STATE OF MINNESOTA DISTRICT COURT
SECOND JUDICIAL DISTRICT
COUNTY OF RAMSEY

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

and

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

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

Case No. C1 94-8565

March 2, 1995

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

PREFACE

As a backdrop to this motion, it bears remembering that the foundation for defendants' argument relating to the alleged fault of smokers is, at best, a striking illustration of hypocrisy. The basis for defendants' claim is that individual smokers should have known of the health risks and addictiveness of cigarettes. *See* Defendants' Memorandum at 1. Yet defendants themselves deny these facts. Indeed, by blaming smokers, defendants attempt to hold ordinary consumers to a higher standard than their own chief executives -- who denied under oath before Congress as recently as last year that cigarettes cause disease ("*I can't accept the causal relationship . . . I reject the premise that smoking causes cancer*") and, one after another, denied that cigarettes are addictive ("*And I. too. believe that nicotine is not addictive*"). In short, the basis for defendants' claim of fault by smokers is that smokers were unreasonable in believing *the representations of defendants themselves*.

Even accepting defendants' duplicitous argument for purposes of this motion, defendants' efforts to interject the fault of smokers into this litigation fails as a matter of law.

I.

INTRODUCTION

In this motion, the State of Minnesota ("the State") and Blue Cross and Blue Shield of Minnesota ("Blue Cross") seek to establish the fundamental and straightforward principle that affirmative defenses must correspond to the causes of action pled in the complaint -- or fail as a matter of law. Since the State and Blue Cross have not pled any cause of action in subrogation, all subrogation defenses -- including the comparative fault of smokers -- fail to state a legal defense.

In their memorandum, defendants once again choose to disregard the contours of the complaint, and, indeed, disregard the legal arguments in plaintiffs' memorandum in support of this motion. Instead, defendants focus a major portion of their brief on extraneous issues! First, defendants present an array of arcane -- and erroneous -- procedural arguments in an attempt to evade the substance of this motion. Second, defendants attempt to argue that the State and Blue Cross have no independent claims, apart from the claims of individual smokers. This argument raises an issue irrelevant to this motion. Indeed, defendants themselves admit in their memorandum that "*the Court need not (and Defendants submit should not) decide the merits of Plaintiffs' independent claim now….*" Plaintiffs agree with this proposition. If defendants believe that plaintiffs have no independent claims, their recourse would have been -- quite obviously -- to file a motion to dismiss all claims.

Ultimately, with respect to the actual issue in this motion, defendants disregard the well-established body of law forbidding the imputation of negligence from one person to another. As stated in a leading treatise on torts, "[o]rdinarily the plaintiff's action for his damages will not be barred by the negligence of any third person who may have contributed to them." The Minnesota Supreme Court has embraced these principles since the turn of the century. In view of this law, defendants' representation that "plaintiffs have offered no authority" for this motion is simply erroneous.

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Instead of addressing this case law, defendants advance four novel arguments as to why the alleged fault of smokers should be considered in this litigation. None of defendants' arguments is even remotely supported by Minnesota law:

1. *The "Fault" of Smokers Is Not Relevant to the Cause of Action for Unjust Enrichment*: Plaintiffs' claim for unjust enrichment is based upon traditional concepts of equity, which provide that restitution is proper where it would be morally wrong for one party to enrich itself at the expense of another. It is also a basic tenet of equity that no wrong will be without a remedy, and, indeed, equitable principles preclude a multiplicity of actions if multiple actions would impede an adequate remedy. Despite these principles, defendants -- as they have with the rest of the complaint -- attempt to rewrite this equitable claim as derivative of smokers' causes of action. This concept is not supported under Minnesota law and, if adopted, would threaten the viability of this litigation in a manner which equity is specifically designed to prevent.

2. *The Minnesota Comparative Fault Statute Does Not Require the Assessment of "Fault" of Individual Smokers*: Defendants appear to be contending -- but are unwilling to state directly -- that smokers should be considered third-party defendants in this action. If this industry seriously contends that its customers -- who have done nothing more than purchase and consume its products in a manner intended by defendants -- should be held jointly and severally liable for damages in this action, defendants should state so directly and articulate a basis upon which a recovery of damages conceivably could be sought against smokers.

3. *The Conduct of the State and Blue Cross Does Not Provide a Legal Basis for the Imputation of the Smokers' "Fault"*: In addition to casting blame on their own customers, defendants also cast blame on the plaintiffs in this case, particularly the State, for merely performing routine governmental functions. In large part, defendants' argument is premised on an attempt to mischaracterize this action as seeking damages from defendants for merely selling a legal product -- and then blaming the State for, in essence, negligently failing to prohibit the sale of and negligently taxing the product. Clearly, it would be a remarkable mutation of traditional jurisprudence to condone this argument. Moreover, the fact that a *product is legal* does not mean that the defendants' *conduct was lawful* -- and in the present case it is the defendants' unlawful conspiracy upon which liability is based. In any event, at best, defendants' contentions are relevant to the comparative fault and assumption of the risk by the State and Blue Cross -- defenses which plaintiffs have not yet moved to dismiss. Indeed, the section of the Restatement (Second) of Torts cited by defendants does not relate to imputation of fault at all, but instead to the conduct of the plaintiffs themselves.

4. *The State and Its Citizens Are Not a Single Entity For Purposes of Assessing Fault*: Defendants also assert the far-reaching contention that the State and its citizen-smokers are indistinguishable for purposes of assessing fault in this litigation. However, defendants offer no authority which supports this startling proposition and instead attempt to apply entirely inapposite principles of corporate law.

***

Finally, in an effort to forestall the inevitable, defendants argue that discovery is necessary prior to the determination of this motion. However, the discovery defendants repeatedly cite in their memorandum relates to matters not at issue in this motion: (1) liability discovery relating to plaintiffs' causes of action, and (2) the alleged comparative fault of the State and Blue Cross.

