STATE OF MINNESOTA
IN THE 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; BROWN & WILLIAMSON TOBACCO CORPORATION; LORILLARD TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC.; R.J. REYNOLDS TOBACCO COMPANY; AND LIGGETT GROUP, INC.,
Defendants-Appellants;

and

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

Case No. C1-95-1324

October 20, 1995

APPELLANTS' BRIEF AND ADDENDUM

STATEMENT OF THE CASE

Blue Cross/Blue Shield of Minnesota ("BCBSM") has entered into contracts that require it to pay the medical expenses of smokers covered under group insurance plans provided by their employers. Complaint ("Compl.") ¶ 8(b). (A-7)[1] BCBSM alleges that appellants' conduct has resulted in increased medical expenses for those insured employees, and seeks to recover those costs. *Id*. ¶ 8(d) (A-8) The Complaint includes pages of allegations concerning the relationship between smoking and health, and includes nine counts: breach of a special duty, antitrust conspiracy, monopolization, consumer fraud, unlawful trade practices, deceptive trade practices, false advertising and two restitution claims. At numerous points, the Complaint emphasizes the alleged effects of appellants' actions on the decisions and health of individual smokers. *See*, *e.g*. Compl. ¶¶ 2, 3, 8(e)-(f). (A-2, 6) This is inevitable because BCBSM does not allege any harm to itself, with respect to any of the claims in the Complaint, except as a consequence of injuries sustained by individual smokers that BCBSM insured.

The remedy the law affords BCBSM in these circumstances is a subrogation action -- an action with the same elements and subject to the same defenses as one brought by the individual smokers themselves. However, BCBSM steadfastly disclaims any reliance on its contractual or common-law subrogation right to bring a cause of action against appellants for the harm they allegedly caused individual insured smokers. Indeed, in a motion to strike all of appellants' defenses based on the actions of individual smokers, BCBSM contended that individual smokers' conduct and its legal consequences were wholly irrelevant to this suit. Instead, BCBSM claims that appellants violated a duty owed directly to BCBSM as a provider of health care to those smokers. *See* Compl. ¶ 8(g). (A-8-9)

Appellants, defendants below, filed a motion in the Ramsey County District Court to dismiss BCBSM for lack of standing. (A-56) Appellants argued that under this Court's decision in *Northern States Contracting Co. v. Oakes*, 191 Minn. 88, 253 N.W. 371 (1934), BCBSM had suffered neither a legally cognizable injury nor an injury in fact and that its remedy, if any, lay in its contractual right to subrogation. (A-112-113, 116, 136-147) The District Court denied the motion. *See* May 18, 1995 District Court Order (Chief Judge Fitzpatrick). (A-148) Appellants then filed a petition for discretionary review in the Court of Appeals, in which they argued that the District Court's judgment was irreconcilable with *Northern States*. The Court of Appeals denied discretionary review. with one judge dissenting on the ground that the petition "involve[d] solely a question of law that was previously decided to the contrary by the Minnesota Supreme Court in *Northern States*." July 18, 1995 Court of Appeals Order at 3. (A-160) This Court granted appellants' petition for review on September 20, 1995.

STATEMENT OF FACTS

BCBSM is a statutorily defined "nonprofit health service plan corporation." It operates like other health insurance companies who provide employer group health insurance. BCBSM enters into contracts with employers to provide certain specified health care services to their employees in exchange for predetermined premiums. BCBSM also enters into

[1] Citations to the Appendix are denoted herein as "A-__."

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contracts with so-called "preferred" providers who agree to provide specified medical services to the covered employees at predetermined rates. *See* Minn. Stat. § 62C.02(7) (1994).[2] BCBSM may also reimburse insured employees for a portion of the costs of service rendered by providers who do not have a contract with BCBSM.

Like other health insurers, BCBSM recognizes that in some circumstances it may seek to recover the costs of medical care it provides to a covered employee who is harmed by a third-party tortfeasor. Hence, BCBSM presumably has inserted subrogation provisions into its contractual agreements with subscribing employers, and, in any event, retains a common law right to step into the shoes of the insured and prosecute his claim. In either case, of course, BCBSM would be subject to all the defenses the tortfeasor would have against the insured.

BCBSM is distinct from other health insurers in one critical respect: its nonprofit status. BCBSM's enabling statute, the Nonprofit Health Service Plan Corporations Act ("the Act"), Minn. Stat. § 62C.01 (1994), et seq., includes a specific requirement that BCBSM pass through all increases or reductions in costs to the subscribing employers. Specifically, the Act mandates that the premiums that BCBSM receives from subscribing employers must fully cover the "actuarial projection of the cost of providing or paying for services." Minn. Stat. §§ 62C. 15 & 62A.02, subd. 3 (1994). The Act also authorizes the State Commissioner of Commerce to reject BCBSM's proposed premiums "if the proposed premium rate is… not adequate" to cover BCBSM's costs. Minn. Stat. §§62C.15, subd. 2(b) (1994); 62A.02, subd. 3(3)-(4) (1994). In other words, BCBSM must pass through all its increased costs to its subscribers in order to comply with the Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal implicates issues of tremendous consequence for this litigation, the law of torts, the requirement of standing, and for the entire judicial system. Rejection of BCBSM's legal theory will reaffirm bedrock principles of law established in Northern States. Allowing BCBSM to go forward with this suit, on the other hand, would signal a sea-change in the way in which the judiciary resolves disputes, in derogation of fundamental common-law principles.

