly inappropriate for dismissal at this preliminary stage because of the complexity of the issues and the procedural posture of this appeal.

In analogous circumstances -- with cases presenting unique and extraordinary facts -- courts have been especially reluctant to dismiss on a preliminary motion and have recognized that development of the factual record may be required prior to a ruling on an issue of law. *See, e. g., Hebron Public School Dist. No. 13 v. U.S. Gypsum*, 690 F. Supp. 866, 867 (D.N.D. 1988); *Ass'n of Haystack Property v. Sprague*, 494 A.2d 122, 125 (Vt. 1985). Indeed, defendants themselves urged this very point in the trial court in response to *plaintiffs'* motion to dismiss certain defenses, filed simultaneously with defendants' motion. Defendants stated:

> For the Court to adequately 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*.

Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings at 8-9 (RA-46-47) (emphasis added).

Remarkably -- in view of their arguments in this appeal -- defendants further stated in the same brief in the trial court that, "*the Court need not (and Defendants submit should not) decide the merits of Plaintiffs' independent claim now*." *Id.* at 10 (RA48) (emphasis added).[4]

In view of these statements by defendants in the trial court, it is perhaps not surprising that the procedural posture of this appeal is severely deficient and, at a minimum, precludes a considered review of all of the issues. Certain issues in this appeal -- i.e. "injury-in-fact" -- may be addressed without a particularized analysis of each cause of action.

[4] Nor did plaintiffs seek a ruling establishing their direct causes of action in their motion. *See* Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings at 3. (RA-30). Instead, Blue Cross and the State requested that the complaint be taken as pled and that inappropriate defenses be struck. *Id.* at 3-4. (RA-30-31).

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However, defendants' primary argument in this appeal -- their contention that subrogation is exclusive -- cannot be decided without an analysis of the potential alternatives to subrogation, i.e., an analysis of each direct cause of action pled in the complaint. In short, subrogation is the exclusive remedy only if each and every cause of action in the complaint fails to state a claim.

Yet defendants failed to affirmatively challenge six of the nine causes of action in the trial court. *See Mattson v. Underwriters at Lloyds*, 414 N.W.2d 717, 720 (Minn. 1987) ("an appellate court will not ordinarily consider an issue not first presented to the trial court"). The causes of action that were challenged by defendants for failure to state a claim -- antitrust and undertaking -- were upheld by the trial court and are not the subject of this appeal. In fact, in their Petition for Discretionary Review filed in the Court of Appeals, defendants affirmatively precluded appellate review of the antitrust and undertaking counts, stating, "Defendants also moved [in the trial court] to dismiss certain counts of the complaint for failure to state a claim. Petitioners do not seek discretionary review of the district court's order denying that request for relief." *Id.* at 2 n. 2 (emphasis added) (RA-24). *See Lener v. St. Paul Fire & Marine Ins. Co*., 263 N.W.2d 389, 390 (Minn. 1978) ("Where a party fails to urge an assignment of error or contest a trial court order in his brief on appeal, the point is deemed waived....").

In short, it does not appear "to a certainty" that *no* facts exist to support any of the relief demanded. *See Northern States Power*. 122 N W 2d at 29

B. BLUE CROSS HAS STANDING TO MAINTAIN THIS ACTION

1. Standing is Demonstrated by "Injury-in-Fact"

This Court has adopted an "injury-in-fact" analysis for standing. *Snyder's Drug Store, Inc. v. Minnesota State Bd. of Pharmacy*, 301 Minn. 28, 221 N.W.2d 162, 165 (1974). This Court has further recognized that the primary purpose of the standing doctrine is "to guarantee that there is a sufficient case or controversy between the parties so that the issue is properly and competently presented to the court." *Minnesota State Bd. of Health v. City of Brainerd*, 308 Minn. 24, 241 N.W.2d 624, 628 (1976); *see also Channel 10, Inc. v. Ind. School Dist. No. 709*, 298 Minn. 306, 215 N.W.2d 814, 821 (1974) (recognizing "the trend of broadening the standing rights of litigants, particularly where the facts and issues will be vigorously, fairly. and adequately presented in an adversary setting.").

As demonstrated below, Blue Cross -- which has a unique statutory mandate and which is a direct purchaser of health care -- clearly has met this minimal threshold of "injury-in-fact" and is positioned to "properly and competently" present the issues of this case.

Thus, Blue Cross brings this action as a direct purchaser of health care to recover damages "for increased costs for health care services." Complaint at ¶ 8(g) (A-8-9). Blue Cross sues on its own behalf as a purchaser of health care (1) to recover damages and (2) to obtain equitable relief. *Id.* In addition, Blue Cross seeks the same equitable relief on behalf of its subscriber groups. *Id.* Blue Cross does not seek damages on behalf of its subscriber groups, although, as a practical matter the recovery in this action will inure to their benefit since Blue Cross, as a regulated nonprofit health service plan, will "pass on" benefits to its subscribers. Id.[5]

2. Blue Cross Has a Unique Status Under Minnesota Law And Has a Statutory Mandate to Advance Public Health

Blue Cross occupies a unique status under Minnesota law. Blue Cross is incorporated pursuant to a special enabling statute, the Minnesota Nonprofit Health Service Plan Corporations Act ("the Act"), Minn. Stat. §§ 62C.01, *et seq*. With its corporate affiliates, Blue Cross is the only nonprofit health service plan incorporated pursuant to this Act. Complaint at ¶ 8 (A-6).

Providing more economical health care and advancing the public health are part of Blue Cross's statutory mandate. Specifically, the Act provides that nonprofit health service corporations were created "to promote a wider, more economical and timely availability of… health services for the people of Minnesota through nonprofit, prepaid health service plans, and thereby advance public health." Minn. Stat. § 62C.01, subd. 2 (emphasis added). This statutory purpose also is embraced in Blue Cross's articles of incorporation. Complaint at 18 (A-6-7).

The Blue Cross enabling statute is relevant to the standing inquiry since it establishes the

[5] Blue Cross will not, as defendants assert, recoup *'windfall damages*." Appellants' Brief at 27. *See* District Court Order, May 18, 1995 (A-152) ("The relief it seeks will not provide a 'windfall' to BCBSM, but instead will benefit the group subscribers, and ultimately the public, as statutorily mandated.")

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uniqueness of Blue Cross, establishes an organizational purpose germane to this action and establishes the status of Blue Cross as a direct purchaser of health care. However, Blue Cross is not relying on this statute as a specific grant of standing to bring this action.[6]

3. Blue Cross Is a Direct Purchaser of Health Care

Pursuant to statute, Blue Cross has direct and distinct contractual relationships both with (1) its subscriber groups and individual subscribers, and (2) the hospitals, clinics and physicians which provide health care services:

> (1) Blue Cross enters into health service plan contracts to provide prepaid health services to both subscriber groups and to individual subscribers. Minn. Stat. § 62C.02, subd. 7; see also Complaint at ¶ 8(b) (A-7).
>
> (2) Blue Cross also enters into service agreements with health care providers. Minn. Stat. § 62C.02, subd. 8; see also Complaint at ¶ 8(a) (A-7). Under a service agreement, a provider agrees in advance to furnish health care services in return for a fee to be paid by Blue Cross. A participating health care provider is required to look to Blue Cross for payment and may not directly bill a subscriber. Minn. Stat. § 62C.02, subd. 8. Thus, Blue Cross, from its own funds, has the contractual obligation to purchase health care services and to pay health care providers directly.

It is Blue Cross's contracts with providers -- not with its subscriber groups -- which establishes Blue Cross's status as a direct purchaser. Thus, Blue Cross does not, as defendants assert, *"stands two contracts removed..."* Appellants' Brief at 8. Instead, Blue Cross seeks damages *as a direct purchaser of health care*, pursuant to its provider contracts, for increased health care expenditures in its group business.[7]

Blue Cross's role as a purchaser of health care distinguishes Blue Cross from a traditional health insurer. As the United States Supreme Court stated in *Group Life & Health Ins. Co. v. Royal Drug Co*., 440 U.S. 205 (1979), a case involving Blue Shield of Texas:

> The functions of such an organization are not identical with those of insurance or indemnity companies. The latter are concerned primarily, if not exclusively, with risk.... On the other hand, the cooperative is concerned principally with *getting service rendered to its members* and doing so at lower prices made possible by quantity purchasing and economies in operation.

Id. at 228 (citations omitted) (emphasis in original). Thus, the Supreme Court concluded that Blue Shield's provider agreements with participating pharmacies "are merely arrangements for the purchase of goods and services by Blue Shield." *Id.* at 214.[8]

Similarly, in *Blue Cross & Blue Shield of Michigan v. Demlow*, 270 N.W.2d 845, 84849 (Mich. 1978), the court noted that Michigan Blue Cross was "a unique creation" and was "not an insurance company in the usual sense of the term." The court stated:

> BCBSM has a *direct and distinct* contractual relationship both with its subscribers and with the participating providers. *Other entities in the health care protection field. most notably health insurance companies. do not enjoy such a position. They have a contractual relationship only with their policyholders*. Unlike BCBSM, they do not have direct access to both sides of

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[6] In the trial court, Blue Cross specifically stated that it was not relying on its enabling statute as a specific grant of standing. (RA-74 n.3). Nevertheless, defendants have devoted a section of their brief in this appeal to arguing this point, which is not at issue. *See* Appellants' Brief at 20-22.