Even with respect to the conduct of smokers, defendants again discuss discovery relating to matters *not* at issue in this motion, that is, proximate cause and damages. In effect, defendants threaten to render this litigation unmanageable -- one way or another -- regardless of the outcome of this motion. However, there is a wealth of jurisprudence on proving proximate cause and damages based upon statistics, expert testimony and presumptions, all of which will allow these issues to be addressed in an efficient manner.

Contrary to defendants' contentions, the practicalities of discovery are relevant to the present motion. Indeed, Rule 12 motions are specifically designed, as a matter of policy, to promote judicial economy and avoid confusion of the issues. Moreover, plaintiffs have clearly met the legal standard of Rule 12 in demonstrating that there is no issue of fact *relating to the issue before this Court* and in premising this motion on well-established Minnesota law prohibiting the imputation of defenses.

The fact that this motion will streamline discovery is but one further reason to grant plaintiffs' request.

II.

ARGUMENT

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A. A MOTION FOR JUDGMENT ON THE PLEADINGS IS A PROPER METHOD FOR CHALLENGING DEFENDANTS' SUBROGATION DEFENSES

The State and Blue Cross filed this motion pursuant to Rule 12.03, Minn.R.Civ.P., and pursuant to this Court's order of December 30, 1994, which specifically contemplated cross motions on the pleadings *pursuant to Rule 12.03*. *See* Order of December 30, 1994 at § 2. Defendants now contend that this is not the correct procedure for challenging the legal sufficiency of their subrogation defenses and argue that plaintiffs' motion should be characterized as a motion to strike under Rule 12.06. Defendants' argument ignores, however, Rule 12.08 which specifically provides that "an objection of failure to state a legal defense to a claim may be made… by a *judgment on the pleadings*." Minn.R.Civ.P. 12.08 (emphasis added).

Moreover, defendants' preference for treating this as a motion to strike is a difference without a distinction. It is true that this Court, in the alternative, has the discretion to consider this as a motion to strike. *See* Minn. R. Civ. P. 12.06 (court "upon its own initiative at any time" may order a defense stricken). In any event, whether this Court chooses to characterize this motion as one for judgment on the pleadings or as a motion to strike, the legal standard and policies underlying these Rule 12 motions are the same. *See* 5A Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1367 at 515 and 644-46 ("the technical name given to a motion challenging a pleading is of little importance"). In short, this motion should be granted because the defenses at issue present a pure issue of law.

Equally flawed is defendants' argument that this motion is improper because there is "no legal or policy basis for 'partially' dismissing or striking a defense." Defendants' Memorandum at 7. The law is clear that "[a]ll or part of the opponent's pleading may be stricken…." McFarland & Keppel, *Minnesota Civil Practice* § 1119 at p. 35. In fact, the first case cited by defendants supports this Court's authority to strike only the subrogation defenses. *See F.D.I.C. v. RC Marketing and Leasing. Inc*., 714 F. Supp. 1535 (D. Minn. 1989) (striking some but not all of the defendants' affirmative defenses). In the only other case cited by defendants for this proposition, *United States v. Walerko Tool & Engineering Comm*., 784 F. Supp. 1385, 1388 (N.D. Ind. 1992), the court declined to strike certain defenses because they "still may be available as to the other claims in the [] complaint." In contrast, defendants' subrogation defenses are not a proper defense to any of the plaintiffs' claims as pled.

Policy considerations under Rule 12 also support this motion. Thus, while not generally favored, a defense will be stricken where the "allegations have no possible relation to the controversy and may cause prejudice to one of the parties" or may "confuse the issues in the case." Wright & Miller, *supra*, § 1382 at p. 685-690, 697. In addition, considerations of "judicial economy" are appropriate. McFarland & Keppel, *supra*, § 1119 at 37. In the present case, subrogation defenses "have no possible relation" to the action which has been pled; the State and Blue Cross have not brought this action as subrogated parties to any underlying tort claims of individual smokers. *See also Fagerstrom v. Rappaport*, 176 Minn. 254, 257, 223 N.W. 142, 143 (1929) (court may strike an answer "which has no substantial relation to the controversy between the parties to the suit"). In addition, striking the subrogation defenses will prevent confusion of the issues, advance judicial economy and prevent prejudice to plaintiffs by avoiding a quagmire of unmanageable -- and legally irrelevant -- discovery.

B. NO DISCOVERY IS WARRANTED ON THE ISSUE OF WHETHER THE SUBROGATION DEFENSES STATE A LEGAL DEFENSE

The fact that the subrogation defenses asserted in this action fail to state a legal defense is a clearly defined issue of law, ripe for adjudication. Repeatedly, defendants urge that dismissing the subrogation defenses would be premature. However, the logic of their reasoning dissolves into a meandering argument about the necessity of conducting discovery on issues unrelated to whether the subrogation defenses state a legal defense.

1. Liability Discovery on Plaintiffs' Causes Of Action Is Irrelevant To The Validity Of Subrogation Defenses

Defendants repeatedly argue that discovery is necessary to evaluate the validity of plaintiffs' causes of action. However, no amount of discovery on these causes of action will have any bearing on the validity of the subrogation defenses, since no amount of discovery will convert this direct action into a subrogation action which has not been pled. Nevertheless, in their memorandum, defendants consistently focus on this issue:

> "Once Defendants have established through discovery the precise nature of Plaintiffs' purported independent theory of recovery and have created an adequate factual record, they will bring a motion for summary judgment on Plaintiffs' alleged nonsubrogation

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> remedy. This is when the issue should be decided. Striking defenses now without full briefing on the merits of the claim to which they apply would be premature and counterproductive."
>
> "At a minimum, Defendants are entitled to discovery to demonstrate, among other things, the State's role in its health care program is analogous to that of an insurer."
>
> "Discovery may reveal that BCBSM has express rights of subrogation under its insurance contracts with the medical care recipients. These contractual rights of subrogation are specifically contemplated by the statute authorizing creation of BCBSM as a nonprofit corporation…. No defenses should be stricken until defendants have an opportunity to determine through discovery the scope of such subrogation rights."