BCBSM's Complaint rests on the false premise that it can recover for certain costs which (it claims) are associated with smoking, even if concepts like proximate cause, assumption of the risk and comparative negligence would preclude recovery by individual smokers. This Court can significantly streamline this litigation by confirming that (i) the cause of action lies with the party directly injured by an alleged tortfeasor and (ii) parties further removed cannot bring their own action (except through subrogation) and certainly can never inherit a stronger claim than the directly injured party.

The issues in dispute here also go to the heart of the law of torts. BCBSM cannot bring this direct cause of action in its own name without violating the principle elaborated by this Court in *Northern States*. *Northern States* establishes that 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. Alteration of that basic principle would work a fundamental change in tort law, raise the specter of double recoveries, and introduce profound uncertainties about the scope of tort law liability and duties.

Furthermore, the basic requirements of standing under Minnesota law preclude BCBSM's suit. BCBSM admits that it has passed on all of the alleged increases in health care costs to its customers, as its enabling statute requires it to do. Having passed on all of the alleged increases, however, BCBSM has also shifted on to others all of the harm appellants are alleged to have inflicted. By the terms of its own pleadings, BCBSM lacks any injury in fact. Nor can BCBSM sue under explicit statutory authority or as representative of its subscribing employers, for no statute remotely supplies BCBSM with standing and BCBSM represents no one but itself.

Finally, this appeal raises fundamental questions about the nature of adjudication and the meaning of "Due Process of Law." BCBSM, implicitly acknowledging the tenuousness of its alleged injury, claims that it can prosecute this action on behalf of individual smokers and their employers, or, alternatively, on behalf of society as a whole. BCBSM seeks to convert a legal system designed to provide a remedy to injured individuals into one that allows entities without a direct stake to force an accounting of certain societal costs they claim are associated with a lawful activity. In effect, BCBSM wishes to bring an ill-defined class action with none of the traditional procedural protections for defendants and class members. But these desires cannot be reconciled with the judiciary's traditional functions or with constitutional principles. Unless the Due Process rights of appellants, individual smokers, and their employers are to be sacrificed in the name of an alleged

[2] The statutes cited herein are reproduced in pertinent part in the Addendum attached to this brief.

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health care crisis, BCBSM's suit must fail.

The argument that follows deals *first* with BCBSM's effort to maintain this action on its own behalf, and *second* with its suggestion that it may sue as a representative of insured employers or of society generally.

ARGUMENT

I.

BCBSM CANNOT BRING A DIRECT ACTION AGAINST APPELLANTS FOR THE ALLEGED INJURIES OF ITS INSUREDS ALLEGEDLY CAUSED BY CIGARETTE SMOKING.

A. This Court's Decision in Northern States Bars BCBSM's Direct Action.

This Court's decision in *Northern States* controls BCBSM's claims. As the dissenting judge in the Court of Appeals observed, BCBSM's claim for relief presents solely a "question of law that was previously decided to the contrary by the Minnesota Supreme Court in *Northern States*." July 18, 1995 Court of Appeals Order at 3. (A-160).

In *Northern States*, the plaintiff-employer attempted to bring a direct cause of action against a defendant who had allegedly injured the plaintiff's employee and thereby increased the plaintiff's premiums for workers' compensation insurance. This Court dismissed the employer's suit, finding that "the damages sought to be recovered by the plaintiff are too remote to be the proper subject of recovery." *Northern States*, 191 Minn. at 89, 253 N.W. at 371. In reaching that conclusion, the Court began by clarifying that plaintiff's suit was "not an action wherein the plaintiff by subrogation seeks to recover what, under the Compensation Act, it has been compelled to pay to an injured employee." *Id*. The Court also stressed that "plaintiff's obligation to its employee was contractual in its nature." *Id*. The Court then relied on a consistent line of cases, including the United States Supreme Court's decision in *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 758 (1877), that rejected similar claims for relief. In all of those cases, the courts held that in the absence of a subrogation right, a plaintiff cannot recover from a third party who injured another in a manner that increased the plaintiff's contractual obligations. This Court embraced these cases and held that "the damages sought to be recovered by the plaintiff are too remote" to be recovered. Northern States, 191 Minn. at 89; 253 N.W. at 371.[3]

Under *Northern States*, BCBSM has no legal injury and no cause of action against appellants. Indeed, Northern States applies *a fortiori* to BCBSM's claim because BCBSM stands one step further removed from the injured party than the employer in Northern States. BCBSM's subscribing employers occupy the same position in this litigation as the employer denied recovery in Northern States. According to the allegations of the Complaint, the subscribing employers had to pay increased premiums to BCBSM because of the injuries sustained by their smoking employees. Complaint ¶ 8(g). (A-8-9) Northern States establishes that this harm is too remote to establish a legal injury to the employers or to give them a direct cause of action against appellants. BCBSM is one step further removed. To the extent BCBSM alleges any harm, it can point only to the costs associated with its increased expenditures on health care, pursuant to a contractual relationship with the subscribing employers, who in turn have a contractual relationship with the allegedly injured smokers. In short, BCBSM stands two contracts removed from the party with a direct injury and a direct cause of action.