[7] Subscriber groups consist primarily of private employers and political subdivisions. Complaint at ¶ 8(b) (A-7). In its contracts with subscriber groups, Blue Cross must purchase comprehensive health care services for *all* members of the group – smokers and nonsmokers alike – pursuant to the requirements of Minnesota's mandated benefits laws. *See* Minn. Stat. §§ 62E.01 *et seq.*; *See also* Complaint at ¶ 8(c) (A-7). Blue Cross is *not* seeking damages in this action for persons covered by individual – as opposed to group – policies. *Id.* at ¶ 8(g) (A-8-9).

[8] The issue in *Royal Drug* was whether provider contracts between Blue Shield of Texas and pharmacists were the "business of insurance" under the McCarran-Ferguson Act. *Id.*, 440 U.S. at 210. The Court noted that Blue Shield had two types of contracts and repeatedly emphasized that the analysis should focus on the specific contracts at issue in the case, that is, the provider contracts with the pharmacies, as opposed to the contracts Blue Shield had with its subscribers. *Id.* at 213, 216, 216 n. 14, 227 n. 34, 230 n. 37. Similarly, in the present case, it is the provider contracts with hospitals, clinics and physicians – not the subscriber contracts – which establish Blue Cross's status as a direct purchaser and which are the focus of the standing analysis.

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the health care equation.

Id. at 849 (emphasis added). *See also Kartell v. Blue Shield of Massachusetts, Inc*., 749 F.2d 922, 925 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985) (an opinion by now -- Justice Breyer stating that "from a commercial perspective, Blue Shield in essence 'buys' medical services for the account of others."); *Wildenauer v. Blue Cross and Blue Shield of Minnesota*, 737 F. Supp. 64, 67 (D. Minn. 1989) (Blue Cross is a "health-care purchaser").

4. Courts Have Decisively Rejected the "Pass On" Defense In Cases Such as This Where a Direct Purchaser Sues for Damages

As a purchaser of health care, Blue Cross has suffered an injury-in-fact by incurring the expense of paying for health care services for smoking-attributable diseases caused by the unlawful conduct of defendants. It is not accurate, as defendants contend, that Blue Cross *"has nothing to distinguish it from any other litigant with a merely abstract desire to enforce its views of social policy through the courts."* Appellants' Brief at 16. Instead, Blue Cross -- with a unique statutory mandate and with direct contracts with providers -- brings this action for damages as a direct purchaser of health care.

Nor is it accurate to represent that *"BCBSM has failed to plead actual injury."* Appellants' Brief at 16. The case law is clear that a direct purchaser is the proper party to assert an action for damages, even if the direct purchaser has "passed on" increased costs to the ultimate consumers. This line of case law is founded upon the recognition of the difficulty -- or even impossibility -- of a damages action by a large and scattered group of individuals, who might not have the incentive or the resources to pursue recovery, and upon considerations of judicial economy.

The case law rejecting the pass-on defense is so ubiquitous that defendants have failed to cite a single "pass-on" decision which supports their argument. Instead, defendants argue -- contrary to case law -- that this well-established doctrine should be limited to federal antitrust cases.[9]

One of the leading decisions on the pass-on defense is the opinion of Justice Holmes in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co*., 245 U.S. 531 (1918). Southern Pacific involved a claim by a lumber company for excessive rates charged by a railroad in violation of the interstate commerce act. Justice Holmes, writing for the Court, held that the lumber company could recover the overcharges even though the charges had been passed on to customers. Justice Holmes rejected the defendant's argument that the company had not suffered injury, stating:

> The only question before us is… whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the Purchasers. prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law. in regard to damages. at least. is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law. and it does not inquire into later events.

Id., 245 U.S. at 533-534 (emphasis added).

The pass-on defense argument also has been rejected where a plaintiff is required, by law or state regulation, to pass on its damages. In *Kansas v. Utilicorp United, Inc*., 497 U.S. 199 (1990), the Supreme Court held that a regulated public utility had standing in an antitrust price-fixing case, rejecting the defendants' argument that "pursuant to state and municipal regulations and tariffs filed with state regulatory agencies, the utilities had passed through the entire wholesale cost of the natural gas to their customers." 497 U.S. at 205 (emphasis added). The Court found that the utility was the proper plaintiff "even if state law would require a utility to reimburse its customers for recovered overcharges...." *Id.* at 214. The Court noted that allowing the utility -- as opposed to consumers -- to sue would alleviate concerns about the difficulty of apportioning damages among numerous plaintiffs, the risk of multiple recoveries and the diminished incentive to bring an antitrust claim in a case where the damages award would be reduced and divided among multiple plaintiffs. *Id.* at 208-209.

[9] Defendants also refer in passing to generalized postulates on damages, which are not relevant to the pass-on defense and which have no relevance to the issues before this Court. *See Vanderline v. Wehle*, 274 Minn. 477, 481, 144 N.W.2d 547, 550 (1966) (award in personal injury case not excessive in view of the injury sustained); Dobbs, *Law of Remedies*, § 3.7 at 187 (1973) (discussing avoidable consequences rule), cited in Appellants' Brief at 16.

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Similarly, the United States Court of Appeals for the Third Circuit held that Pennsylvania Blue Cross, a nonprofit corporation, had standing to assert an antitrust claim for damages. Pa. Dental Ass'n v. Medical Serv. Ass'n of Pa., 815 F.2d 270, 276-77 (3d Cir.), *cert. denied*, 484 U.S. 851 (1987). The Third Circuit rejected defendants' argument that only the subscribers were able to assert a claim, stating:

> The overcharges resulted from payments Blue Shield made on behalf of Blue Shield subscribers. This injury -- i.e., the payment of overcharges as a result of a horizontal agreement [among dentists] to resist in-house reviews which were aimed at cost containment -- is unquestionably an antitrust injury suffered by Blue Shield alone.

Id. at 276 (emphasis added). The court also recognized that the subscribers would lack the incentive to bring a claim, another factor in favor of granting Blue Shield standing. *Id.* at 277. In addition, the court noted that granting standing to Blue Shield -- as opposed to subscribers -- would keep the trial "within judicially manageable limits." *Id.* at 277, *quoting, Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 543 (1984).[10]

Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit, citing *Pa. Dental*, arrived at a similar conclusion two months ago. In *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic and Security Health Plan of Wis. Inc*., 65 F.3d 1406 (7th Cir. 1995), Judge Posner found that Blue Shield of Wisconsin was the proper party to assert an antitrust claim. Judge Posner rejected defendants' arguments that only the patients could sue. Judge Posner based his decision on the fact that Blue Cross of Wisconsin was the "direct purchaser" of health care. *Id.* at 1414 ("[H]ere the money went directly from Blue Cross to the Clinic, and although the two entities were not linked by any overarching contract, each payment and acceptance was a separate completed contract. We do not think more is required to establish Blue Cross's right to sue to collect these overcharges."). Judge Posner also rejected the contention that the appropriate course would be a class action by subscribers, finding that "[i]t would be cumbersome, to say the least, for patients of the Marshfield Clinic to organize into a class action to recover money that the patients never paid…" and that Blue Cross was able "to proceed on its own without the aggregation of separate plaintiffs required for a class action. " *Id.* (emphasis added).[11]

In view of this overwhelming authority, defendants have resorted to an attempt to restrict this line of pass-on cases to actions brought under the federal antitrust statutes. It is true that the pass-on defense has been frequently analyzed -- and rejected -- in federal antitrust cases. It is clear, however, that courts also reject the pass-on defense in cases involving other causes of action. As noted above, one of the earliest decisions rejecting the pass-on defense -- Justice Holmes's opinion in Southern Pacific -- did not involve an antitrust claim. Similarly, in a recent case involving a negligence action, the Seventh Circuit stated:

> *The fact that costs may be passed on is. in general. not a defense to a claim by an injured purchaser*.... The County is the "direct purchaser," and the fact that it can distribute excess costs to waste system users is no bar to recovery. Indeed, to allow a passing-on defense would presumably make a supplier's negligence actionable only by the ultimate consumer -- here the generator of solid waste. In that event, these indirect purchasers would, to pursue recovery, face the daunting task of apportioning damages. And the costs of suit for most ultimate users might exceed the potential recovery. These considerations, developed mainly in the context of antitrust cases, would in matters like the one before us undermine the deterrent impact of negligence actions. As noted, the Supreme Court has rejected the passing-on defense with respect to antitrust claims. *We see no reason why similar principles should not govern Wisconsin's law of professional negligence*.