Defendants' Memorandum at 16-17, 14, 14 n.9.

None of this discovery relates to the subrogation defenses at issue in this motion. Defenses which can never state a legal defense to plaintiffs' causes of action should be rejected now.

2. Discovery of the Alleged Comparative Fault of The State and Blue Cross Is Irrelevant to The Validity Of the Subrogation Defenses

Plaintiffs have *not* moved to dismiss any defenses which assert a claim of comparative fault or assumption of the risk on the part of the State or Blue Cross. Nevertheless, defendants repeatedly assert that discovery is necessary, for purposes of this motion, as to the fault of the State and Blue Cross:

> "Numerous facts have already come to light showing Plaintiffs' substantial involvement in smoking, as set forth below, and discovery is plainly necessary to fill out the record."
>
> "For example, *the State* forbids employers from discriminating against employees on the ground that they smoke. Minn. Stat. § 181.938. Although certain smoke-free areas are required, the law also authorizes businesses to establish smoking areas. Minn. Stat. §§ 144.415 - 144.416. *The State* has authorized small cities to own and operate their own liquor stores that sell tobacco. *Id.* § 340A.601. It also authorizes blind persons to operate vending stands that sell tobacco, among other things, in state buildings. *Id.* § 248.07."
>
> "Discovery is needed to determine the extent to which *the State* sells cigarettes to prison inmates, patients at hospitals and so forth. Moreover, even if it did not sell cigarettes, it has the ability to exercise extensive control over smoking by these groups as well as by others, such as state employees, students of public high schools and colleges, etc."
>
> "*[T]he State* has always affected the level of smoking in Minnesota by the level at which it set the tax… [D]iscovery is plainly needed to explore this and other methods of control."

Defendants' Memorandum at 23, 24-25 n.19, 25 n. 20, 26 (emphasis added).

Defendants also argue at length that the State's conduct in performing routine governmental functions should somehow be compared with four decades of an intentional and pervasive fraud on the market by this industry, an incredible proposition in and of itself, but one which is wholly irrelevant to the validity of subrogation defenses in this action.

3. The Dismissal of Subrogation Defenses Will Narrow And Focus the Scope of Discovery in This Case

When all else fails, defendants threaten that dismissal of the subrogation defenses will not narrow the scope of discovery because defendants intend to argue that this same discovery -- inherently unmanageable -- would be necessary to the proof of proximate cause and damages in this case. This threat is entirely unjustified.

With respect to proximate cause, there is a wealth of jurisprudence on the proof of proximate cause in a variety of contexts where there has been a pervasive fraud on an entire market. The analysis is inevitably fact specific, and the manner of proof may range from cases in which proximate cause is presumed to cases in which courts entertain expert evidence and/or statistics. The present action will simply not require discovery and evidence on thousands of individual smokers.

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With respect to damages, cigarette smoking is the most extensively documented cause of disease ever investigated in the history of biomedical research. *See* Complaint at ¶ 76. In addition, statistical models have been developed to assess the economic costs of smoking attributable deaths and disease. *Id.* at 79. While there may well be limited discovery of certain data from the State and Blue Cross relating to damages, there is no legitimate need for this discovery to be broadly defined.

C. SUBROGATION IS NOT THE EXCLUSIVE REMEDY IN THIS CASE

The State and Blue Cross specifically chose to assert only direct causes of action in their complaint, based upon the breach of direct duties owed by defendants to the State and Blue Cross and based upon the nine specific causes of action pled in the complaint. In their memorandum, defendants' first substantive argument is a challenge to all of these direct claims on the basis that subrogation is an exclusive remedy. However, defendants have failed to bring a motion to dismiss all of these claims. Indeed, defendants state in their memorandum that "the Court need not (and Defendants submit should not) decide the merits of Plaintiffs' independent claim now…." Defendants' Memorandum at 10. Accordingly, as plaintiffs stated in their opening memorandum, for purposes of this motion, the complaint must be taken as pled. Because defendants have not moved to dismiss the entire complaint, and because defendants admit that the Court should not decide the issue of the plaintiffs' independent claims at the present time, plaintiffs present herein only a brief reply to this argument.

1. Minnesota Law Does Not Mandate Subrogation in All Cases

In the memorandum filed in support of this motion, plaintiffs addressed the principles of law establishing the right of plaintiffs to plead their own complaint and the general rule against exclusivity of remedies. *See* Memorandum in Support of Plaintiffs' Motion at 9-11. In addition, plaintiffs cited *Pelowski v. Frederickson*, 263 Minn. 371, 116 N.W.2d 701 (1962), a case in which the Minnesota Supreme Court faced -- and rejected -- a defendant's attempt to limit a plaintiff's cause of action to subrogation. The Court stated:

> This cause of action is not dependent upon subrogation to the rights of decedent's surviving spouse, but rather upon a claim of breach of a decedent's duty to third-party plaintiffs.
>
> ***
>
> [T]he third-party plaintiffs… have a sufficient basis for their action because of the breach of an independent duty owing to them by the decedent and hence need not base it upon any theory of subrogation to any cause of action of plaintiff against decedent.