B. Northern States Reflects the Broader Principle That Appellants Do Not Owe BCBSM Any Legal Duty.

BCBSM's basic theory of recovery in this case distills to a flawed syllogism: (1) appellants breached legal duties, (2) as a result of that breach, BCBSM had to expend more money on health care pursuant to its contractual obligations to its subscribers, (3) therefore, BCBSM is entitled to recover its expenditures from appellants. The flaw in BCBSM's syllogism -- a flaw to be found in each one of BCBSM's claims -- is that a plaintiff must show more than a breach of duty and a resulting harm to recover. A plaintiff must show breach of a legal duty owed to him by the defendant.[4]

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[3] The District Court committed a fundamental error in accepting BCBSM's suggestion that *Northern States* is a rule unique to the law of workers' compensation. (A-152). To be sure, the insurance policy at issue in *Northern States* was a workers' compensation policy. But this Court's decision that the employer could not recover directly for its increased premiums did not turn in any manner on the type of policy involved. Accordingly, in reaching its decision, the Court relied on cases involving fire insurance, *Rockingham Mutual Fire Ins. Co. v. Bosher*, 39 Me. 253 (1855), life insurance, *Connecticut Mutual Life Ins. Co. v. New York & New Haven R.R. Co.*, 25 Conn. 265 (1856), and cases involving simple indemnification contracts, *Anthony v. Slaid*, 11 Metc. 290 (Mass. 1846). *Northern States* no more turns on the type of policy involved than on the type of injury suffered.

[4] This point holds not only for BCBSM's common-law claims but also for its statutory claims – and indeed for any possible claim, because the law always makes breach of a duty owed

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Northern States proves the point. There, this Court assumed *arguendo* that the defendant had acted negligently and that the plaintiff-employer had suffered harm as a result. Nonetheless, this Court denied recovery because whatever duty the defendant owed to the injured employee it owed no duty to the plaintiff-employer. A plaintiff simply cannot "claim a legal injury to himself from another because the latter has injured a third person in such a manner that the plaintiff's contract liabilities are thereby affected." *Northern States*, 191 Minn. at 91, 253 N.W. at 372 (quoting Connecticut Mutual. Life Ins., 25 Conn. 265 (1856)).

In other words, *Northern States* establishes that the contractual obligations that third parties may have to an injured party do not create additional independent duties for the alleged tortfeasor. BCBSM's claim is not the "indirect" loss that occurs when a product passes through several steps in the distribution process and then causes injury to a consumer, and for which the law allows a remedy directly against the manufacturer. This case, like *Northern States*, involves a plaintiff who is not in the chain of product distribution at all, and who claims injury solely as a result of independent contractual obligations to the persons allegedly harmed. *Northern States* establishes that under such circumstances the plaintiff's harm flows, not from the actions of the defendant, but from the plaintiff's independent contractual obligation to the injured party. BCBSM's claimed harm flows from its insurance contracts and cannot fairly be traced to appellants. *See, e.g*., Brame, 95 U.S. at 757; *The Federal No. 2*, 21 F.2d 313, 314 (2d Cir. 1927) ("The cause of the responsibility is the contract; the tort is the remote occasion.")

These principles are not idiosyncratic aspects of Minnesota law. Rather they represent a venerable common-law doctrine that denies recovery to people who suffer indirect economic loss because of an injury to another. In Brame, for example, the United States Supreme Court rejected an insurance company's direct cause of action for injuries inflicted on its insured. The Court found that the injury was exclusively to the "personal rights" of the insured. "[T]hat it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act." Brame, 95 U.S. at 758.[5]

Nor can these principles be dismissed as antiquated. Courts and commentators have recently confirmed the Northern States rule and the broader premise on which it rests. *See, e.g*., *RK Constructors, Inc. v. Fusco Corp*., 650 A. 'd 153, 156-57 & n.7 (Cone. 1994) (adopting the *Northern States* rule and citing *Northern States*); *Fischl v. Paller & Goldstein*, 282 Cal. Rptr. 802 (Cal. Ct. App. 1991) (adopting *Northern States* rule); *Unique Paint Co. v. W.F. Newman Co*., 411 S.E.2d 352 (Ga. Ct. App. 1991) (same); *Erie Castings Co. v. Grinding Supply, Inc*., 736 F.2d 99, 102 (3d Cir. 1984) (same under Pennsylvania law); *see also Ore-Ida Foods, Inc. v. Indian Head Cattle Co*., 627 P.2d 469 (Or. 1981) (en bane) (no recovery of worker's compensation payments from third party); *Ferguson v. Green Island Contracting Corp*., 36 N.Y.2d 742 (1975) (employer may not recover expenses of replacing injured employee from third party tortfeasor); *Phoenix Professional Hockey Club, Inc. v. Hirmer*, 502 P.2d 164 (Ariz. 1972) (same). *See generally* W.P. Keeton et al., Prosser and Keeton on the Law of Torts at 997-1000 (5th ed. 1984); Harper, James & Gray, The Law of Torts, §25.18A, at 619-621 (2d ed. 1986).