LaCrosse County v. Gershman. Brickner & Bratton, 982 F.2d 1171, 1175-76 (7th Cir. 1993) (emphasis added),

[10] As an alternative basis for standing, the court in *Pa. Dental* noted that Blue Shield also had presented evidence of lost sales and income. *Id.*, 815 F.2d at 276. Similarly, in the present case, the trial court noted other potential bases for demonstrating injury-in-fact, i.e., that it may be a question of fact as to whether Blue Cross had fully recouped all of its costs and that Blue Cross may have lost market share. District Court Order at 6 (A-150). These additional items of potential loss merely illustrate the minimal showing of injury-in-fact necessary to establish standing under Minnesota law.

[11] Judge Posner stated that the standing issue in *Blue Cross & Blue Shield of Wisconsin* was not jurisdictional but "antitrust standing." *Id.* at 1414.

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citing *Utilicorp*.[12]

In sum, courts have decisively rejected attempts to assert a pass-on defense against direct purchasers. These decisions -- and their underlying policies of streamlining litigation -- apply with particular force in the present case, where this industry has exploited its disparity in resources to render litigation by individuals virtually impossible. See Complaint at ¶¶ 4, 81 (A-2, 39-40).

5. Blue Cross Also Has Standing to Sue for Equitable Relief On Its Own Behalf and on Behalf of Its Subscriber Groups

In addition to its claim for damages, which Blue Cross seeks on its own behalf as a purchaser of health care, Blue Cross also seeks extensive equitable relief on its own behalf and on behalf of its subscriber groups. Complaint at ¶ 8(g) (A-8-9). The equitable relief sought includes requiring defendants to disseminate all scientific research they have conducted on smoking and health; to fund a corrective public education campaign: to fund clinical smoking cessation programs; to undertake affirmative steps to prevent the distribution and sale of cigarettes to minors, and to dissolve the two industry trade groups. *Id.* at ¶ 134 (A-51-52).

Blue Cross's standing to seek equitable relief on behalf of its subscriber groups is based upon well-established principles of associational standing, which recognize that an organization may sue based on injuries to itself or based on injuries to its members. *See No Power Line, Inc. v. Minn. Envtl Quality Council*, 311 Minn. 330, 250 N.W.2d 158, 160 (1976) (nonprofit corporation may "derive standing from its members"); *Snyder's Drug*, 301 Minn. 28, 221 N.W.2d 162 (1974) (representative standing granted to two nonprofit corporations, the Minnesota Public Interest Research Group and the Metropolitan Senior Citizens Federation, to challenge a regulation prohibiting pharmacists from advertising drug prices).

Notwithstanding this authority, defendants attempt to argue that Blue Cross is not an "association" of "members." Appellants' Brief at 23. However, this argument was rejected in the very case relied upon by defendants to challenge the associational standing of Blue Cross.

Thus, in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 337 (1977), the plaintiff was *a state agency*, the Washington State Apple Advertising Commission, which was "charged with the statutory duty of protecting and promoting the State's apple industry." The Commission brought suit in its representative capacity challenging a North Carolina regulation that prohibited the display of Washington State apple grades. *Id.* The *Hunt* defendants argued, like the defendants here, that associational standing was precluded since the Commission was "not a traditional voluntary membership organization" and had "no members." *Id.* at 342. The Supreme Court rejected this argument, finding that "it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association...." *Id.* at 345.

Defendants also cite the three-prong test set forth in *Hunt* to challenge the standing of Blue Cross, *i.e.*, (1) whether its members would otherwise having standing to sue in their own right; (2) whether the interests it seeks to protect are germane to the organization's purpose, and (3) whether the claim asserted or the relief requested requires the participation of individual members in the lawsuit. Id., 432 U.S. at 343. However, it is clear that the three *Hunt* standards are met in the present case, particularly when viewed against the backdrop of Minnesota law.

With respect to the first requirement, the Blue Cross group subscribers are no differently situated, *with respect to injunctive relief*, than the students and senior citizens in Snyder's Drug, where this Court recognized the associational standing of Minnesota Public Interest Research Group and the Metropolitan Senior Citizens Federation. In reaching this conclusion, this Court noted that' "The ultimate intended beneficiaries of the regulation are the consumers of prescription drugs." Id., 221 N.W.2d at 166. This Court also stated that the injury-in-fact concept of standing

[12] Defendants argue that the pass-on defense should be permitted for claims under the Minnesota Antitrust Law. This argument is refuted by decisions such as *Southern Pacific* and *LaCrosse County*, which specifically extend the "pass-on" doctrine beyond federal antitrust law. Defendants' argument also fails under an analysis of the Minnesota Antitrust Law. The Minnesota statute does not eliminate standing for direct purchasers; instead, it expands standing to include persons injured *both* directly and indirectly. Minn. Stat. § 325D.57; *See also* Section D(2)(a), *infra*. Thus, the line of pass-on decisions cited above applies with equal force to an action, such asht eh present, involving only a direct purchaser under the Minnesota statute. It is only where an action involves both direct and indirect purchasers that the pass-on defense would be applicable. In such a case, both the defendant and the indirect purchasers would argue pass-on in order to appropriately apportion damages. *See* Transcript of Hearings on Minn. S.F. No. 1807 (3-19-84) at 4 ("[W]hat you have here is a situation where *direct purchasers and indirect purchasers both can argue, and defendants as well can argue*, where the damages lie.") (emphasis added) (Appellants' Addendum, at 16).

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is "much simpler" under state law than under the complicated federal doctrine. *Id.* at 165.[13]

The second requirement under *Hunt* is also met. The interests Blue Cross seeks to protect in its representative capacity are obviously germane to its unique statutory purposes -- to "promote a wider, more economical and timely availability of… health services for the people of Minnesota" and to "advance public health." Minn. Stat. § 62C.01, subd. 2.

The third *Hunt* factor is met as well. In their brief, defendants fail to distinguish between the capacity in which Blue Cross sues for damages and the capacity in which Blue Cross sues for equitable relief. Blue Cross sues for equitable relief only on behalf of its subscriber groups.[14] The United States Supreme Court has found the third prong of the Hunt test -- whether participation of individual members is required -- presumptively satisfied where equitable relief. as opposed to damages, is sought. *See United Auto Workers v. Brock*, 477 U.S. 274, 287 (1986) (injunctive relief does not require individual participation by the members of the organization); *Warth v. Seldin*, 422 U.S. 490, 515 (1975) (whether final requirement for associational standing is met "depends in substantial measure on the nature of the relief sought.").[15]

C. SUBROGATION IS NOT THE EXCLUSIVE REMEDY IN THIS CASE

1. Remedies Are Rarely Exclusive Unless Specifically Mandated By Statute

With the threshold inquiry of standing satisfied, the analysis turns to the options of Blue Cross, as the plaintiff, to determine the manner in which it will seek to enforce its legal rights. *See Monroe v. Thulin*, 181 Minn. 496, 499, 233 N.W. 241, 242 (1930) ("It is not for the wrongdoer to dictate the remedy to be pursued by his victim in order to seek redress."); *Corey v. Corey*, 120 Minn. 304, 312, 139 N.W. 509, 512 (1913) ("The denial of a remedy, because it is claimed another and more appropriate one exists, frequently results in the deprivation of a right.").

Generally, remedies are not exclusive unless specifically mandated by statute. Thus, in *Davis & Michel v. Greater N. Ry. Co*., 128 Minn. 354, 151 N.W. 128 (1915), this Court stated:

> *It is well settled in this state… that a complaining party may resort to any judicial remedy for the enforcement of his rights. legal or equitable. which is adequate and appropriate to the relief sought*. The rule, as we understand it, extends to all actions or special proceedings, except in those cases where a right, not existing at common law, is created by statute, and a remedy for its enforcement is also provided.

Id., 151 N.W. at 129 (emphasis added*). See also Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76, 82 (1924) ("[W]e recognize that no legislative adoption is necessary to affirm the existence of the common law, but that statutory enactment is essential to repeal, abrogate, or change the rules or doctrine of the common law.").

Thus, the issue of exclusivity of remedies generally arises in cases involving statutory schemes which create new rights. See, *e.g*., *Wirig v. Kinney Shoe Corp*., 461 N.W.2d 374, 377-78 (Minn. 1990) (generally a cause of action will not be abrogated except by the "express wording or necessary implication" of a statute). A classic example of the exclusivity of remedies is, of course, workers' compensation law. *See e.g*., *Foley v. Western Alloyed Steel Casting Co*., 219 Minn. 571, 18 N.W.2d 541, 542 (1945).

In the present case, there is no statute abrogating remedies. Thus, in order to determine whether Blue Cross has an alternative to subrogation, all of the potential alternatives must be analyzed. As a matter of law, and as a matter of logic, it is impossible to hold that subrogation is exclusive unless each of the possible alternative remedies is analyzed -- and ruled out. In this respect, defendants have thoroughly failed, particularly on the present state of the record.

2. Northern States Does Not Establish a *Per Se* Rule of Exclusivity

Northern States, the decision upon which defendants place principal reliance, is not nearly so far-reaching as to establish a *per se* rule abolishing *any*

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[13] In *Gloria Dei Lutheran Church Missouri Synod v. Gloria Dei Lutheran Church of Cold Spring*, 513 N.W.2d 488, 490 (Minn. Ct. App. 1994), the sole associational case cited by defendants other than *Hunt*, the court declined to find associational standing because a specific statute designated the appropriate persons who could bring claims and "only the persons so designated have the right to bring such an action."