263 Minn. at 375, 116 N.W.2d at 704.

Defendants fail to address *Pelowski* in their responsive memorandum. Instead, defendants cite a variety of cases, many of which stand for the unremarkable proposition that subrogation is an available remedy to pursue against a wrongdoer and that in subrogation the subrogee "stands in the shoes" of the subrogor. *See, e.g., Westendorf v. Stassen*, 330 N.W.2d 699 (Minn. 1983); *Regie de L'assurance Automobile Du Quebec v. Jensen, 399 N.W.2d 85 (Minn. 1987).*

The decisions cited by defendants simply do not stand for the proposition that subrogation is the sole remedy in all circumstances. For example, a primary case upon which defendants rely is *Holmes v. Securities Investor Protection Corp*., 112 S.Ct. 1311 (1992). *See* Defendants' Memorandum at 11-12. Defendants represent that this case stands for the "bedrock rule" that persons incurring an "indirect" injury are barred from pursuing any claims in the absence of subrogation. *Id.* However, in *Holmes*, the main claim asserted was subrogation itself, which the Supreme Court rejected. 112 S.Ct. at 1319-21. There was also an alternative cause of action, based upon a claim of a "statutory entitlement" under the federal Securities Investor Protection Act. *Id.* at 1321. The Court also rejected this claim, in a brief, two-paragraph discussion of that particular act. *Id.* Nothing in the opinion even suggests that subrogation is an exclusive remedy.

Other cases cited by defendants -- mostly from the 1800s -- merely found direct claims not available under the particular facts of each case. These cases focused, in essence, on a proximate cause analysis and found the claims "too remote." *See, e.g. Mobile Life Ins. Co. v. Brame*, 95 U.S. 754 (1878); *Northern States Contracting Co. v. Oakes*, 191 Minn. 88, 253 N.W. 371 (1934); *Anthony v. Slaid*, 11 Met. 290, 52 Mass. 290 (1846). It should be noted that under modern Minnesota law, "[a] direct cause is a cause 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. Moreover, each of these

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cases involved only a single, isolated incident of wrongdoing. By contrast, the present case involves a sustained and systemic pattern of wrongdoing which has directly caused the most pervasive public health issue of our time. Complaint at ¶ 76. The impact of defendants' conduct on health costs was not only foreseeable -- it was intentional. *Id*. at ¶ 75. Under these circumstances, the harm -- unprecedented expenditures for medical costs -- certainly is not remote.

In fact, one of the cases cited by defendants specifically recognized that a direct action would be available to an insurance company if there was an independent duty. *Connecticut Mutual Life Ins. Co. v. New York & N. H. R. Co*., 25 Conn. 265, 275 (1856) ("an independent right of action resides in the party to whom the duty was to be performed"). In addition, the court in *Connecticut Mutual* found that a duty would be owed directly to the insurance company if the defendants had an "intent to injure" the insurer. *Id*. at 276 ("every man owes a duty to every other not to intentionally injure him."). This, of course, is precisely the posture of the present case, where both an independent duty and intent to injure are alleged.[1]

2. Subrogation Under Medicaid Law Is Not Exclusive

The presence of subrogation rights under Medicaid, General Assistance Medical Care and MinnesotaCare law does not preclude the State from choosing to proceed in a direct action. Under well-established rules of construction, a cause of action provided by statute is cumulative of other remedies unless there is clear statutory language making the statutory remedy exclusive. *See*, e.g., *In re Shetsky*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953) ("An existing common-law remedy is not to be taken away by a statute except by express wording or necessary implication.").

Clearly, the legislature knows how to make a remedy exclusive when it chooses do so. For example, the Minnesota Workers' Compensation Act provides that "[t]he liability of an employer by this chapter is *exclusive and in place of any other liability* to such employee...." Minn. Stat. § 176.031 (emphasis added). In contrast, the defendants point to no such language in the present statutes, and, indeed, the statutory frameworks for Medicaid, General Assistance Medical Care and MinnesotaCare contain no similar language indicating that subrogation is the exclusive means for recovering health care expenditures. *See* Minn. Stat. §§ 256B.042, 256B.37 (Medicaid); § 256D.03 (General Assistance Medical Care); §§ 256.9353, subd.8, 256D.015 (MinnesotaCare).[2]

In an attempt to argue that subrogation under these statutes is exclusive, defendants claim that the State did not have the right, at common law, to recover medical assistance expenditures. Defendants' Memorandum at 15. However, the only authorities defendants offer for this argument are two cases holding that the State could not recover public assistance payments from an *individual recipient* or from the *recipient's estate* at common law. *See In re Estate of Turner*, 391 N.W.2d 767, 768 (Minn. Ct. App. 1986); *In re Dufek's Estate (County of Brown v. Penkert)*, 164 Minn. 55, 204 N.W. 469, 469 (1925).

By contrast, the present case does not involve a claim against the recipient of medical services, but, instead, against third-party wrongdoers. In this situation, the Minnesota Supreme Court has explicitly recognized the authority of the government, at common law, to bring an action to recover assistance from a responsible third party. In *County of Brown v. Siebert*, 175 Minn. 39, 220 N.W. 156 (1928), the Court held that a county, in the absence of statutory authority, could bring a common law action against a husband who had deserted his wife to recover public assistance furnished during his absence. Significantly, the Court distinguished one of the decisions cited by defendants in the present case and found that the "question here is different" from the issue of whether a county could recover public assistance from the recipient. *Id*., 220 N.W. at 157 (citing *In re Dufek's Estate (County of Brown v. Penkert)*, 204 N.W. at 469).

In view of this authority, defendants' accusation that plaintiffs took "badly out of context" the decision in *Davis & Michel v. Great Northern Ry*., 128 Minn. 354, 151 N.W. 128 (1915) is entirely unwarranted; the issue of a statute creating a right not existing at common law has no application in this case.

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[1]Other cases cited by defendants are duplicates of cases from defendants' earlier Memorandum in Support of Answering Defendants' Motion to Dismiss and were addressed in Plaintiffs' Memorandum in Opposition. These cases deal with claims in exclusive statutory settings, such as workers' compensation, or in the context of derivative actions for indemnity. *See* Plaintiffs' Memorandum in Opposition at 22-23.