If BCBSM has any remedy for alleged increased expenditures under its contracts, that remedy lies in its contractual and common law right to subrogation. It has long been established that, absent an express statutory cause of action, subrogation represents an insurer's exclusive remedy to recover payments made to a covered individual. *See, e.g., Great American Ins. Co. v. United States*, 575 F.2d 1031, 1033 (2d Cir. 1978) ("the authorities and the cases unanimously hold that the insurer's recovery is premised exclusively upon subrogation"); *see also id*. at 1033 n.3 (collecting cases and treatises). Indeed, the equitable remedy of subrogation developed precisely because the common law provided the insurer with no remedy at all. As the United States Supreme Court held many years ago, the insurer's right to recover from an alleged tortfeasor arises only through subrogation, and that subrogated cause of action is subject to all the defenses applicable to the insured. *See St. Louis. I.M. & S. Ry. Co. v. Commercial Union Ins. Co*., 139 U.S. 223, 235 (1891) ("in any form of remedy the insurer can take nothing by subrogation, but the rights of the

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directly to the plaintiff a condition of liability. BCBSM's two claims under the antitrust statutes, for example, fail because BCBSM is not a participant in the market alleged to be affected, and is therefore too remote from the alleged violation to bring suit. *See e.g., Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539-41 (1983). This and similar doctrines simply reflect the general principle that "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts… stand[s] at too remote a distance to recover." *Holmes v. Securities Investor Protection Corp*., 503 U.S. 258, 268-69 (1992).

[5] Even before *Brame*, the principle announced there was entrenched in the common law. *See e.g., Cattle v. Stockton Waterworks Co.*, L.R. 10 Q.B. 453 (Q.B. 1875). The *Brame* Court noted that the plaintiff could not cite "any case in this country or Great Britain where a different doctrine has been held." *Brame*, 95 U.S. at 759.

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assured; and if the assured has no right of action, none passes to the insurer"). *See also Williams v. Globe Indem. Co*., 507 F.2d 837, 840 (8th Cir. 1974) ("The rights acquired by the insurer upon payment to the insured are solely derivative rights of subrogation… the insurer stands in the shoes of the insured and takes no [additional] rights"), *cert. denied*, 421 U.S. 948 (1975). The *Northern States* Court implicitly acknowledged this point by emphasizing that the plaintiff was not bringing a subrogation action. *See Northern States*, 191 Minn. at 89, 253 N.W. at 371. BCBSM steadfastly refuses to pursue a subrogation action, apparently for one simple reason: although its claimed injury is based on alleged injury to its insureds, it does not want the Court to afford appellants their common-law defenses to those claims. BCBSM wants to be in the artificial and enviable position of pursuing the claims of its insureds while at the same time stripping appellants of their traditional defenses against such claims.[6]

C. The Principles Announced By This Court in *Northern States* Remain Vital and Cannot Be Diluted in an Attempt to Solve an Alleged Health Care Crisis.

The rule established by this Court in *Northern States* is one of the pillars of the common law and has retained its vitality for generations. The notion that the law does not create abstract duties to the world at large, but rather specific duties to specific individuals, is central to the law of torts. *See e.g*., *Palsgraf v. Long Island R.R. Co*., 162 N.E. 99 (N.Y. 1928) (opinion of Cardozo, J.) ("What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one"). The law of standing, principles of legal duty, limits on causes of action and notions of proximate cause all embody a search for the most directly injured person. The law then authorizes that person, and that person alone, to bring a direct action to redress the injuries sustained. Those who are contractually bound to reimburse the injured party may bring a subrogation claim in which they stand in the shoes of the injured party. However, the defendant may join the injured party in such an action to avoid double recovery or inconsistent adjudications. These salutary principles place necessary limits on litigation and avoid double recoveries, while simultaneously preventing the litigation of abstract or generalized grievances that would place the courts in a domain properly reserved for the legislature.

Moreover, these fundamental principles cannot be relaxed without exploding the settled limits on legal duties and potential liability. If appellants are deemed to owe a duty not only to smokers, but also to all those who claim to be disadvantaged because of contingent contractual obligations to smokers, potential liability will be greatly expanded without notice. As the California Supreme Court has held:

> No case has been cited to us which would support plaintiff's contention that, because under its contract with decedent, plaintiff was compelled to expend sums for his medical care and treatment by reason of the injuries negligently inflicted upon decedent, plaintiff has a direct cause of action against defendants based upon such negligent injuries, and we are satisfied that *to so hold would constitute an unwarranted extension of liability for negligence*.

Fifield Manor v. Finston, 354 P.2d 1073, 1075 (Cal. 1960) (en banc) (emphasis added). Moreover, if those injured indirectly can sue unburdened by any defenses that may absolve appellants from liability to the injured party, then liability expands geometrically. After all, the requirements of proof and the availability of defenses help inform the nature of a person's legal duty. *See, e.g*., *In re Fibreboard Corp*., 893 F.2d 706, 711 (5th Cir. 1990) ("requirements of proof define the duty of manufacturers"). Accordingly, this Court held that an insurer of an injured worker could not maintain a direct action against the tortfeasor to recover workers' compensation payments by the insurer; the Court stated that a direct action would "shift the employer's obligations under the employment contract to third parties who are strangers to that contract in complete disregard of the principles of *respondeat superior*, comparative negligence, and the common law measure determinative of the nature and extent of damages recoverable in actions sounding in tort." *Allstate Ins. Co. v. Eagle-Picher Indus., Inc*., 410 N.W.2d 324, 328 (Minn. 1987).