[14] To the extent there is any ambiguity in the complaint about the capacity in which Blue Cross asserts associational standing, *see* Complaint at ¶ 8(g) (A-8-9), this issue was clarified by Blue Cross in the trial court. (RA-64, 79).

[15] The single case cited by defendants in arguing the third *Hunt* prong is not satisfied, *Easterlin v. State*, 330 N.W.2d 704 (Minn. 1983), is factually inapposite since, *inter alia*, it involved a claim for damages, not injunctive relief.

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type of direct action, for *any* benefits paid, for *any* fact situation.

In *Northern States*, an employer sought to recover $8,356.71 in increased workers' compensation premiums. 253 N.W. at 371. The premiums had been increased following an accident in which a construction employee was killed, allegedly due to the negligence of a subcontractor in driving piling. *Id.* This Court rejected the direct claim by the employer, stating the damages were "too remote." *Id.* at 372.

The opinion in *Northern States* is brief (less than two pages) and cryptic. The decision appears to be based on a proximate cause analysis. ("[T]he law has been compelled to adopt the practical rule of looking only to the proximate cause...." *Id., citing North v. Johnson*, 58 Minn. 242. 59 N.W. 1012, 1012 (1894)). Proximate cause, of course, is inherently a fact-sensitive analysis, and *Northern States* -- which involved only a single, simple and isolated claim of negligence -- did not hold that a direct action would be barred in all cases. Nor did *Northern States* hold that subrogation was an exclusive remedy in all cases. Moreover, to the extent *Northern States* relies upon common-law principles of proximate cause, it has been undermined in critical respects by a subsequent decision of this Court. That decision is *City of St. Paul, supra*, 167 N.W.2d 17, one of only two Minnesota cases which has cited *Northern States* in 60 years.[16]

In striking contrast to *Northern States*, this Court specifically found in *City of St. Paul* that the employer's payment of workers' compensation benefits "results directly and proximately from the wrong of another." 167 N.W.2d at 19 (emphasis added). Accordingly, this Court held that an abatement defense, which the tortfeasor could have asserted against the estate of the worker, could not be maintained against the employer. 167 N.W.2d at 22.

City of St. Paul distinguished *Northern States*, in part, on the basis that the damages sought in Northern States were "insurance premiums," whereas the damages in City of St. Paul were actual "benefits paid." *Id.* at 19. Similarly, in the present case, Blue Cross seeks to recover "benefits paid" as a direct purchaser of health care -- not premiums. *See* Complaint at ¶ 8(g) (A-8) (Blue Cross brings this action "for increased costs for health care services....").

Contrary to defendants' interpretation of *Northern States*, this Court stated in *City of St. Paul* that *Northern States* "implicitly" recognized a common-law cause of action by an employer:

> *The oblique light which the Northern States Contracting case casts on our present problem comes from the circumstance that we recognized there. implicitly at least. that in some situations an employer does have a common-law cause of action against a third-party tortfeasor who causes injury to his servant* for the direct and proximate damage caused by the third-party's negligence, and that this law, in so far as it results from the burden imposed by the Workmen's Compensation Act, arises from the employment contract.

Id. at 19 (emphasis added).

Yet certain aspects of *City of St. Paul* also are cast in "oblique light." For example, *City of St. Paul* never specifically resolved the issue of whether the employer could proceed in a direct action. as opposed to an action in subrogation. However, *City of St. Paul* noted that defenses would normally be imputed in a derivative claim in subrogation -- yet declined to impute the abatement defense in the case before it. *Id.* at 21. In addition, *City of St. Paul* noted that some courts recognized common-law actions by employers and cited to *Jones v. Waterman SS. Corp*., 155 F.2d 992 (3d Cir. 1946), a leading maritime decision upholding a direct cause of action. 167 N.W.2d at 19-20. (In Jones, the Third Circuit held that an employer's claim to recover for benefits paid to a seaman "is not a derivative right ... but is a separate and distinct action...." 155 F.2d at 1001).[17]

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[16] It is perhaps because of the scant attention *Northern States* has received by this Court that defendants failed to cite the case – which they now characterize as establishing "*bedrock principles of law*" – in their opening brief in the trial court. *See* Appellants' Brief at 5 (Defendants' reference to *Northern States* in their reply brief in the trial court was limited to two sentences. (A-112-13, 116). The decision also was cited by defendants in oral argument. (A-138-46)).

[17] *City of St. Paul* also cited *Am. Mut. Liab. Ins. Co. v. Reed Cleaners*, 265 Minn. 503, 122 N.W.2d 178, 182-83 (1963), which found that an employer's right to proceed was limited by statute to the exclusive subrogation provisions of the workers' compensation statutes. It is, of course, important to note that *City of St. Paul* and *Northern States* arose under the unique statutory scheme of workers' compensation. As even cases cited by defendants recognize, workers' compensation law is a classic example of exclusive remedies mandated by specific legislative enactment. For example, in *Allstate Ins. Co. v. Eagle-Pitcher Indus. Inc.*, 410 N.W.2d 324, 327-28 (Minn. 1987), the sole Minnesota case other than *Northern States* cited by defendants for their contention that subrogation is exclusive, this Court stated, "More than twenty years ago this court held that the traditional principles of indemnity were inapplicable in the workers' compensation setting." *See also*

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In short, *City of St. Paul* refutes defendants, arguments that the common law never recognized a direct cause of action for recovery of benefits and that a third party can never acquire a stronger claim than the "directly" injured person. In addition, in a striking demonstration of the principle that proximate cause rests upon a case-specific analysis, *City of St. Paul* reached an opposite conclusion than *Northern States* on this issue. *See City of St. Paul*, 167 N.W.2d at 19 (damages "result[] directly and proximately from the wrong of another"); *Northern States*, 253 N.W. at 372 (damages "too remote"). As detailed below, the present case offers far more compelling circumstances for finding both proximate cause and direct duty than either *Northern States* or *City of St. Paul*, given, inter alia, the foreseeability and magnitude of the harm, the repeated acts of intentional misconduct, the specific undertakings by defendants and the close connection between cigarettes and the health-field.

3. Other Decisions Cited By Defendants Recognize That Subrogation Is Not Always an Exclusive Remedy

Other cases cited by defendants also do not stand under scrutiny for the proposition that subrogation is the exclusive remedy for all facts and for all causes of action. Indeed, some of the decisions cited by defendants recognize that a direct cause of action may be available in cases -- like the present -- which involve intentional wrongdoing. *See Phoenix Professional Hockey Club, Inc. v. Hirmer*, 502 P.2d 164, 165 (Ariz. 1972) (noting that claim involved "mere negligence" and implying that the result could be different with an intentional tort); *Fifield Manor v. Finston*, 354 P.2d 1073, 1075 (Cal. 1960) ("The courts in common-law jurisdictions have long recognized that an action will lie for the intentional interference by a third person with a contractual relation…"). This distinction between negligence and intentional misconduct has deep roots in tort law and is an important factor in establishing a direct and independent duty to Blue Cross in the present case. *See* Section D(l)(a), *infra*.

Similarly, one of the cases relied upon in *Northern States* specifically recognized that a direct action might be available to an insurance company if there were an independent duty and that a such a duty would be established if the defendants had "an intent to injure" the insurer. *Conn. Mut. Life Ins. v. N.Y. & New Haven Ry. Co*., 25 Conn. 265, 275-76 (1856) ("every man owes a duty to every other not to intentionally injure him.") (emphasis added).[18]

Defendants also rely upon a case which has been emphatically overruled, *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927). *See* Appellants' Brief at 10 (citing *The Federal No. 2* without noting its subsequent history). In this 1927 decision, the United States Court of Appeals for the Second Circuit held that an employer could not assert a direct action to recover hospital expenses for an injured seaman. In 1988 however, the Second Circuit overruled this decision in *Black v. Red Star Towing & Transp. Co. Inc*., 860 F.2d 30, 34 (2nd Cir. 1988). In so doing, the Second Circuit noted that *The Federal No. 2* had long been the subject of significant criticism and concluded that, "[A]fter sailing in Second Circuit waters for six decades, *The Federal No. 2* is formally abandoned." *Red Star*, 869 F.2d at 33-34. Accordingly, the Second Circuit in *Red Star* held that a shipowner could assert an indemnity action against the tortfeasor. *Id.* at 34.[19]

Finally, many of the cases cited by defendants involve a fact pattern similar to Northern States, that is, a single act -- and simple claim -- of negligence. *See, e.g., RK Constructors, Inc. v. Fusco Corp*., 650 A.2d 153 (Conn. 1994) (negligence on construction site); *Fischl v. Paller & Goldstein*, 282 Cal. Rptr. 802 (Cal. App. 1991) (*ibid*); *Unique Paint Co. v. Wm. F. Newman Co*., 411 S.E.2d 352 (Ga. App. 1991) (vehicular collision); *Ore-Ida Foods, Inc. v. Indian Head Cattle Co*., 627 P.2d 469 (Or. 1981) (employee struck by truck); *Phoenix Professional*, 502 P.2d 164 (automobile accident). These cases cannot be fairly read -- particularly in view of other authority -- to preclude a direct action under all circumstances and all causes of action. *See e.g., Great Am. Ins. Co. v. U.S*., 575 F.2d 1031, 1035 (2d Cir. 1978); *Williams v. Globe Indem. Co*., 507 F.2d 837, 840 (8th Cir. 1974) (two other cases cited by defendants which recognize that --under different facts -- there may be a direct action).[20]

Erie Castings Co. v. Grinding Supply, Inc., 736 F.2d 99, 103 (3d Cir. 1984) (noting "an unmistakable trend to view the workmen's compensation system as the exclusive source of recovery") (cited at Appellants' Brief at 11).