[2]Even if the State were to proceed pursuant to the medical assistance statutes, there is strong authority indicating that the comparative fault of medical assistance recipients would not be imputed to the State. *See Perkins v. Utnehmer*, 361 N.W.2d 739, 741 (Wis. Ct. App. 1984) (State's Medicaid recovery is not reduced by percentage of the recipient's contributory negligence); *Wright v. Dept. of Benefit Payments*, 90 Cal. App. 3d 446, 153 Cal. Rptr. 474, 478 (1979) ("[T]here is no basis for imputation to the department of [the Medicaid recipient's] negligence and its lien need not be reduced by the percentage of fault attributable to him."). *But See Bales v. Warren County*, 478 N.W.2d 398, 401 (Iowa 1991) (Medicaid recipient's "degree of contributory fault will be a factor in determining what amount the State is entitled to recover").

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Indeed, defendants' accusation merely compounds their error, which began with their own failure to cite any Minnesota authority supporting their argument of a lack of a common-law remedy against wrongdoers and their own failure to cite *Siebert* -- a case directly on point and directly contrary to their position.[3]

D. IN A DIRECT ACTION, AFFIRMATIVE DEFENSES MAY NOT BE IMPUTED FROM A THIRD PARTY TO THE PLAINTIFF

In the memorandum filed in support of this motion, plaintiffs presented a detailed discussion of the general rule against imputation of defenses from one person to another. *See* Memorandum in Support of Plaintiffs' Motion at 13-17. As stated in *Prosser and Keeton on the Law of Torts*:

> Ordinarily the plaintiff's action for his damages will not be barred by the negligence of any third person who may have contributed to them…. Except for vestigial remnants which are at most moribund historical survivals, "imputed contributory negligence" in its own right has now disappeared.

Id., § 74 at 529-30 (5th ed. 1984). *See also Weber v. Stokely-Van Camp, Inc*., 274 Minn. 482, 487, 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."); *Christensen v. Hennepin Transp. Co*., 215 Minn. 394, 412, 10 N.W.2d 406, 417 (1943) ("Liability for a wrong should be borne by the party who caused it.").

In their response, defendants virtually ignore this entire and well-established body of Minnesota law. In addition, defendants do not seriously contest that one of the recognized, narrow exceptions to imputed negligence applies in this case. Instead, defendants embark upon an imaginative frolic and detour in an attempt to, one way or another, focus this action on the conduct of anyone other than themselves. Defendants advance four arguments in this effort -- none of them recognized under Minnesota law.[4]

1. Defendants' Attempt to Interject the Alleged Fault Of Smokers Into the Unjust Enrichment Claim Is Another Attempt to Recast This Complaint as a Derivative Action

Defendants do not cite a single case where the comparative fault of a third party was a factor in an unjust enrichment analysis or where the well-established rules against imputation of fault were held not to apply in equity. Instead, defendants again attempt -- without authority -- to coalesce their duty and liability to individual smokers with the distinct concept of their duty and liability to the State and Blue Cross. Thus, defendants argue -- in an attempt to interject derivative principles into this litigation -- that "[p]laintiffs must establish that defendants were legally liable to pay for smokers health care." Defendants' Memorandum at 19.

This, however, is not a requirement for a claim of unjust enrichment, and this is not the way the complaint has been pled. *See* Complaint at ¶¶ 125-29. Repeatedly, the Minnesota Supreme Court has stated that the issue in an unjust enrichment claim is whether defendants had a moral obligation to pay for the harm or ought to do so "in equity and good conscience." *See, e.g.* in *Klass v. Twin City Federal Savings and Loan Ass'n*, 291 Minn. 68, 190 N.W.2d 493. 494-95 (1971). Similarly, in *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. Ct. App. 1984), a case cited by defendants, the court stated that "[a]n action for unjust enrichment may be based on failure of consideration, fraud, mistake, and situations where it would be morally wrong for one Party to enrich himself at the expense of another." (Emphasis added).[5]

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[3]*United States v. Standard Oil Co*., 332 U.S. 301 (1947), also affords no support to defendants' argument that a state could not recover medical assistance at common law. In *Standard Oil*, the Supreme Court held that the federal government could not seek medical care expenditures from a third-party tortfeasor. However, the Supreme Court specifically recognized the more limited scope of federal as opposed to state common law powers. *Id.* at 313.

[4]Generally, the only exceptions to the rule against imputation are in certain actions involving derivative claims, master/servant relationships or joint enterprises. *See generally* Restatement (Second) of Torts §§ 485, 486, 491 and 494. The closest defendants attempt to even argue the application of one of these exceptions is to suggest that "[t]he relationship between the State and its citizens resembles in many ways that of a joint enterprise." Defendants' Memorandum at 23 n. 17 (emphasis added). The basis for this statement is defendants' sweeping assertion that the State "is controlled by the public with equal rights of all citizens to participate in governance…." *Id.* This argument is so implausible that even defendants do not contend that there actually is a joint enterprise between the State and its citizens.

[5]Defendants cite comment b of the Restatement of Restitution § 1 in an effort to argue that "benefit" is narrowly defined as satisfying another's debt or duty, and from this defendants argue that plaintiffs must show an underlying liability to smokers. Defendants' Memorandum at 18-19. However, consistent with Minnesota law, the Restatement definition of "benefit" is much broader. Thus, comment b to Section 1 of

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Here, defendants have reaped substantial benefits -- in the form of billions of dollars of profits -- from illegal and unlawful conduct. This illegal and unlawful conduct has resulted in increased health care expenditures directly attributable to cigarette smoking. As a result, the State and Blue Cross have been required to pay for the medical costs stemming from defendants' unlawful acts. In equity and good conscience, it would be unjust for defendants to enrich themselves at the expense of plaintiffs.