It is undisputed that BCBSM was not directly injured by the alleged actions of appellants. 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. BCBSM nonetheless insists that it must have its own

[6] Indeed, as noted above, BCBSM filed a motion to dismiss those defenses that it contends relate to subrogation issues. Appellants contend that even if BCBSM could assert a direct claim, the defenses which could be raised against individual smokers would remain relevant. The District Court denied BCBSM's motion on the ground that further discovery is required to determine exactly how those defenses would apply to its claims. (A-150).

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independent cause of action, whatever the consequences, because of an alleged health care crisis precipitated by tobacco-related injuries. In essence, BCBSM contends that desperate times justify desperate measures. But even taking BCBSM's allegations at face value, there is no justification for abandoning the rule of *Northern States*.

The fundamental requirement that the party most directly injured bring suit has endured for generations and outlasted many perceived crises. The justification for this rule remains as valid today as it was a century ago. In *North v. Johnson*, 58 Minn. 242, 59 N.W. 1012 (1894), this Court rejected the rule "that he who commits a wrongful act should be answerable for all the losses which flow from that act, however remote." The Court concluded that "any such rule would set society on edge, and fill the courts with endless litigation." *Id. Northern States* confirmed that the law remedies the injuries of directly-injured individuals, and that subrogation is the exclusive remedy for parties such as insurers or employers who reimburse the injured party pursuant to contract. *See Northern States*, 191 Minn. at 91, 253 N.W. at 372 (*quoting North*).

BCBSM's suggestion that the Court abandon this long-established and essential principle invites calamity. To accept BCBSM's position here is to accept that health insurers could sue General Motors for the remote consequences of personal injuries suffered in automobiles; could sue McDonald's for increased health care expenses attributable to eating cheeseburgers; and could sue ATF Florists to recoup the expenses of care for those who are allergic to flowers. In none of these cases, of course, would the courts adjudicate specific legal disputes under traditional doctrines of torts, property or contract. Rather the courts would sit to measure the potential liability of whole industries against uncertain theories of economics and public health policy. That is the role of legislators, not of judges. BCBSM's suit should be summarily rejected.

D. BCBSM Alleges No Injury in Fact.

Under *Northern States*, it is clear that any harm alleged by BCBSM flows from its contracts with subscribers, so that BCBSM has no direct cause of action against appellants. But BCBSM's claim for relief hides an even deeper defect -- BCBSM has suffered no injury in this case, direct or indirect. Under Minnesota law a litigant must plead and prove injury in fact to have standing to bring suit absent specific statutory authority to sue, which BCBSM does not enjoy. (*See infra*, at 20-21). *See, e g., In re Sandy Pappas Senate Comm*., 488 N.W.2d 795, 797 (Minn. 1992); *Snyder's Drug Stores v. Minnesota State Bd. of Pharmacy*, 301 Minn. 28, 32, 221 N.W.2d 162, 165 (1974). BCBSM has failed to plead actual injury. The Complaint confesses that the increased expenses for health care have been passed on to BCBSM's customers through increased premiums, and that the customers, as opposed to BCBSM, will obtain the entire benefit of any recovery from this litigation in the form of reduced premiums. & Compl. 11 8(g). Simply put, BCBSM has no stake in this litigation.

Because BCBSM has passed on its expenditures to its customers, appellants have no potential liability to BCBSM. *See e.g*., Dobbs, *Law of Remedies* 3.7, at 187 (1973) ("[D]efendant is… relieved of liability for losses the plaintiff did in fact avoid"). And even if there were any liability, BCBSM could not recover any damages. *See e.g*., *Vanderlinde v. Wehle*, 274 Minn. 477, 481, 144 N.W.2d 547, 550 (1966) (noting the "elementary principle that plaintiff should be given neither more nor less than the sum which leaves him financially whole"). BCBSM, then, has nothing to distinguish it from any other litigant with a merely abstract desire to enforce its views of social policy through the courts. That sort of desire, no matter how fervent, "does not substitute for the injury-in-fact requirement." Byrd v. Independent School Dist. No. 194, 495 N.W.2d 226, 231 (Minn. Ct. App. 1993).[7]

BCBSM's failure to plead any injury in fact was no accident. By pleading actual injury BCBSM would admit that it violated state law, for Minnesota law requires BCBSM to pass on its costs to its customers.[8] BCBSM's enabling act requires it to charge premiums adequate to cover the "actuarial projection of the cost of providing or paying for services." Minn. Stat. §§ 62C.15 & 62A.02, subd. 3 (1994). Under the statutory scheme, BCBSM is, in essence, a conduit or clearinghouse for health care transactions. If anyone has a cause of action associated with allegedly higher health care costs it is those who sustained them:

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[7] BCBSM could of course sue in its own right to recover any expenditures apart from payouts under its insurance contracts – for example, property damage suffered by it directly, as a legal entity. The Act requires BCBSM to pass on only the "cost[s] of providing or paying for services." Minn. Stat. §§ 62C.15 & 62A.02, subd. 3 (1994).

[8] An injury in fact that results solely from the *plaintiff's* violation of law is, by definition, not legally cognizable and thus cannot serve as a basis for standing. *See e.g., Envall v. Independent School Dist. No. 704*, 399 N.W.2d 593, 596 (Minn. Ct. App. 1987), ("a party must show… injury or threat of injury to a *legally recognized… interest*") (emphasis added). *Cf. Fidelity & Casualty Co. of N.Y. v. Christenson*, 183 Minn. 192, 236 N.W. 618 (1931) (party who causes injury by violating a statute has no right of contribution from parties whose negligence contributed to injury); *Pinter v. Dahl*, 485 U.S. 622 (1988) (plaintiffs who participate in unlawful activity may not recover under federal securities law).

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employers and employees. They are the real parties in interest, and they alone should be permitted to litigate their legal rights, if any.

The District Court erred by concluding that BCBSM could pursue its claims on the basis of two theories of actual injury that BCBSM never advanced. First, the Court stated that "[w]hether or not BCBSM, as a non-profit organization, fully recouped all its costs is a fact question, not a matter of law which can be determined at this stage of the proceedings." May 18, 1995 District Court Order at 6. (A-152) That would indeed be a question of fact, but it is one that neither party has put at issue. The Complaint nowhere even claims that less than the full measure of costs was recouped; it says rather that BCBSM's subscribers "have been required to pay increased premiums for health insurance ...." Compl. ¶ 8(g). (A-9) BCBSM decided that it could not make the claim that the District Court deemed a disputed question. Moreover, in its appellate filings BCBSM has renounced any intention of claiming less than full reimbursement, announcing quite plainly that "Blue Cross passes on costs -- and also benefits -- to its subscribers." Resp. to Pet. for Review of Decision of Court of Appeals at 2.

Second, the Court attempted to find "possible injury" by speculating that "BCBSM may be able to demonstrate that its costs for health care services related to smoking-related diseases . . . resulted in loss of its market share of the health care market." May 18, 1995 District Court Order at 6. (A-152) Presumably, the Court's theory was that if BCBSM had been able to pass through lower costs, it could have gained market share. But BCBSM has not pled this highly speculative form of injury, much less any facts to support it. BCBSM sues "as *purchaser*[] of health care," not as a seller of health insurance. Jan. 26, 1995 Mem. in Supp. Of Pls.' Mot. for J. on the Pleadings at 11 (emphasis added). Moreover, this theory would require BCBSM to prove not only that appellants' alleged wrongs increased total health costs, but also that those increased costs had a greater negative effect on BCBSM than on the other health insurers with which BCBSM competes.

BCBSM itself does not argue that it suffered either of the injuries posited by the District Court. See Resp. to Pet. for Review of Decision of Court of Appeals at 3. Instead, BCBSM argues that its pass-on of any and all increased costs to its customers is irrelevant as a matter of law, citing the principle of federal antitrust law which bars defendants from asserting a "pass-on" defense. *See e.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp*., 392 U.S. 481 (1968).[9]

This analogy in fact squarely supports appellants' position. Federal antitrust law's prohibition on the pass-on defense is an exception to the general requirement that a plaintiff demonstrate a net economic harm. That exception is logically dictated by the federal rule that indirect purchasers who bear the ultimate burden of an antitrust overcharge may not sue the violator. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). That is, if indirect purchasers cannot sue, direct purchasers cannot be subjected to the defense that they passed on the overcharge. But if indirect-purchaser suits are allowed, the pass-on defense must be allowed as well -- for otherwise defendants would suffer a duplicative liability to both direct and indirect purchasers. Thus the federal rule holds that the pass-on defense and indirect-purchaser suits must stand or fall together. *See Illinois Brick*, 431 U.S. at 728 ("[W]hatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants")

Minnesota has abolished the *Illinois Brick* rule by statute and allows indirect purchasers to sue. *See* Minn. Stat. § 325D.57 (1994). That statute accordingly makes the pass-on defense valid, as its text and history confirm.[10] Minnesota thus has no need to alter the normal rule that "the plaintiff should be given neither more nor less than the sum which leaves him financially whole." Vanderlinde, 274 Minn. at 481, 144 N.W.2d at 550. Judged by that standard, rather than by an inapposite principle of federal antitrust law, BCBSM

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[9] That is, a seller that conspires to fix prices may not defend on the ground that its customer passed on the overcharge to later, indirect purchasers.

[10] Minnesota's Assistant Attorney General for the Antitrust Division testified to the legislature that the statute would permit the pass-on defense:

> [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. ...[O]f course, the defendants, will be able to bring on the fact that... the direct purchaser group has passed [the damages] on and that's why [it] shouldn't be entitled to recover...

Transcript of Hearings on Minn. S.F. No. 1807 (3-19-84) at 4 (testimony of Steve Kilgriff). The legislature unmistakably adopted this view by providing for apportionment of actual damages between the direct and indirect purchasers. *See* Minn. Stat. § 325D.57 (1994) ("In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant"). Such apportionment would not be necessary if the direct purchaser's recovery was not limited to the extent it passed on costs. And, of course, one potential apportionment is the case in which the direct purchaser receives *no* damages because it has passed on the whole overcharge, which is simply the pass-on defense by another name.

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has suffered no injury in fact.

BCBSM has passed on all of its costs to its customers and claims that it would, likewise, pass on any recovery in this lawsuit. It could not be more clear that BCBSM has no economic stake in this litigation. Outside the inapplicable context of *Illinois Brick*, a case that Minnesota has expressly rejected, there is no need to create an exception to the rule that a party without any injury lacks standing to bring suit. BCBSM has suffered no injury, and it ought not be allowed to use the courts to enforce its abstract views of public health policy.

II.

BCBSM CANNOT PROSECUTE AN ACTION ON BEHALF OF OTHERS.

Implicitly recognizing the defects inherent in its claim of direct injury, BCBSM asserts two other bases of standing: (i) that the Nonprofit Health Service Plan Corporations Act, Minn. Stat. § 62C.01 (1994), *et seq*. ("the Act") authorizes BCBSM to sue as a private attorney general to promote the public health, and (ii) that BCBSM may sue as an "association" representing the interests of its "members." The first claim fails because the statute says no such thing; the second fails because BCBSM is not an "association" and has no "members" to represent.

A. BCBSM Has No Statutory Standing or Stake in This Litigation.

Under Minnesota law, in limited circumstances, a statute may give a party authority to sue even in the absence of a direct injury. *See In re Sandy Pappas Senate Comm*., 488 N.W.2d 795, 797 (Minn. 1992). This Court, however, has found such standing only where the statute granted it in express terms. *Compare Minnesota Pub. Interest Research Group v. Minnesota Dep't of Labor & Indus*., 311 Minn. 65, 72, 249 N.W.2d 437, 441 (Minn. 1976) (finding statutory standing by virtue of a "specific provision" that "sets clear standing requirements") with *In re Sandy Pappas*, 488 N.W.2d at 796 (holding that the Ethics in Government Act does not confer standing). BCBSM bases its claim to statutory standing on the following passage:

> "Purpose. It is the purpose and intent of [the Act] *to promote a* wider, more economical and timely availability of hospital, medical-surgical, dental, and other *health services for the people of Minnesota, through nonprofit, prepaid health service plans, and thereby advance public health* and the art and science of medical and health care within the state ...."

Minn. Stat. § 62C.01 (1994) (emphasis added).

BCBSM contends that this section authorizes this suit because the suit purports to "promote health services" and "advance public health." BCBSM is wrong. In the first place, this vague passage, far from authorizing BCBSM to sue, says nothing about BCBSM or any other specific party, about standing, or about enforcement of the substantive provisions of the Act. It bears no resemblance to the specific provisions held to authorize standing in *Minnesota Public Interest Research Group*. *See id*., 311 Minn. at 73, 249 N.W.2d at 442 ("'Any person aggrieved by a final [agency] order… is entitled to judicial review'") (quoting Minn. Stat. §182.665). Second, this provision identifies both a worthy end (promotion of "health service") and a specific means to that end ("through [the establishment of] non-profit, pre-paid health plans"). BCBSM wishes to view the end in isolation and suggests that anything it does to promote public health is authorized by statute. Such a view would allow BCBSM to bring any suit statewide that it believes would promote public health. The largely precatory provisions of this section simply cannot bear the tremendous weight that BCBSM places on them.

Other provisions of the Act demonstrate the limited role of § 62C.01. The Act does provide for legal actions to enforce its provisions, but it expressly grants that power to the Commissioner of Commerce, see Minn. Stat. § 62C.23 (1994), and to the Attorney General in criminal cases, see Minn. Stat. § 62C.22 (1994), rather than to BCBSM or any other private party. The explicit enforcement provisions of the Act preclude any inference that § 62C.01 creates an implied statutory grant of standing for BCBSM. Cf. Animal Legal Defense Fund, Inc. v. Espy, 23 F.3d 496, 503 (D.C. Cir. 1994).

B. BCBSM Cannot Sue in a Representative Capacity.

BCBSM's final claim of standing is that, even if it lacks either an economic or a statutory stake in this litigation, it can sue as a representative of parties who have allegedly suffered some actual injury. To make this last claim, BCBSM must stretch the concept of associational standing beyond the breaking point.

BCBSM calls the employers and businesses with whom it contracts to provide health care services "member groups," and claims that it may sue as an "association" to represent the interests of those

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"members." Even under this strained description, BCBSM lacks associational standing. An association may sue on behalf of its members only if: (1) the members would otherwise have standing to sue in their own right, (2) the interests the suit advances are germane to the organization's purpose, and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. *See Hunt v. Washington State Apple Advertising Comm*., 432 U.S. 333 (1977) (cited with approval in Gloria Dei Lutheran Church-Missouri Synod v. Gloria Dei Lutheran Church of Cold Spring, Minn., 513 N.W.2d 488, 490 (Minn. Ct. App; 1994)). BCBSM does not satisfy any of these requirements.[11]

In the first place BCBSM's "members`" employers who contract for health services from BCBSM, would not have standing in their own right; they are identically situated to the employers denied the right to recover for increased worker's compensation insurance premiums in *Northern States*. *See supra* at 7-8. Likewise, this suit is not germane to the purpose for which BCBSM was incorporated under Minnesota law: "the purpose of establishing or operating a health service plan in Minnesota." Minn. Stat. § 62C.01, subd. 3 (1994). The operation of a health service plan does not encompass litigation against manufacturers of any good or service that, in the unreviewable judgment of the operating nonprofit corporation, poses unjustified risks to health.

But BCBSM's claim of associational standing fails for a more fundamental reason: BCBSM is not even an "association" of "members" in the first place. The Nonprofit Health Service Plan Corporations Act nowhere defines or even uses the term "members." Rather, the Act refers to "subscriber's contract" and to "group contract." Minn. Stat. § 62C.14 (1994). As BCBSM's own Complaint puts it, "[BCBSM] brings this action… on behalf of its fully insured groups with whom it has contracts." Compl. ¶ 8(g) (emphasis added). (A-8-9) The employers with whom BCBSM contracts are customers, not members; BCBSM is a corporation, not an association. The persons on whose behalf an association would litigate must have "indicia of membership in an organization," *Hunt*, 432 U.S. at 344, such as electing the governing body of the association, financing its activities, and generally enabling the association to "express their collective views and protect their collective interests." *Id*. at 344-345. BCBSM's customers, of course, do none of these things, and have interests opposed to those of BCBSM just as buyers and sellers always have opposed interests. Indeed. BCBSM "suffered" the very injury that it would assert on behalf of individual "members" -- the payment of increased premiums -- as an influx of cash. BCBSM can no more litigate on their behalf than a steel company could sue as representative of the auto industry.

C. BCBSM's Suit Sacrifices the Due Process Rights of Absent Individuals and Employers and of Appellants.

Under BCBSM's own theory of the case, two categories of potential parties have suffered more directly from appellants' allegedly illegal conduct than BCBSM: individual smokers and their employers. Neither category is represented before the Court; BCBSM has instead appointed itself to litigate on their behalf in a de facto class action. This abrogation of the rights of absent parties would negate the protections for class plaintiffs provided by both the Minnesota Rules of Civil Procedure and the Due Process Clause of the Fourteenth Amendment, would deprive appellants of the right to assert the common-law defenses to which they would be entitled in individual cases, and would burden the Minnesota courts with a massive suit that will fail finally to settle the controversy.

The standard class action or representative suit is an exception to the due process principle that nonparties may not be bound by judgments *in personam. Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). In return for this deprivation of the right to participate, however represented members of the class are granted constitutional protections: a judicial determination that the class representative fairly embodies their interests and will litigate adequately on their behalf, Hansberry, 311 U.S. at 41-45; stringent requirements of personal notice, *See e.g*., Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); and (at least in certain circumstances) a right to opt out of the class suit, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985). The Minnesota and federal class action rules accord further safeguards for absent parties. *See e.g*., Minn. Rule Civ. Proc. 23.05 (requiring judicial approval of binding settlement in class suits). Not one of these safeguards applies to the unprecedented quasi-representative suit that BCBSM has invented, even though BCBSM acknowledges that only the absent parties have suffered loss and only the absent parties stand to gain.

[11] BCBSM does not satisfy the third requirement, as adjudication of the asserted claims and requested relief will assuredly require participation of the employers and their smoking employees in the lawsuit. *Cf. Easterlin v. State*, 330 N.W.2d 704, 708 (Minn. 1983) (noting that subrogation suit by employer against injurer of employee requires participation of the employee). That question, however, is currently the subject of dispute before the District Court, which ruled that further discovery is required to decide this point. *See* May 18, 1995 District Court Order at 3-4. As BCBSM's failure to satisfy any one of the *Hunt* requirements independently defeats its claim of associational standing, this Court need only consider the first two requirements for the purpose of this appeal.

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Consequently this suit, if allowed to proceed to judgment, will place the Minnesota courts in an untenable position whatever judgment is issued. If BCBSM prevails and is awarded the legal relief it seeks, the critical question in a subsequent suit (for example, an employer suing to recover the increased premiums paid to insure employees who smoke), will be whether the employer's claim has been merged into BCBSM's judgment under principles of res judicata. If so, the employer's constitutional rights to an adequate representative, to personal notice, and to opt out of the representative suit will be forever lost. The same problem would obtain a fortiori if BCBSM loses and the judgment is held to bar later suits by the other classes of plaintiffs. But if BCBSM gains relief in the present suit and that judgment is held not to bar a subsequent suit, then appellants' due process rights will have been sacrificed in turn. A judgment for the employer or smoker in that subsequent suit could subject appellants to a double award of damages and grant the future plaintiff a double recovery -- a result that adds injustice to unconstitutionality.

Moreover, whatever the outcome, appellants will have been deprived of the protections given to defendants in class suits and of their right to assert applicable defenses against the represented parties. BCBSM invites the Minnesota courts to litigate a class action without class representatives. But dispositive defenses of causation and assumption of the risk cannot be litigated in a class suit without any individual plaintiffs. That the present suit will inevitably lead the Minnesota courts into a mire of constitutional difficulties and novel procedural rulings is sufficient reason to divest BCBSM of its self-appointed status as representative of the affected parties -- parties who have given no consent to representation and have received no notice of the lawsuit sought to be prosecuted in their name.

CONCLUSION

BCBSM has no economic stake in the issues it seeks to litigate (apart from the prospect of extracting windfall damages) and no accountability to its unconsenting clients. Its lawsuit threatens to warp and weaken sound rules of justiciability, procedure and liability developed to adjudicate real suits between real parties to redress real injuries. The Court should rebuff the pretensions of BCBSM, lest its attempt to convert the courts of Minnesota into a forum for the creation of public health policy damage the institutional structure of adjudication.

For the reasons set forth above, the order under review should be reversed.

Respectfully submitted,

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