[18] Other cases relied upon by *Northern States*, however, involved willful misconduct. *See Mobile Life Ins. Co. v. Brame*, 95 U.S. 754 (19877); *Rockingham Mut. Fire Ins. v. Bosher*, 39 Me. 253 (1855). As with many of the cases cited by defendants, these decisions involve single incident of wrongdoing and appear to rest upon a proximate cause analysis, which is fact – and case – specific.

[19] The court in *Red Star* found that the employer's claim would be limited to the tortfeasor's proportionate share of fault. *Id.* at 34 ("When a contributorily negligent seaman is paid maintenance and cure by a non-negligent shipowner, equity dictates that a third-party tortfeasor should not bear liability in excess of its proportionate share of fault."). The Court, however, stated that "[t]here is authority to the contrary." *Id.*, citing *Savoie v. LaFourche Boat Rentals, Inc.*, 627 F.2d 722 (5th Cir. 1980).

[20] Other cases cited by defendants merely stand for the well-established principle that an insurer proceeding in subrogation stands in the shoes of the insureds. *See e.g., St. Louis, I.M. S.*

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4. The Supreme Court's Decision in Burnside Held That subrogation Is Not Exclusive and recognized a Direct Claim

The United States Supreme Court also recognized the availability of a direct action in Burnside, supra, where an employer asserted a direct claim against a tortfeasor to recover compensation benefits paid to the estate of a deceased employee. The Supreme Court framed the issue as follows:

> The question presented by this case is whether a stevedoring contractor whose longshoreman employee was killed in the course of his employment is limited to this subrogation remedy in seeking reimbursement from a shipowner on whose vessel the longshoreman met his death.

Id., 394 U.S. at 407. Both the district court and the court of appeals held that subrogation was an exclusive remedy. *Id.* The Supreme Court reversed and remanded. *Id.* at 422.

First, the Court considered whether the statutory grant of a subrogation right under the Longshoremen's and Harbor Workers' Compensation Act was an exclusive remedy. *Id.* at 411. The Court found no exclusivity because there was no "clear language" in the act expressly limiting remedies. *Id.* at 412-13. The Court recognized that "[n]ormally the stevedoring contractor is content with its remedy of subrogation...." *Id.* at 410. However, the Illinois Wrongful Death Act would have limited the claim of the estate to $30,000. *Id.* The employer's claim was for more than $70,000. *Id.* Thus, the employer asserted a direct claim to avoid a defense -- the damages cap -- which would have limited its recovery in a subrogation action.

Second, the Court considered whether the tortfeasor owed the employer "any duty whose breach will give rise to a direct action." *Id.* at 412. The Court found a direct duty in tort, based in part on the foreseeability of the harm to the employer. *Id.* at 415. The Court stated:

> We hold… that federal maritime law does impose on the shipowner a duty to the stevedoring contractor of due care under the circumstances, and does recognize a direct action in tort against the shipowner to recover the amount of compensation payments occasioned by the latter's negligence.

Id. at 416-17.

The Court in *Burnside* specifically noted that the duty of the tortfeasor would run both to the employee, who was directly injured, and to the employer, which suffered an economic loss as the result of the death of its employee. *Id.* at 415. The Court stated that the employer's direct cause of action " is founded not on [the tortfeasor's,] wrong to [the employee] but on its independent wrong to [the employer]. *Id.* at 418 (emphasis added).

Burnside was decided in the context of a maritime action, which has certain distinct features. However, to the extent *Burnside* rests upon general principles of law -- and its analysis is primarily grounded on such principles -- it offers a valuable framework for the analysis of the present case. As noted above, defendants themselves attempted to rely upon a maritime decision, albeit overruled, and have relied heavily upon cases from other areas of law, such as workers' compensation. Also, this Court relied upon a leading maritime case (*Jones v. Waterman*) in *City Of St. Paul*, 167 N.W.2d at 19.

In the present case, as in Burnside, there is no express statutory limitation of remedies (as there is under workers' compensation law). Thus, the analysis turns to whether there is a direct cause of action under any of the asserted claims. *Burnside* specifically found a direct duty in tort. In the present case, a number of factors offer even a stronger foundation for a direct action than *Burnside* -- such as extraordinary facts (including intentional misconduct) and distinctive causes of action (including a specific undertaking of duty and specific statutory and equitable claims).

Burnside clearly mandates that each of the plaintiff's potential causes of action be separately analyzed. Thus, the Court in Burnside considered whether, in addition to a direct action in tort, the employer also would have a direct action for an express or implied contract or a right of indemnity. *Id.* at 418-420. Because the record was incomplete, the Court did not resolve these issues but noted that the employer would not be foreclosed from asserting other direct causes of action in the district court. *Id.* at 418-21. The Court stated:

> In holding that the stevedoring contractor has a direct action in tort, *we do not preclude the possibility of a direct action under some other theory*.

Ry. Co. v. Commercial Union Ins. Co., 139 U.S. 223, 235 (1891).

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Id. at 418 (emphasis added). Accordingly, the Court remanded, inter alia, for further consideration of other causes of action. *Id.* at 418-422.

Similarly, it is inappropriate in this appeal to reach the issue of each of the direct causes of action which Blue Cross may assert since defendants have failed to properly raise these issues, both in the trial court and on appeal. In the trial court, defendants failed to affirmatively challenge six of the nine causes of action pled by Blue Cross. With respect to the antitrust and undertaking causes of action which were challenged, defendants lost their motion to dismiss for failure to state a claim and failed to present these issues for appeal. Nevertheless, the following overview demonstrates the ability of Blue Cross to assert each of the specific claims pled in the complaint.

D. BLUE CROSS HAS PROPERLY PLED DIRECT CLAIMS UNDER ALL OF THE COUNTS IN THE COMPLAINT

1. Count 1: Undertaking of Special Duty

a. Fundamental Tort Principles Impose A Direct Duty to Blue Cross

Under fundamental principles of tort law, the existence of a legal duty is determined upon the facts of each case, including, most prominently, the foreseeability of the harm. Other factors which affect -- and extend -- the scope of duty are the magnitude of the harm and the intent of the defendant. Considerations of public policy also are relevant. Finally, although the existence of duty is a question of law, this Court has repeatedly emphasized that the analysis is heavily dependent upon an examination of the particular circumstances of each case. *See e.g.*, *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n. (Minn. 1989) ("The existence of a legal duty depends on the factual circumstances of each case."); *Andrade v. Ellefson*, 391 N.W.2d 836, 841 (Minn. 1986) ("*[T]here is no bright line*, and each situation will require its own analysis."); *Lundgren v. Fultz*, 354 N.W.2d 25, 29 (Minn. 1984) ("*This case has its own special facts*.") (emphasis added).

The sweeping pronouncements upon which defendants base their argument -- *"the law of torts generally provides one and only one cause of action for each tortious injury and assigns that cause of action to the party most directly injured"* -- are contrary to law. See Appellants' Brief at 5. Repeatedly, this Court has recognized -- explicitly and implicitly -- that duty may extend to more than one person. *See e.g.*, *80 S. 8th St. Ltd. Partnership v. Carey-Canada, Inc.*, 486 N.W.2d 393, 398 (Minn. 1992), amended 492 N.W.2d 256 (asbestos manufacturer owes duty to building owner for cost of abatement; presumably, duty also owed to injured persons); *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 170 (Minn. 1989) (security firm owes duty to two classes of customers); *Lundgren, supra*, (psychiatrist owes duty to third-party killed by patient in random attack; presumably, duty also owed to patient); *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 910-11 (Minn. 1983) (employer owes duty to employees and to members of public); *see also* 13B Dunnell Minn. Dig. 2d Neg. § 2.01 at 157 (3d ed. 1981) ("One may owe two distinct duties in respect to the same thing...."). This same principle was the foundation of the decision in *Burnside*, where the Supreme Court held that an employer's cause of action "is founded not on [the tortfeasor's] wrong to [the employee] but on its *independent wrong* to [the employer]." 394 U.S. at 418 (emphasis added).

Thus, defendants owe a duty not only to individual smokers, who may have separate and distinct claims, but also -- based upon the specific facts of this case -- to Blue Cross.

The harm to Blue Cross was clearly, indeed unquestionably, foreseeable. This establishes a critical element of duty. As this Court stated in *Lundgren*:

> Foreseeability has been called the fundamental basis of the law of negligence. Justice Cardozo succinctly expressed the central relationship between the foreseeability of harm and the existence of a legal duty in *Palsgraf*, stating that "[t]he risk reasonably to be perceived defines the duty to be obeyed."

354 N.W.2d at 28, citing *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928).[21]

The magnitude of the foreseeable harm also extends the scope of duty. As this Court stated in *Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630 (Minn. 1978):

> Special circumstances which impose a greater potentiality of foreseeable risk or more serious injury, or require a lesser burden of preventative action, may be

[21] The relationship among the parties also may be a factor in establishing duty, for example, in cases involving a duty to control the actions of a third party, particularly criminal actions of a third party. *Doe v. Brainerd Intern. Raceway, Inc.*, 533 N.W.2d 617, 621 (Minn. 1995); *Erickson*, 447 N.W.2d at 168-69; *Lundgren*, 354 N.W.2d at 27.

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> deemed to impose an unreasonable risk on, and a legal duty to, third persons.

Id. at 634 (citations omitted); *see also Delgado v. Lohmar*, 289 N.W.2d 479, 484 (Minn. 1979) ("extra care must be taken" when involved in "extremely dangerous activity.").

Intentional wrongdoing also extends the scope of duty. Indeed, one central tenet of tort law is the distinction between negligence and intentional misconduct. A leading treatise calls this distinction "one of the most basic, organizing concepts of legal thinking," and states:

> There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong. More liberal rules are applied as to the consequences for which the defendant will be held liable, the certainty of proof required, and the type of damage for which recovery is to be permitted, as well as the measure of compensation.

Prosser and Keeton on the Law of Torts § 8 at 33, 37 (5th ed. 1984); see also Restatement (Second) of Torts § 870 (1977) ("One who intentionally causes injury to another is subject to liability to the other for that injury.... This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."); *c. f. M.H. v. Caritas Family Services*, 488 N.W.2d 282, 286 (Minn. 1992) (noting differing scope of liability for intentional, as opposed to negligent, misrepresentation); *Florenzano v. Olson*, 387 N.W.2d 168, 176 n. 7 (Minn. 1986) ("Intentional torts are punished not because the actor failed to use reasonable care, but because the actor intended the act").

In the present case, the extraordinary facts of the complaint -- which must be accepted as true at this stage of the proceedings -- mandate the recognition of a direct duty. The magnitude of the foreseeable harm is unparalleled. Nationwide, the death toll from smoking -- in one year alone -- equals the number of American lives lost in battles in all the wars this country has fought this century. Complaint at ¶ 3 (A-2). In Minnesota, more than 6,000 people lose their lives each year due to smoking-related disease. *Id.* at ¶ 77 (A-38). The effects of cigarette smoking are so staggering -- and so certain -- that statistical models have been developed to measure health care expenditures. *Id.* at ¶¶ 78-79 (A-38-39). See *Tapemark*, 273 N.W.2d at 637 n. 7 ("Some courts have relied on statistical studies to conclude that there is generally a high risk...."). The costs -- ultimately borne by all of the citizens of Minnesota -- are more than $350 million each year. Complaint at 179 (A-38-39).

This harm is not only foreseeable -- cigarettes kill when used as intended, and there is no known safe level of consumption -- it is also a direct result of the intentional wrongdoing of defendants.[22] *Cf. R.W. v. T.F.*, 528 N.W.2d 869, 873 (Minn. 1995) ("the greater the likelihood of the harm occurring, the more reasonable it is to infer intent").

Indeed, the long history of intentional wrongdoing of the defendants distinguishes this case as *sui generis*. This is an industry which markets an addictive drug ("we are, then, in the business of selling nicotine, an addictive drug...."), with children as the vast majority of its new customers ("[n]early all first use of tobacco occurs before high school graduation...."). Complaint at ¶¶ 57 and 72 (A-30 and A-36). This is an industry which has intentionally concealed research on the hazards of smoking and which has intentionally misrepresented those hazards. *Id.* at ¶ 2 (A-2). This is an industry which developed a safer cigarette ("[c]igarette tar has been neutralized") but which has refused to market the product because of litigation concerns ("[t]he industry position has always been that there is no alternative design for a cigarette as we know them."). *Id.* at ¶¶ 38-42, 45 (A-23-26). This is an industry whose in-house counsel discusses removing "deadwood" from company files. *Id.* at ¶ 63 (A-32).

In their brief, defendants have gone to extreme lengths to avoid confronting these facts and to avoid the admonitions of this Court that the "special facts" of each case must be considered.

Instead, defendants propound outlandish hypotheticals -- *"To accept BCBSM's position here is to accept that health insurers… could sue ATF Florists to recoup the expenses of care for those who are allergic to flowers"* -- which highlight the glaring weakness of defendants' arguments when applied to the facts of this case and which demonstrate a striking callousness on the part of an industry whose intentional wrongdoing is responsible for the death of at least one out of every four of its customers. See Appellants' Brief at 15; Complaint at 177 (A-38).

b. Defendants Undertook and Assumed A Direct Duty To Blue Cross

There is an additional and decisive factor in

[22] The complaint pleads both intentional and negligent wrongdoing. *See e.g.*, Complaint at ¶¶ 1, 2, 75, 87, 103, 113, 118, 131 (A-1-2, 37-38, 41, 47, 48, 50).

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this case which mandates the recognition of a direct duty to Blue Cross -- the defendants' own voluntary assumption of a duty. These defendants assumed a duty to render services to protect the public health and a duty to those who advance the public health, including Blue Cross. In large part, defendants assumed this duty through their own public statements that they would accept an interest in the public's health as a basic and paramount responsibility and that they would research the issue of smoking and health and report all facts to the public. *See e.g.*, Complaint at ¶ 25(d) (A-15) ("We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."); *Id.* at ¶ 25(f) (A-15) ("*We always have and always will cooperate closely with those whose task it is to safeguard the public health*."); *Id.* at 25(g) (A-15) ("We are pledging aid and assistance to the research effort into all phases of tobacco use and health.") (emphasis added).

Based upon these specific representations, the duty which Blue Cross asserts in Count 1 is not merely a general duty but the specific undertaking of a direct duty to Blue Cross -- "whose task it is to safeguard the public health" -- by defendants. See Complaint at ¶ 25(f) (A-15). As Justice Cardozo stated long ago:

> It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.

Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922).

This Court has repeatedly recognized that a defendant may assume a duty through its words and actions, even if no such duty existed in the first instance. *See, e.g., Cracraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979) ("special duty" is "nothing more than convenient terminology… for the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance."); *Isler v. Burman*, 305 Minn. 288, 232 N.W.2d 818, 822 (1975) (" [O]ne who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so.").

c. Public Policy Supports a Direct Duty to Blue Cross

Public policy also overwhelmingly supports the existence of a direct duty in the present case. Contrary to defendants' contention -- *"That is the role of legislators, not of judges"* -- this Court has recognized that policy is the foundation of duty. *Compare* Appellants' Brief at 15, with Caritas Family Services, 488 N.W.2d at 287 ("Whether the plaintiff's interests are entitled to legal protection against the defendant's conduct is a matter of public policy"); *Erickson*, 447 N.W.2d at 169 ("Ultimately, the question is one of policy."). In the present case, policy considerations -- including public health concerns and the need for a remedy -- are compelling.

This Court has long noted its concern for the health of the citizens of this state. *See Skillings v. Allen*, 143 Minn. 323. 173 N.W. 663, 664 (1919) ("The health of the people is an economic asset. The law recognizes its preservation as a matter of importance to the state."). Specifically, this Court has recognized these concerns in tobacco litigation. Thus, in *Forster v. R.J. Reynolds Tobacco Co*., 437 N.W.2d 655, 658 (Minn. 1989), a personal injury action brought by an individual smoker, this Court rejected certain of defendants' claims of federal preemption. This Court noted "this state's deep concern for honesty as well as health" and stated that federal legislation did not grant defendants "a license to lie." *Id.* at 662. This Court further stated:

> This state has a vital interest in protecting the health and safety of its citizens. Our state constitution affirms the importance of our citizens having legal redress when harmed.

Id. at 658 (citations omitted).

This Court also has specifically encouraged plaintiffs who have suffered financial harm to take action to abate public health hazards. For example, in *80 S. 8th St., supra*, this Court held that a building owner could assert an action in tort for the cost of maintenance, removal and replacement of asbestos fireproofing, stating:

> One objective of tort law is to deter unreasonable risks of harm.... Rather than waiting for an occupant or user of the building to develop an asbestos related injury, *we believe building owners should be encouraged to abate the hazard to protect the public. We believe our decision today will do so*.

492 N.W.2d at 398 (emphasis added).

And this Court has not hesitated to use the inherent flexibility and resourcefulness of the common law to accommodate unique and compelling circumstances. Indeed, in doing so in past cases, this Court has considered and rejected virtually every

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argument advanced by defendants. For example, in *Miller v. Monsen*, 228 Minn. 400, 37 N.W.2d 543 (1949), this Court recognized a direct cause of action under new factual circumstances, rejecting claims that "judicial recognition of such a right would constitute judicial legislation" and that such a ruling would cause a "flood of litigation." *Id*., 37 N.W.2d at 544, 546 This Court stated:

> The common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation. Its principles have been determined by the social needs of the community and have changed with changes in such needs. These principles are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require.

37 N.W.2d at 547. This Court further stated that *the common law draws "its inspiration from every fountain of justice." Id. quoting Funk v. United States*., 290 U.S. 371, 383 (1933) (emphasis added). Confronting the facts of the case before it, this Court concluded:

> We cannot bury our heads in the sand and ignore the new tendencies and conditions so notorious.

Id. at 548.

Similar policy considerations in the present case -- "and conditions so notorious" -- also support the recognition of a direct duty.

d. Defendants' Wrongful Conduct Is The Proximate Cause of Blue Cross's Damages

Proximate cause, of course, is another essential element of a tort claim, and a recurring theme throughout defendants' memorandum is an attack on the causal chain between the industry's unlawful conduct and the resulting harm to Blue Cross. Again, however, defendants' sweeping generalizations about proximate cause find no support in Minnesota law. Indeed, in many respects, it is difficult to distinguish the elements of proximate cause and duty. See Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985); Prosser § 53 at 358. Thus, much of the foregoing discussion on duty -- including the extension of liability for intentional misconduct -- applies with equal force to the analysis of proximate cause.[23]

It is a basic premise of Minnesota law that proximate cause is an act or omission "which had a substantial part in bringing about the harm . . . either immediately or through happenings which follow one after another. " Minnesota Jury Instruction Guides 3d, JIG 140 (emphasis added); *see also Staloch v. Belsaas*, 271 Minn. 315, 136 N.W.2d 92, 100 (1965) ("The proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance or space."); *Cooper v. Hoeglund*, 221 Minn. 446, 22 N.W.2d 450, 453 (1946) ("It is sufficient that [defendant's] negligence set in motion the chain of events that proximately caused the ultimate harm."). The actions of a third party will not break the causal chain and become a superseding cause if, inter alia, such actions were "brought about by the original negligence" of the wrongdoer and were "reasonably foreseeable by the original wrongdoer." *Ponticas*, 331 N.W.2d at 915.

Thus, the fact that individual smokers, to use defendants' words, may be *"antecedent steps in the chain leading to its claimed harm"* is, by itself, of little consequence under Minnesota law. *See* Appellants' Brief at 14. The actions taken by individual smokers were to purchase and smoke cigarettes -- in a manner not only foreseeable but precisely intended by these defendants. The resulting harm -- death and disease, with the attendant health care expenditures -- also was foreseeable. *See City of St. Paul*, 167 N.W.2d at 19 (payment of workers' compensation benefits "results directly and proximately from the wrong of another").[24]

Indeed, Blue Cross's damages flow inexorably from the intentional misconduct of defendants. For decades, defendants have concealed critical scientific information and misrepresented the hazards of smoking. This pervasive disinformation campaign was

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[23] Accordingly, whether *Northern States* is viewed as resting upon duty or proximate cause is of little significance for analysis of the present case, except that duty is ultimately an issue for the court and proximate cause is a quintessential issue of fact. *Tapemark*, 273 N.W.2d at 633-34; *Morey v. Shenango Furnace Co.*, 112 Minn. 528, 127 N.W. 1134, 1135 (1910). *Northern States* was decided on a demurrer; however, the complex fact issues in the present case are particularly inappropriate for resolution on the pleadings.

[24] It is important to distinguish the issues of proximate cause and "pass on" of damages. With proximate cause, the analysis traces the chain of foreseeable events, i.e., individual smokers who purchase and smoke cigarettes as intended. The inquiry focuses on the causal chain. However, with "pass-on," the analysis looks to the first party which bears the economic impact, i.e., the direct purchaser. In the present case, of course, Blue Cross is the direct purchaser.

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specifically designed to "creat[e] doubt about the health charge" and to influence the public -- particularly smokers -- to "perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor." Complaint at 33(f) (A-21) To a large extent, the industry's message has been targeted at youth and adolescents. *Id.* at 71-74 (A-36-37). The industry's own internal documents boast of its success. *Id.* at 33(d) (A-20) (the "public relations problem… must be solved for the self-preservation of the industry."); *Id.* at 33(f) (A-21) (industry strategy "was brilliantly conceived and executed").

Along with sowing the seed of doubt about health risks, the industry has further maintained its market through intentionally addicting its customers. *Id.* at ¶¶ 64-69 (A-32-35) ("The product is nicotine.") The industry also has withheld safer products from the market. *Id.* at ¶¶ 38-45 (A23-26) ("Any domestic activity will increase the risk of cancer litigation....").

In sum, the unlawful conduct of this industry caused millions of persons, primarily children, to begin to smoke; caused millions of persons to continue to smoke; caused adverse health effects in millions of smokers, and caused expenditures for medical care to increase dramatically. *Id.* at ¶ 75 (A-37-38). As even the internal memorandum of one defendant admits. tobacco products "are *directly related* to the health field." *Id.* at 136 (A-22) (emphasis added).

e. The Trial Court Specifically Denied Defendants' Motion to Dismiss Count 1

In the trial court, defendants specifically moved to dismiss the claim of undertaking of special duty. Defendants' challenge to Count 1 was based upon their assertions that Blue Cross (and the State) could not recover in tort for economic damages. (A-71-72, 92, 127). Defendants further contended that because Blue Cross (and the State) had failed to properly plead reliance or increased risk, there was no direct duty. (A-110, 127, 129). The trial court denied defendants' motion to dismiss Count 1, and defendants have failed to raise this issue in their Petition for Review or in their brief to this Court.

2. Blue Cross Also Has Direct Claims Under Non-Tort Causes of Action

In addition to the undertaking claim, Blue Cross has pled eight non-tort counts which are based either on specific statutory enactments or on principles of equity. On appeal, defendants' sole reference to these other causes of action is one footnote. which asserts that a direct duty also must be established *"for any possible claim.* Appellants' Brief at 9 n. 4. Defendants offer this sweeping -- and erroneous -- pronouncement without the citation of any authority. in fact, as illustrated below, each of these other causes of action expands traditional tort principles.

a. Counts 2 and 3: The Minnesota Antitrust Law

The Minnesota Antitrust Law was specifically amended in 1984 to expand antitrust standing beyond federal law to include all persons injured directly *or indirectly*. The statute states:

> Any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.

Minn. Stat. § 325D.57 (emphasis added). Thus, even assuming, *arguendo*, that Blue Cross's injuries are "indirect," Blue Cross has standing under this statute.

Defendants' only reference to the merits of the two antitrust counts in their brief is in a single sentence, which erroneously contends that these counts "fail." Appellants' Brief at 9 n.4. Remarkably, defendants do not disclose in their brief that they challenged the antitrust counts in the trial court for failure to state a claim, that their motion was denied and that this issue has not been appealed.

Specifically, the trial court rejected defendants' claims that Blue Cross (and the State) failed to demonstrate antitrust standing. (A-71, 84). The trial court found that "Minnesota is one of the few states which has promulgated legislation more expansive than the federal antitrust measures" and that "[t]he statute expressly allows those indirectly injured to proceed." (A-153-154).[25]

b. Counts 4-7: The Minnesota Consumer Protection And Deceptive Trade Practices Statutes

[25] The antitrust issues were fully briefed below. (RA-91-103).

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Blue Cross also has pled causes of action for violation of Minnesota's consumer protection and deceptive trade practices statutes: Consumer Fraud, Minn. Stat. § 325D.69: Unlawful Trade Practices, Minn. Stat. § 325D.13; Deceptive Trade Practices, Minn. Stat. § 325D.44, and False Advertising, Minn. Stat. § 325F.67. These statutes are remedial in nature and are construed liberally in favor of protecting the public. *See State v. Alpine Air Prod*., 500 N.W.2d 788, 790 (Minn. 1993) (" In passing consumer fraud statutes, the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law."). In addition, standing to enforce these statutes is broadly defined in Minn. Stat. § 8.31, subd. 3a.[26]

As this Court is aware, certain issues concerning the scope of these statutes have been the subject of dispute in recent years. None of these issues has been addressed in the trial court in this case, since defendants failed to specifically challenge these causes of action.

c. Counts 8 and 9: The Equitable Causes of Action

Finally, Blue Cross has pled two causes of action in equity: performance of another's duty to the public and unjust enrichment. *See Indep. School Dist. No. 197 v. Grace*, 752 F. Supp. 286, 303 (D. Minn. 1990) (recognizing cause of action for the cost of asbestos abatement under the Restatement of Restitution § 115); *Klass v. Twin City Fed. Sav. & Loan. Ass'n*, 291 Minn. 68, 190 N.W.2d 493, 495 (1971) (unjust enrichment may be based on "situations where it would be morally wrong for one party to enrich himself at the expense of another") (citations omitted); see also Restatement of Restitution § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

Equity may offer a substantive remedy, as pled in Counts 8 and 9 of the complaint, and/or varieties of relief, as pled in the Prayer for Relief. (A-49-50; A-51-53). As a substantive remedy, equity stands as a separate and distinct body of law from torts and from contracts. *See* 1 Palmer, Law of Restitution § 1.1, at 1-2 (1978). As one leading commentator states:

> Unjust enrichment cannot be precisely defined, and for that very reason has potential for resolving new problems in striking ways.

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> Not all unjust enrichment turns on tort, on tangible property, or on contract breach.

1 Dobbs, *Law of Remedies* § 4.1 (2) at 557 and 559 (2d ed. 1993). Significantly, especially in view of defendants' arguments regarding duty as an essential element for all causes of action, Professor Dobbs also stated, "Sometimes a plaintiff confers a benefit upon a defendant "*wholly apart from any breach of substantive duty*." *Id.* at 559 (emphasis added).[27]

Minnesota has long recognized the need for equity to ensure that no wrong will be without a remedy. *See Brown v. Maplewood Cemetery Ass'n*, 85 Minn. 498, 89 N.W. 872, 879 (1902) ("The very origin of equity… was that there was never a wrong for which there was no remedy, or no adequate relief at law"); *Swooger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955) ("Equity… functions as a supplement to the rest of the law where its remedies are inadequate to do complete justice. "). As this Court stated in *Beliveau v. Beliveau*, 217 Minn. 235, 14 N.W.2d 360 (1944):

> It is traditional and characteristic of equity that it possesses the flexibility and expansiveness to invent new remedies or modify old ones to meet the requirements of every case and to satisfy the needs of a progressive social condition.

217 Minn. at 245, 14 N.W.2d at 366. *See also* 1 Palmer, *Law of Restitution* § 1.6 at 40 ("The restitution claim is even stronger when the plaintiff has no other remedy. "); *cf.* Minn. Const. art. I, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs… ").

This case presents a classic paradigm for equity, particularly since courts of law, to date, have failed to provide an adequate remedy in actions brought by individual smokers against the cigarette

[26] The Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-.48, is not specifically enumerated in Minn. Stat. § 8.31.

[27] Thus, while the tern "duty" is used in equity, it is a distinct concept from "duty" in tort law. For example, in *Grace, supra*, Judge MacLaughlin noted both a duty in tort as well as a more expansive "'duty to refrain from putting abroad in the marketplace a defective product'" and a "'duty to prevent exposure of the public to asbestos-containing products…'" 752 F.Supp. at 303 (citations omitted). Similarly, in *U.S. Gypsum*, another asbestos abatement case involving an equitable claim, Judge Van Sickle stated that "[t]his duty [in equity] need not be absolute, and need not be of a type or degree that would otherwise give rise to legal liability." 690 F.Supp. at 869.

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industry. *See* Complaint at ¶¶ 80-83 (A-39-40).[28]

D. This Action Does Not Threaten the Constitutional Rights of Individual Smokers. Group Subscribers or Defendants

1. Individual Smokers and Group Subscribers

Defendants' arguments regarding the constitutional rights of smokers is premised upon their erroneous contention that Blue Cross is asserting a derivative claim on behalf of smokers, or, to use defendants' words, *"a de facto class action."* Appellants' Brief at 24.

In fact, however, the damages incurred by Blue Cross (and the State) for increased expenditures for *medical costs* are separate and distinct from any personal injury damages suffered by individual smokers, such as *bodily and mental harm and loss of earnings*. Defendants virtually admitted this distinction in the trial court, stating:

> The Defendants could… 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*.... [I]f 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.

Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings at 34. (RA-52) (emphasis added).

Similarly, in a variety of contexts, this Court has recognized that the claims of a third-party payor may be separate and distinct from personal injury claims, even where such claims rest upon subrogation. *See e.g., Folstad v. Eder*, 467 N.W.2d 608' 613 (Minn. 1991) (subrogated workers' compensation damages "separated out" of plaintiff's action); *Lines v. Ryan*, 272 N.W.2d 896, 903 (Minn. 1978) (insurer is the real party-in-interest where it fully reimburses the insured for his loss); *Travelers Indemnity Co. v. Vaccari*, 245 N.W.2d 844, 845-46 (Minn. 1976) (separate action by subrogated insurer for recovery of medical expenses is not splitting of cause of action) *cf.* Minnesota Collateral Source Statute, Minn. Stat. § 548.36 (1986) (generally, recovery of medical expenses ultimately belongs to the third-party payor).

In the present case, where Blue Cross asserts a direct claim, the distinctiveness of Blue Cross's damages for medical costs is even more manifest. In short, Blue Cross's direct action to recover its own damages for increased health care costs does not in any manner jeopardize the rights of smokers to proceed with personal injury claims.[29]

Nor is Blue Cross asserting a derivative claim for damages on behalf of its subscriber groups. As noted above, Blue Cross asserts associational standing only with respect to injunctive relief. In this context, the United States Supreme Court has specifically rejected the argument raised by defendants that a representative claim may only be litigated as a class action. Thus, in United Auto Workers v. Brock, supra, the Supreme Court declined to "abandon settled principles of associational standing" and extolled the "special features" of associational standing:

> While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. 'Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack.' These resources can assist both courts and plaintiffs.

477 U.S. at 289-90 (citations omitted).

With respect to damages, as Judge Posner recently found, Blue Cross may "proceed on its own without the aggregation of separate plaintiffs required for a class action." *Blue Cross & Blue Shield United of Wisconsin*, 65 F.3d at 1414.

2. The Defendants

As their last resort, defendants assert that

[28] In the trial court, defendants' sole reference to Blue Cross's equitable claims in their motion to dismiss was in a footnote in their reply brief. (A-116 n. 7). The equitable claims also were briefly discussed in plaintiffs' response to defendants' motion and in plaintiffs' motion to dismiss certain defenses. (RA-49-51, 90, 110-112).

[29] Moreover, it is particularly disingenuous for the cigarette industry to appear before this Court and express concern for the due process rights of smokers. Any concern by this industry for the rights of deceased smokers is, to say the least, belated.

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their own due process rights are in jeopardy. First, defendants claim that they may be subject to duplicative damages awards. However, since the damages claimed by Blue Cross (and the State) are separate and distinct from the damages suffered by smokers, there is no threat of duplicative recovery. Moreover, any concern about duplicative awards is, at best, premature and speculative.

Second, defendants assert that this action will unconstitutionally deprive them of certain defenses which may (or may not) be applicable in any personal injury action brought by individual smokers. Appellants' Brief at 5, 14, 24-26. Again, however, defendants cite no authority for this proposition, and their overstated pronouncements -- *"parties… certainly can never inherit a stronger claim than the directly injured party"* -- are expressly contradicted by decisions of this Court. In fact, this Court has repeatedly and emphatically rejected attempts to impute the negligence of one person to another. See *Weber v. Stokely-Van Camp, Inc*., 274 Minn. 482, 144 N.W.2d 540, 543 (1966) ("[T]here is just no way to rationalize the rule of imputed contributory negligence."); *Pierson v. Edstrom*, 286 Minn. 164, 170, 174 N.W.2d 712, 716 (1970) ("Most text writers are in agreement that the rule of imputed contributory negligence is unsound."); *see also* Prosser and Keeton, § 74 at 529-30 ("Except for vestigial remnants which are at most moribund historical survivals, 'imputed contributory negligence' in its own right has now disappeared.").

In any event, the issue of the imputation of defenses -- from individual smokers to Blue Cross (and the State) -- is not before this Court at the present time. This issue was raised below in plaintiffs' motion, which the trial court denied as premature and which has not been appealed. Moreover, at the time this issue is re-visited in the trial court -- after the opportunity for discovery of defendants' misconduct -- there will be yet another reason for striking all claims of comparative fault on the basis of the intentional wrongdoing of defendants. *See Florenzano, supra*, 387 N.W.2d at 175-76 ("Without question, principles of comparative negligence would not apply to an intentional tort… Where society wants certain conduct absolutely prohibited and discouraged, apportionment of fault is not appropriate.").

CONCLUSION

To date, our legal system has failed to hold accountable an industry which, unlike any other in this country, has manipulated our system of jurisprudence in an attempt to create immunity for its unprincipled misconduct. The result has been unprecedented harm, both human and economic. In large part, the cigarette industry has achieved its litigation objectives through tactics designed to abuse the overwhelming imbalance of its vast resources. ("To paraphrase General Patton…") (A-39-40). Undoubtedly, future generations of Americans will look back on the history of the cigarette industry -- and the cigarette litigation -- and ask the obvious question as to why our system failed, for so long. In the present appeal, the issue is simply whether this Court will apply fundamental principles of Minnesota law to allow Blue Cross the opportunity to move beyond the pleadings and to establish the case against the cigarette industry on a full factual record.

For all of the foregoing reasons, Blue Cross respectfully submits that the district court's order should be affirmed.

Respectfully submitted,

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