Moreover, the unwarranted interjection of the fault of individual smokers -- which would render this litigation virtually unmanageable -- would frustrate the basic tenet of equity that no wrong will be without an adequate remedy. *See Brown v. Maplewood Cemetery Ass'n*, 85 Minn. 498, 514, 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."). Indeed, equity exists to prevent the precise outcome that defendants attempt and to ensure that plaintiffs' remedy is not lost because of a multiplicity of claims. *Fegelson v. Niagara Fire Ins. Co*., 94 Minn. 486, 489, 103 N.W.495, 497 (1905) ("Such a remedy is neither certain nor adequate, depending as it does upon the aggregate result of a multiplicity of vexatious actions. It is clear upon principle and authority that equity has undoubted jurisdiction to prevent the necessity for such a multiplicity of actions and to afford the plaintiff a certain and adequate remedy.").

2. The Minnesota Comparative Fault Statute Does Not Require The Assessment of the Alleged Fault of Individual Smokers

Defendants' argument regarding application of the Minnesota Comparative Fault Statute is difficult to discern. *See* Defendants' Memorandum at 21-22. The reason for this confusion seems to be that defendants appear to be arguing -- but unwilling to state in clear language -- that individual smokers should be considered third-party defendants in this action. In other words, this industry is suggesting that its customers -- who have done nothing more than purchase and consume cigarettes in a manner intended by these defendants -- should in some fashion be considered defendants. Thus, in cryptic terms defendants state that, "the defendant may still be jointly and severally liable with absent parties," implying that smokers should be "jointly and severally liable" for damages. Defendants' Memorandum at 21. Similarly, defendants cite the "15 percent rule," which assumes the presence of smokers as jointly and severally liable for the damages in this case. *Id*., citing Minn. Stat. § 604.02.

If this industry seriously contends that its customers -- who have already suffered death and disease in unprecedented numbers -- should also be held jointly and severally liable for the damages in this action, defendants should state so directly and articulate a basis upon which recovery of damages conceivably could be sought against smokers as third-party defendants.[6]

3. The Conduct of the State and Blue Cross Does Not Provide A Legal Basis for the Imputation of the Smokers' Alleged Comparative Fault

In their memorandum, defendants devote a great deal of effort in an attempt to cast blame on the plaintiffs in this case, particularly the State. Many of these allegations are quite far reaching, such as defendants' citation to a Minnesota statute which authorizes blind persons to sell tobacco in state buildings. At best these contentions are relevant to the comparative fault or assumption of risk by the State or Blue Cross -- defenses which are not at issue in the present motion (but obviously will be challenged by plaintiffs at the appropriate time, as will unwarranted discovery).

The sole basis upon which defendants attempt to link the conduct of the State and Blue Cross to the conduct of the smokers in this argument is by way of Section 495 of the Restatement (Second) of Torts, which states:

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the Restatement provides that "[t]he word 'benefit,' therefore, denotes any form of advantage." In addition, Section 1 itself, which is titled "Unjust Enrichment," provides in its entirety that, "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."

[6]In their memorandum, defendants state that the Minnesota Comparative Fault Statute requires that the fault of smokers must be considered "whether or not smokers are parties to the lawsuit or liable to the Plaintiff." Defendants' Memorandum at 17; *See also Id.* at 20. For this proposition, defendants cite *Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978), which recognizes that there are situations in which an absent party's fault should be considered "whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release." *Id.* at 903. As noted in *Lines*, this situation frequently occurs when one defendant settles with the plaintiff prior to trial; that defendant's fault still would be assessed on the special verdict form. Since that defendant has settled, it would be no longer a party to the lawsuit and no longer liable to the plaintiff. However, there still must be a basis upon which recovery could have been sought against the absent defendant. *See Dahlbeck v. Dico Co*., 355 N.W.2d 157, 164 (Minn. Ct. App. 1984) ("Section 604.01 only requires submission of fault as to any '*person against whom recovery is sought*.'") (emphasis added) (quoting Minn. Stat. § 604.01).

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> A plaintiff is barred from recovery if the negligence of a third person is a legally contributing cause of his harm, and *the plaintiff has been negligent in failing to control the conduct of such person*.

(Emphasis added). At the threshold, it is clear that Section 495 has nothing to do with imputation of negligence at all. Instead, under Section 495 the focus is on the conduct of the plaintiff himself and whether the plaintiff -- and not the third person -- was negligent. Thus, at best, the defendants have asserted an argument as to why the State and Blue Cross themselves are at fault, an issue not involved in the present motion.[7]

Moreover, as is clear from the face of this provision, Section 495 is not applicable even as to the fault of the State and Blue Cross unless, *inter alia*, the State and Blue Cross were (1) negligent in (2) failing to control the conduct of individual smokers (or, if defendants' arguments are taken at face value, for failing to control the conduct of defendants themselves).

The facts that defendants point to in support of their contention of "negligent control" are, quite simply, routine governmental regulatory functions of the State. Thus, defendants cite to the fact that the State authorizes and taxes the sale of cigarettes and, in limited circumstances, distributes cigarettes in state institutions. Defendants' Memorandum at 24-25. Certainly, it would be a remarkable change in traditional jurisprudence to find that a State "controls" its citizens -- and is therefore responsible for any negligence on their part -- merely through the exercise of routine governmental regulatory functions.[8]

Moreover, under Section 495 defendants would have to demonstrate not only that the State had the ability to "control" the conduct of smokers (or defendants) -- but that the State's failure to do so was negligent. Since the conduct of the State at issue is the authorization and taxation of the sales of cigarettes, defendants would have to make an argument -- quite novel, to say the least -- asserting "negligent authorization" or "negligent taxation" of the sale of cigarettes. Defendants cite no cases which even remotely suggest support for this proposition.[9]

Indeed, defendants' litigation position is quite at odds with their position outside of the courtroom, where the industry invests a monumental expenditure of resources to advertise and lobby against the regulation and taxation of cigarettes.

