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.

Court File No. C1-94-8565

January 26, 1995

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWERING DEFENDANTS' MOTION TO DISMISS PLAINTIFF BLUE CROSS AND BLUE SHIELD OF MINNESOTA FOR LACK OF STANDING AND TO DISMISS COUNTS ONE, TWO AND THREE OF THE COMPLAINT FOR FAILURE TO STATE A CLAIM

[Tables of Contents and Authorities omitted herein]

I.

INTRODUCTION

Plaintiffs claim damages flowing from illnesses allegedly caused by the consumption of cigarettes. But plaintiffs have not even tried to state a cause of action under Minnesota product liability law, which should govern such damage claims. Instead, in an apparent effort to evade product liability law's proof requirements and recognized defenses, plaintiffs have attempted to twist other bodies of law beyond recognition -- including antitrust law and the law governing "good samaritans" who voluntarily undertake a special duty to protect others from harm. These legal theories are so clearly inapplicable on the face of the complaint that they are the subject of the present Rule 12 motion to dismiss, which seeks dismissal of Counts 1, 2 and 3 for failure to state a claim.[1]

In addition, answering defendants have moved to dismiss Blue Cross and Blue Shield of Minnesota ("BCBSM") from the entire case because its lack of standing is abundantly clear from the face of the complaint.

Section II of this brief addresses BCBSM's lack of standing. BCBSM is a "nonprofit health service plan corporation," a statutorily defined entity that provides agreed health services to subscribers in exchange for payment of a premium. In order to establish standing to bring suit, a plaintiff must allege that it personally has sustained a concrete injury in fact. BCBSM has sustained no injury to itself because, by statute, it is required to set its premiums to pass through all health care costs to its subscribers. BCBSM alleges that its subscribers have been injured, but BCBSM alleges no right to sue to collect for its subscribers' injury, and cannot base its standing on alleged wrongs done to subscribers without alleging a right to subrogation. Moreover, even if BCBSM had alleged personal injury in fact, the causal connection between any such injury and the alleged wrongful conduct of defendants is too attenuated and speculative to support BCBSM's standing.

Section III of this brief addresses the antitrust causes of action of the Complaint, Counts 2 and 3. In these Counts, plaintiffs allege that defendants conspired to restrain trade in the cigarette market by suppressing the development of a so-called "safer" cigarette and information about the harmful effects of smoking. These allegations, however, do not satisfy the threshold requirement that plaintiffs allege antitrust injury. The injury plaintiffs claim to have suffered -- increased health care costs -- does not flow from competitive harm in the market for cigarettes. Rather, any increased costs flow from personal injury allegedly suffered by smokers, an injury the tort laws, but not the antitrust laws, are designed to remedy. In addition, plaintiffs lack antitrust standing because the harm they allegedly suffered is too causally remote from the defendants' alleged conduct. Counts 2 and 3 therefore should be dismissed.

[1]This motion is brought on behalf of all defendants that have filed answers (the "answering defendants"). These parties are listed in the accompanying Notice of Motion.

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Section IV of this brief discusses the claim for good samaritan liability, Count 1. Plaintiffs have alleged that defendants breached a duty they undertook to the public to conduct unbiased research and to disclose all health information. The claim is defective, however, because the Complaint fails to allege that defendants' conduct made existing cigarettes more dangerous, or that it induced plaintiffs to forego any precautions they otherwise would have taken. Moreover, plaintiffs cannot recover on this theory because the tort is limited to plaintiffs who suffer physical injury, and plaintiffs' damages here are economic only. For both these independent reasons, Count 1 should be dismissed.

II.

BLUE CROSS AND BLUE SHIELD OF MINNESOTA MUST BE DISMISSED BECAUSE THEY LACK STANDING TO MAINTAIN THIS ACTION

Blue Cross and Blue Shield of Minnesota ("BCBSM") brings this action in an attempt to recover alleged "increased costs for health care services caused by the unlawful actions of the cigarette industry." Complaint ¶ 8(g). BCBSM is a statutorily defined "nonprofit health service plan corporation." *Id*. ¶ 8; *see generally* Nonprofit Health Service Plan Corporations Act, