STATE OF MINNESOTA
DISTRICT COURT
COUNTY OF RAMSEY
SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA BY HUBERT H. HUMPHREY, III, ITS ATTORNEY GENERAL, AND BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

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

Civil Case File No. C1-94-8565

December 1, 1995

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

Defendants have requested 10 to 20 depositions of Medicaid recipients to frame the critical issue on which the direction of this litigation will turn: Can the case proceed solely on the basis of aggregate evidence or must individual proofs for Medicaid recipients also be taken into account? If individual proofs are relevant and admissible on any issue -- whether in response to the elements of the State's case (reliance, causation, injury-in-fact) or as part of defendants' affirmative defenses (*e.g*., comparative fault) -- the parties and the Court should know it now.

To frame the issue, imagine a simpler world in which there are only ten Medicaid recipients in Minnesota. As here, the State sues for repayment of Medicaid costs attributable to smoking-related diseases. How will the State's case be proven at trial? Are individual proofs relevant and admissible on any issue?

First, *injury-in-fact*. The State argues that the baseline "fact" of a smoking-related disease will be established conclusively by the diagnosis entered on each recipient's Medicaid record. Under the State's theory, defendants will be permitted no discovery of the ten individual recipients, no cross-examination of their doctors, no opportunity either to see their personal medical records or to present expert rebuttal based on personal examination -- in effect, no opportunity to contest the diagnosis at all.

Second, *causation*. The State says that the causal link between smoking and each recipient's reported disease will be established conclusively by statistics and epidemiology. Never mind whether some or all of the ten recipients were, in fact, grossly overweight or totally sedentary or worked in a dangerous chemical environment or had three generations of ancestors who suffered the same condition. The Court and the jury will never know because defendants would not be permitted to investigate the relevant facts, much less make proof at trial.

Indeed, the State's Medicaid records, which it insists must be the sole evidence of injury and causation, do not even reveal whether individual recipients were smokers or how much they smoked. Nor do they provide a lifetime history of other exposures or previous medical conditions before Medicaid treatment began. Each recipient's diagnosis is irrebuttably established by what the State's Medicaid records say, and then the causal link to smoking is irrebuttably proven by statistics, whatever the true facts may be.

Third, *reliance*. According to the State's proposal, if it can be shown that defendants made material misrepresentations, each of the ten recipients will be conclusively presumed to have heard and relied upon those statements. The absolute rule in this litigation, without any right of discovery, will be that no smoker, not even one, smoked for any reason other than defendants' unlawful conduct. That must be the irrebuttable rule for all recipients, because otherwise the jury would have to hear individual proofs, which the State cannot allow.

Fourth, *comparative fault*. The same fixed rule that establishes reliance for each of the ten Medicaid recipients would also establish that they share no responsibility for their conduct. If the recipient is "statistically" a smoker, it will be irrebuttably presumed not only that he or she smoked (whether he or she actually did or not), but also that he or she had no knowledge of the dangers of smoking and made no

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voluntary choice.

Our ten-recipient hypothetical may be oversimplified, but it is legally indistinguishable from the present situation. The fact that there are one hundred or one hundred thousand Medicaid recipients cannot change the legal analysis. Either the State can obliterate the traditional elements of a legal case or they can't.

Still, defendants do not propose that the Court decide this critical issue today. What we do request is an opportunity to frame the issue in real rather than hypothetical terms by using a limited number of recipient depositions (10 to 20) to illustrate the multiplicity of individual issues inherent in the State's claims. That is, in fact, what this Court already decided in its unequivocal Order of May 19, 1995: "further discovery is required." The only open question was the procedure: "Subject to further argument, the court's position is that it proposes depositions be restricted to a limited number of individual smokers (absent agreement of counsel, that limit shall be court imposed) selected by some means of computerized random selection." 5/19/95 Order at 4 & n.2.

If there is any significant possibility that this Court will conclude that individual proofs are relevant and admissible on any issue. the requested discovery should go forward now. As we now show, none of the reasons advanced by the State even remotely warrants a change in the course already set by this Court.

I.

DEFENDANTS' MOTION IS TIMELY

The State argues that defendants' Motion to Compel is premature, citing Minnesota law for the proposition that any motion "to dismiss the State's direct action" must be based on the entire record developed during discovery. P1. Br. at 6. The short answer is that defendants are not moving to dismiss the State's complaint or any part of it. Defendants seek limited discovery to frame the critical question of whether this case may ultimately proceed on a collective basis or whether individual proofs will be permitted on any issue.[1]

The State gains nothing by urging that further discovery may disclose evidence that the "tobacco companies lied to the public." P1. Br. at 7. For present purposes, the Court may assume the truth of the complaint's allegations of misrepresentation and other misconduct. As our ten-recipient hypothetical makes clear, the question still remains whether individual proof is relevant and admissible on fact-of-injury, causation, reliance and comparative fault.

If we wait two more years, that question will be exactly the same. In the meantime, this Court and the parties will have expended huge resources on an action that might never have gone forward or would certainly have proceeded on a substantially different course. As this Court recognized in its original order, there is no reason for delay. "Further discovery is required" now to frame the critical issues relating to defendants' individual defenses.

II.

INDIVIDUAL PROOFS CANNOT BE AVOIDED OR ASSUMED

The State does not deny that it will have to prove injury-in-fact, causation and reliance. Nor does the State deny that it is the individual Medicaid recipients who were allegedly injured by a smoking-related disease, whose injury was allegedly caused by smoking (not by some other cause) and who smoked in reliance on defendants' alleged misstatements (not because of some other personal choice).

The State contends, however, that each of these uniquely individual elements will be proven collectively at trial by presumptions, by surveys, and by statistical models. P1. Br. at 12-21. Indeed, not only will these elements be proven in the aggregate, they will be proven *conclusively and irrebuttably*. Defendants will not be afforded the opportunity to show that any individual was not injured, that any individual's injury was not caused by smoking, or that any individual did not actually rely on anything the defendants did or said.

The State cites no case in any jurisdiction that has accepted such aggregate proof under common law and then *precluded individual rebuttal evidence*. What the State proposes would represent a true sea change in the direction of American law: a change that would impact every product or practice which, based on presumptions or statistics, may impose some ultimate, down-the-road cost on the State -- *e.g.*,

[1] Furthermore, though the point is irrelevant here, Minnesota law is clear that the pendency of further discovery will *not* foreclose summary judgment, absent a genuine issue of material fact which would be informed by that discovery. *See Port Authority v. Harstad*, 531 N.W.3d 496, 501 (Minn. Ct. App. 1995) *pet. for rev. denied* (Mn. June 14, 1995); *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471, 477 (Minn. Ct. App. 1985) *pet. for rev. denied* (Mn. December 30, 1985). The State's authority, *Wallin v. Rappaport*, 539 N.W.2d 4 (Minn. Ct. App. 1995), is fully consistent with that plain rule.

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alcohol, gambling, automobiles, motorcycles.

The total absence of supporting authority is highlighted by the State's principal reliance on *People ex rel Hartigan v. Lann* 587 N.E.2d 521 (I11. App. Ct. 1992), a case decided under the Illinois Consumer Fraud Statute. All the *Hartigan* court decided was that the aggrieved consumers in a statutory fraud action brought by the Attorney General would not be treated as *party-plaintiffs* for discovery purposes. A basic premise of the decision was that the State had turned over the consumers' names and addresses and that individual discovery was available. *Id.* at 526: The State itself contended that "defendant at his own expense could send interrogatories to each consumer, pay witness fees and depose each individual." *Id.* at 523. That is exactly what the State would deny here.

We show below, in summary fashion, that none of the State's excuses or presumptions -- with respect to proof of reliance or injury or causation is any more on point than the Hartigan case. But, again, that is not the issue this Court has to decide today. Rather, as this Court already ruled, the preliminary step is limited discovery to frame the issue to illustrate the pervasive individuality of the State's claims.

1. Reliance

The State postulates an unprecedented irrebuttable presumption of reliance. Under the State's theory, evidence of intentional misrepresentation by the cigarette industry, coupled with a showing that cigarette sales continued, would be "sufficient to satisfy any reliance element." P1. Br. at 16. Not only is reliance presumed, it is irrebuttably presumed for *every* Medicaid recipient.

That is not the law in Minnesota or anywhere else. Just the opposite is true, as the State's own cases demonstrate. The State cites *Davis v. Retrac Manufacturing Corporation*, 276 Minn. 116, 149 N.W.2d 37 (Minn. 1967), for the proposition that plaintiff's reliance on defendant's misrepresentation of past profits could be inferred from the fact that plaintiff quit his previous job to join defendant. But the court goes on to explain that this was because "[t]here is no evidence that plaintiff had actual knowledge before he commenced the work" that defendant's past profits were lower. *Id.* at 39-40. If "plaintiff had made independent inquiry as to the accuracy of the sales figures represented, reliance on the misrepresentation would not have been justified." *Id.* at 39.

That reasoning applies here exactly. The critical issue for each recipient will be what he or she knew about the alleged risks and whether, in that light, defendants' alleged misstatements made any difference. That may depend on what each recipient learned in school and from family and physicians, and on and on.

But, here, none of that will ever be known, in direct contravention of Minnesota law.[2]

In support of its remarkable presumption, the State asserts that individual testimony is an unreliable indicator of why people smoke, citing company documents as support for this proposition. P1. Br. at 9-12. But defendants' argument is not that individual smoker testimony on issues of personal choice should be conclusive, only that it is probative and cannot be excluded. That is why the law here and everywhere requires a trial, not a blanket presumption or a statistical exercise.

To the extent that defendants have conducted their own consumer surveys, as the State repeatedly asserts (Pl. Br. at 22-23), such surveys may well be admissible evidence, assuming evidentiary standards are met. But, again, the surveys would obviously not be conclusive as to the motivation of any individual smoker (they are, after all, merely aggregations of the same smoker self-reports which the State disparages). That determination would turn on the individual's testimony along with the evidence offered by family members, friends, physicians and consumer behavior experts.

That is exactly what happened in the landmark *Cipollone* case,[3] which also involved personal injury claims based on smoking. The jury heard from friends and family and experts and decided that plaintiff had voluntarily assumed a known risk. Of course, the State would not dare argue that the *Cipollone* plaintiff's testimony regarding why she smoked was irrelevant or inadmissible. Consider then the utter absurdity of what the State does argue: that when one hundred or one hundred thousand plaintiffs make the same claim, individual testimony should be dispensed with *as a matter of law*.

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[2] The other case which the State features, *Financial Timing Publications, Inc. v. Compugraphic Corporation*. 893 F.2d 936 (8th Cir. 1990), is even further off the point. All the court decided there was that the plaintiff had introduced sufficient circumstantial evidence of reliance to withstand summary judgment. The State would now transform that modest ruling into an extraordinary irrebuttable presumption. Indeed, even in the very different context of securities cases, Minnesota has refused to accept the "fraud-on-the-market" theory, so that "each plaintiff would be required to prove his or her individual reliance." *In re Scimed Sec. Litig*. 1993 WL 616692, at *7 (D. Minn. Sept. 29, 1993).

[3] *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 551 (3d Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 112 S. Ct. 2608 (1992).

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The limited discovery which defendants request is designed to provide a factual framework for the legal insufficiency of the State's argument -- to demonstrate the variety of "motivations" in this Medicaid population.

2. Injury and Causation

The State devotes an entire section of its brief to the irrelevant point that, "once the fact of injury has been established," the *amount of damages* may be established by statistical models. P1. Br. at 18-21. But the issue here is not the amount of damages. The issue is how the "fact-of-injury" can be established for each Medicaid recipient and how the causal link between that injury and defendants' conduct must be shown.[4]

The State is correct, of course, that "courts have recognized the value of epidemiological evidence in proving causation." P1. Br. at 17. But the State then goes on to conclude that, "because this case involves a large population of smokers," the proofs on this issue will be limited to general epidemiological studies. *Id.* at 18. Again, the State cites no authority for this remarkable proposition -- no case in which, because "a large population" was involved, the Court and jury heard *only statistics* and defendants were precluded from investigating either the accuracy of the diagnosis (injury) or each individual's lifetime exposures or prior medical conditions (causation).

Once again, the law is just the opposite. The Court of Appeals for the Fifth Circuit decided precisely this issue in *In re Fibreboard Corporation*, 893 F.2d 706 (5th Cir. 1990). The trial judge, faced with three thousand consolidated asbestos cases, proposed that proof of injury, causation, affirmative defenses and damages be presented in the aggregate based on eleven representative trials, illustrative evidence from thirty other claimants, and expert testimony regarding the total damages suffered by all claimants. As here, the underlying theory was that "statistical measures of representativeness and commonality will be sufficient for the jury to make informed judgments concerning damages." *Id.* at 710. The Fifth Circuit, on an extraordinary writ of mandamus, struck down the proposed procedure:

> This type of procedure does not allow proof that a particular defendant's asbestos "really" caused a particular plaintiff's disease; the only "fact" that can be proved is that in most cases the defendant's asbestos would have been the cause. This is the inevitable consequence of treating discrete claims as fungible claims. Commonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury.
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> The plaintiffs suffer from different diseases, some of which are more likely to have been caused by asbestos than others. The plaintiffs were exposed to asbestos in various manners and to varying degrees. The plaintiffs' lifestyles differed in material respects. To create the requisite commonality for trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged.[5]

Id. at 712.

Suppose that in *Fibreboard* the State paid the medical bills of the injured parties (which it may well have done, at least in part). Suppose further that the Texas Attorney General sues the asbestos companies on the same legal theory to collect the same medical costs and proposes the same aggregation. The deprivation of defendants' right to a fair trial, and thus the court's decision, would also be exactly the same.

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[4] If the issue were damages, the result would be the same. The State's own cases are absolutely clear that defendants are guaranteed a right to rebut statistical inferences. *B & Y Metal Painting Inc. v. Ball,* 279 N.W.2d 813, 817 (Minn. 1979) (amount of damages will be established by reasonable inference, "unless evidence is presented to rebut the inference and to establish that the loss was caused by factors other than the breach."); *In re Mid-Atlantic Toyota Antitrust Litig*., 525 F. Supp. 1265, 1285 (D. Md. 1981) ("[d]efendants still retain the opportunity of rebutting the method of proving damages, the facts or assumptions upon which the method rests ...."), *aff'd* 704 F.2d 125 (4th Cir. 1983). That is because "[d]eterminations regarding the appropriate measure of damages and the manner in which those damages will be assessed and administered are questions which will necessarily turn on the individual facts of an individual plaintiffs case." *Kurczi v. Eli Lilly & Co*., 160 F.R.D. 667, 675-76 (N.D. Ohio 1995).

[5] The same result was reached just a few months ago in *Leverance v. PFS Corporation*, 532 N.W.2d 735 (Wis. 1995). Faced with a large group of consolidated personal injury claimants, the trial court proposed a series of test trials in place of individual proof of "causation, damages and contributory negligence." The Wisconsin Supreme Court concluded that the "aggregative procedure cannot be used, as it was here, in place of a party's right to a trial, unless all parties to the litigation consent." *Id.* at 739-40.

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The State's theory here is distinguishable only because in the factual context of this case the aggregation it proposes is so much more egregious. In *Fibreboard*, the claimants were involuntarily exposed to asbestos at their workplace. There were no serious issues of reliance or personal choice. Here, we do not even know if particular Medicaid recipients were really smokers, much less why they smoked, yet their individual cases would be "submerged" in the aggregation.

Just how thoroughly submerged is revealed by the State's version of what evidence *would be* admissible on the issues of injury and causation. In place of access to individual claimants or their personal medical records, the State offers redacted Medicaid files so that the defendants will be able to "create their own statistical models." P1. Br. at 21. But, as noted, those files do not even reveal whether a particular recipient smoked, nor do they relate to periods before the individual's receipt of Medicaid benefits. Suppose a recipient was treated for colon cancer in 1989, went on Medicaid in 1992, and was diagnosed with and received treatment for lung cancer while on Medicaid in 1993. Not only would defendants not know the recipient's smoking history, they would not know that the supposed lung tumor might have resulted from the metastasis of the prior colon cancer.

In other words, in a case that turns finally on whether an individual sustained a particular injury from a particular cause, the State asserts that it will unilaterally define what record evidence is admissible. Never mind that personal medical records may reveal a completely different picture. The State brings the suit and *only* the State's records are admissible on the fundamental questions of injury and causation.

3. Comparative Fault

The State's brief offers no discussion of how comparative fault could be resolved on an aggregate basis. That is especially odd since affirmative defenses, including comparative fault, were the prime focus of this Court's original Order holding that "further discovery is required." 5/19/95 Order at 4.

Presumably, comparative fault will be treated exactly the same way as reliance. If a recipient's Medicaid records indicate a "smoking-related disease," it will be presumed that he or she smoked because of something the companies did, and that he or she bears no responsibility for the choice to smoke. Needless to say, no case supports such a theory.

Once again, the Court need not (and indeed should not) decide whether individual proof is required on any of these issues in the context of this discovery motion. The question here is simply whether defendants should be barred from limited discovery on the State's assertion that individual issues are not implicated on any issue. Given the enormous resources involved here, that would be a senseless result and one which this Court has already declined to follow.

III.

PRIVACY CONSIDERATIONS DO NOT BAR THE PROPOSED DISCOVERY

The State asserts that defendants will question the deponents about "all facets of their personal lives" and in so doing will violate Minnesota law protecting patient privacy. P1. Br. at 24. Of course, to the extent that the depositions involve issues such as why individuals chose to smoke and whether or not they were influenced by, or even were exposed to, statements made by any of the defendants, patient privacy issues are not implicated.

With respect to medical records, the State concedes that, under Rule 35.03 of the Minnesota Rules of Civil Procedure, if a party puts at issue the physical condition of a person under that party's control, the physician patient privilege is waived.[6] The State urges, however, that the waiver rule does not apply here because this case puts in issue groups not individuals. P1. Br. at 28.

But, as previously outlined, the State does not deny that it is the individual Medicaid recipients (not the State) who were supposedly injured by a smoking-related disease and whose injury was caused by defendants' conduct. The recipients' "physical condition" is the beginning and end of this case. Indeed, the State does not really mean that the physical condition of individual Medicaid recipients is not in issue. What the State means is that it intends to put on proof of that physical condition in the aggregate. But the Minnesota rule does not draw the line that way. If a plaintiffs claim puts "physical condition" in issue, the privilege is waived no matter how the State chooses to put on its case.

[6] Rule 35.03 was adopted by the Supreme Court in 1967. The State cites *Wenninger v. Muesing*, 307 Minn. 405, 240 N.W.2d 333 (1976), to the effect that the privilege can only be waived by the patient. That statement comes from a decision, *Maas v. Laursen*, 219 Minn. 461, 18 N.W.2d 233 (1945), that predated the adoption of Rule 35.03. With the adoption of Rule 35.03, it is now clear that where a party such as the State puts in issue the physical condition of a person under that party's control, the privilege is waived.

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This Court may ultimately decide that individual proof is relevant to injury and causation for each recipient, or that only some individual proof (*e.g.*,., a sample of individual recipients) is permissible, or that only aggregate proof will be admissible. But even then, the aggregate proof must represent each individual recipient's "physical condition." How are defendants to present their case on whether aggregation is appropriate, and how is this Court to decide the issue, if the underlying evidence is withheld by the State?

The State further contends that the waiver rule does not apply because the State does not "control" the Medicaid recipients. P1. Br. at 32. But this is just another word game. The State is suing here to recover from a third party the cost of medical treatment to a Medicaid recipient. As set forth in defendants' prior brief (pp. 7-9), both the federal and Minnesota Medicaid statutes anticipate precisely this situation and require that the individual recipients "cooperate," including production of medical records.[7]

The State's reliance on the Minnesota Data Practices Act is also misplaced. P1. Br. at 26-30. The defendants are not seeking by this motion to collect any medical data on individuals that was collected or maintained by the State or the welfare system, other than the identities of 100 Medicaid recipients for the purposes of locating the 10 to 20 individuals to be chosen for deposition. All medical records concerning those individuals will be produced not by the State, but by individual health care providers pursuant to an authorization signed by the recipient. See [Proposed] Order To Compel Initial Depositions of Medicaid Recipients, ¶ 7.[8]

In the end, we come back to the point we began with. If there is any reasonable probability that this Court is going to determine that individual proofs are relevant and admissible *on any issue*, then the requested discovery should go forward now. That is the hurdle this Court already crossed. The question previously presented was whether defendants' affirmative defenses should be dismissed. The Court said that "further discovery was required." That was because the condition of individuals had been put in issue. The State's attempt to avoid its obligations -- and to send this Court and the parties down an incalculably expensive road for the next months and years -- cannot be accepted.

Respectfully submitted,

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On Behalf of Philip Morris Incorporated and Counsel for the Other Moving Defendants (See Appendix of Counsel)

[7] Given this "cooperation obligation," Medicaid recipients cannot reasonably expect that their records will be kept private if, as here, the State decides to recoup payments from a potentially liable third party. Absent an expectation of privacy, a statutory privilege protecting patient privacy is generally held not to bar disclosure of patient records. *See e.g., Reynaud v. Superior Court*, 187 Cal. Rptr. 660 (Cal. Ct. App. 1982) (because patient in California's Medicaid program could be deemed to know that records would be disclosed, the statutory privilege barring disclosure of physician-patient records was held not to apply).

[8] Even the case cited by the State relating to the Data Practices Act is inapposite. In *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299 (Minn. 1990), the Minnesota Supreme Court *rejected* a similar attempt by another government litigant to use the Data Practices Act to withhold relevant information. The court ordered that all "relevant valuation data that the government has in its files must be made available, subject to an appropriate confidentiality order," since allowing the government to present the court "with a one-sided version" of a contested issue would deny the plaintiff the opportunity to disprove the government's theory. *Id.* at 307-08.

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