Finally, defendants' argument regarding government regulation is premised in large part on their attempt to mischaracterize this action as seeking damages from an industry for merely selling a legal product. There is a critical -- and immense -- gap in this logic. The fact that a product is legal does not mean that the defendants' conduct was lawful. Indeed, defendants' hypothetical relating to casinos is instructive. *See* Defendants' Memorandum at 23. Defendants may be correct that a casino would not be liable for damages if the casino had done nothing more than operate as a legal business. However, it would be an entirely different matter if the casino engaged in unlawful conduct -- for example, operating with loaded dice and rigged decks of cards and misrepresenting the odds. Similarly, in the present case it is not the mere selling of cigarettes for which defendants are being sued; instead, the essence of this action is a decades-long conspiracy of wrongdoing. To even begin to

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[7]In addition to the language of Section 495 itself, other portions of the Restatement further illustrate the error of defendants' contention that Section 495 addresses imputed negligence, as opposed to the negligence of the plaintiff himself. For example, the various sections of the Restatement which relate to imputed negligence are contained within Topic 4 of the Restatement, which is titled "Contributory Negligence of Third Persons; Imputed Negligence." Under Topic 4, the only exceptions to the rule against imputed negligence are certain actions involving derivative claims (Section 494), master/servant relationships (Section 486) or joint enterprises (Section 491). *See generally* Restatement (Second) of Torts § 485. By contrast, Section 495 is not in Topic 4 of the Restatement but is in Topic 5, titled "Failure to Control Conduct of Third Persons." Thus, defendants' attempt to depict Section 495 as "giv[ing] rise to imputed contributory negligence" is incorrect. *See* Defendants' Memorandum at 22.

[8]The only mention of Blue Cross in this argument is defendants' reference to the theoretical potential for charging higher premiums for smokers. Defendants' Memorandum at 26 n.23. However, defendants fail to note that Blue Cross seeks damages only for its group policies -- and not for persons covered by individual health service plan contracts. *See* Complaint at ¶ 8(g).

[9]Defendants cite only three cases under Section 495, all from other jurisdictions. Defendants represent that these cases stand for the proposition that "the negligent control issue under section 495 is a jury question." Defendants' Memorandum at 24 n.l8. This trilogy of cases, however, lends virtually no support to defendants' argument. Remarkably, one of these three cases held that the submission of contributory negligence to the jury was reversible error. *Mitchell v. Colquette*, 379 P.2d 757, 760 (Ariz. 1963). A second case also reversed a judgment entered for the defendant, finding that a jury instruction on the duty of passenger in an automobile to take action for her own protection was prejudicial. *Otterbeck v. Lamb*, 456 P.2d 855, 859-60 (Nev. 1969). The third case, from Kansas, specifically noted Minnesota's hostility to the doctrine of imputed negligence. *See Scott v. McGaugh*, 506 P.2d 1155, 1159 (Kan. 1973), citing *Weber*, *supra* ("The Minnesota Supreme Court found the doctrine of imputed negligence so distasteful in automobile cases that it refused in l966 to continue to recognize it.").

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equate this industry misconduct -- involving a massive and intentional conspiracy of deceit and misrepresentation, the purposeful marketing to youth and adolescents, the intentional addiction of the majority of its customers and even the withholding of a safer product from the market -- with the customary regulatory functions of a government is an affront to traditional concepts of justice and jurisprudence.[10]

4. The State and Its Citizens Are Not a Single Entity For Purposes of Assessing Fault

In their final argument regarding imputation of negligence, defendants assert that the State and its citizen-smokers are a single entity, indistinguishable for purposes of assessing fault in this litigation. As authority for this proposition, defendants start with a meaningless citation to the Minnesota Constitution (which merely states in its preamble, "We, the people…") and end with a citation to Judge Lord's decision in *Reserve Mining* on the accountability of parent corporations for the actions of a subsidiary. *See United States v. Reserve Mining Co*., 380 F. Supp. 11, 27-28 (D. Minn. 1974), *aff'd in material part and modified*, 514 F.2d 492 (8th Cir. 1975) (finding that "this subsidiary is being used as a shield to protect the parents from the consequences of an illegal act" and noting "[t]he use of the corporate entity to frustrate discovery….").

The State and Blue Cross would be more than willing to stipulate that Judge Lord's views on the accountability of parent corporations will be the law of this case, a proposition that may give some pause to B.A.T. Industries P.L.C. -- as well as to the parent corporations of other cigarette manufacturing defendants. However, the relationship between the State and its citizens is not analogous to that between a corporation and its shareholders for purposes of imputing fault, and no case cited by defendants even suggests this analogy.

Moreover, as defendants surely would agree, in the corporate setting even the fact that one corporation wholly owns another corporation is not sufficient by itself to pierce the corporate veil, although the parent obviously has the ability to control the subsidiary through its ownership interest. Nor, as defendants surely agree, is it sufficient merely to show that benefits, i.e. profits, flow to the parent corporation from the subsidiary. Thus, even if, as defendants loosely allege, "the Minnesota electorate" has the ability to "control" the State -- or that, as plaintiffs agree, taxpayers will benefit from any recovery in this action-- these are woefully insufficient bases for an argument that the State and its smoker-citizens are legally inseparable entities for purposes of assessing fault.

E. INDIVIDUAL SMOKERS HAVE SEPARATE AND DISTINCT CLAIMS AND ARE NOT NECESSARY PARTIES IN THE PRESENT ACTION

The damages incurred by the State and Blue Cross, in the form of increased expenditures for *medical costs*, are distinct and separate from any personal injury damages individual smokers have suffered, such as *bodily and mental harm and loss of earnings*. Even defendants admit the distinctiveness of these two sets of claims. Thus, defendants note "the possibility of a later suit by smokers for additional damages such as pain and suffering" -- but not medical costs. Defendants' Memorandum at 33. Similarly, defendants state that "individual smokers once again could file another suit for their injuries *other than medical expenses*, such as pain and suffering." *Id*. at 34 (emphasis added). While defendants' concern about finally bearing full accountability for their unlawful conduct may be justified, such a prospect would not subject defendants to *duplicative* recovery since -- as defendants themselves recognize -- the damages for the State and Blue Cross are distinct and separate from the damages for individual smokers. In fact, not only are the damages distinct and separate, but the causes of action are distinct and separate since the State and Blue Cross have pled only direct claims.

Given these admissions by defendants, their attempt to argue duplicative recovery and joinder is perplexing. Defendants' reliance on Rule 19.01, Minn.R.Civ.P., is entirely misplaced since, in the words of the rule, the smokers cannot "claim[ ] an interest relating to the subject of the action" and since there is no "substantial risk of incurring double, multiple, or otherwise inconsistent obligations."

Nor is defendants' citation to the rule against claim splitting applicable in the present case. The claims of the State and Blue Cross in this action -- and the claims of individual smokers -- involve separate and distinct causes of action and separate and distinct categories of damages. *See* 10B Dunnell Minn. Dig. Judgments § 17 at 48-49. In fact, even in the context of derivative actions, the Minnesota Supreme Court has

[10]Similarly, defendants' contention that the payment of cigarette taxes is relevant to the issue of damages is based upon a faulty premise. Taxes are the cost of conducting business in compliance with the law; the payment of taxes is not a license to violate the law. Thus, for example, the fact that there is an alcohol tax is not relevant to the issue of the quantum of damages in a dram-shop action brought for the illegal sale of alcohol.

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indicated that the recovery of medical expenses by a subrogated insurer, on the one hand, and the recovery of other personal injury damages, on the other, may not be considered splitting a cause of action. *Travelers Indemnity Co. v. Vaccari*, 310 Minn. 97, 245 N.W.2d 844 (1976). Indeed, in *Travelers Indemnity*, the Minnesota Supreme Court specifically stated -- in direct opposition to defendants' current position -- that allowing the subrogated insurer to proceed with a claim for medical expenses "minimizes duplication of coverage, reduces premiums, and promotes an equitable allocation of loss." *Id.* at 847.[11]

The distinctiveness of the present claims for medical expenditures -- and the spuriousness of arguments concerning duplicative recovery -- are further underscored by the fact that it is unquestionably the State and Blue Cross which are the proper parties to assert these claims. Thus, for example, under the Minnesota Collateral Source Statute, generally any recovery for medical expenses ultimately belongs to the payor of those expenses. Minn. Stat. § 548.36 (1986). Similarly, the right to Medicaid recovery, which is not encompassed under the Collateral Source Statute, clearly belongs to the State. In fact, it is well-established that even for traditional insurers in the subrogation context, "the insurer is the real party-in-interest where it fully reimburses the insured for his loss." *Lines v. Ryan, supra*, 272 N.W.2d at 903.[12]

Finally, defendants conclude their memorandum with a cavalier request that this Court dismiss this action in view of two pending class actions involving individual smokers. *See* Defendants' Memorandum at 35. In obvious recognition of the insupportable nature of their plea, defendants barely attempt to rationalize this extreme request. Indeed, such a suggestion is completely without foundation. The most notable class action, *Castano v. American Tobacco Co*., Civ. No. 94-1044S (E.D. La. Feb. 17, 1995), was certified only conditionally and only on the issues of liability and punitive damages. The court in *Castano* specifically declined to certify the class for damages or for medical monitoring. *Id.* at 2-3, 33. Moreover, the definition of the certified class includes only "nicotine-dependent persons," along with their estates, representatives and family members. *Id.* at 33. Third-party payors are not a part of the class. Also, *Castano* is an opt-out class and participation is not mandatory, even for class members (i.e. individual smokers). *Id.* at 33. Finally, it is plaintiffs' understanding that the class in *Castano* is not seeking damages for personal injury but, instead, only damages for nicotine addiction, such as emotional distress. *Id.* at 2-3 ("Plaintiffs do not seek recovery of personal injury damages in the form of physical pain and suffering or any related damages.").[13]

The second class action, *Engle v. R.J. Reynolds Tobacco Co*., No. 94-08273 (11th Cir. F1.), also includes only individual smokers and their survivors and also is an opt-out class. *Id.* at 2. While the damages sought in *Engle* are more expansive than *Castano* and include traditional personal injury claims, the State and Blue Cross are not class members, and it would hardly be appropriate, if even feasible, to force the State and Blue Cross to prosecute their substantial claims in a state court in Florida.

The State and Blue Cross -- exercising the traditional rights of plaintiffs to select their own causes of action and their own forum -- chose to file the present case as a direct action on their own behalf, in their own State of Minnesota, under Minnesota law. Defendants simply do not have the prerogative to usurp this fundamental right of these -- or any other -- plaintiffs.

III.

CONCLUSION

For all of the foregoing reasons, the State and Blue Cross respectfully request that this Court grant their motion for judgment on the pleadings.

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[11] *Travelers Indemnity* arose in the context of the settlement and release of claims by the insured. The Court found that such release did not extinguish the insurer's subrogation rights, where the tortfeasor had notice of the insurers' subrogation interest. 245 N.W.2d at 845.

[12] Moreover, Minnesota courts have the authority to and are well accustomed to protecting against the potential of duplicative recovery, in a variety of contexts. *See, e.g., Folstad v. Eder*, 467 N.W.2d 608, 613 (Minn. 1991) (after subrogated damages claim settled by workers' compensation carrier, those damages are "now out of the lawsuit"); Minnesota Antitrust Law, Minn. Stat. § 325D.57 ("In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.").

[13] While defendants cited to the *Castano* class certification order in their memorandum, their appendix of cases included two earlier *Castano* orders but not the February 17, 1995 certification order. A copy of this order is therefore included in Plaintiffs' Appendix, attached hereto.

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SPECIAL ATTORNEYS FOR THE STATE OF MINNESOTA and ATTORNEYS FOR BLUE CROSS AND BLUE SHIELD OF MINNESOTA

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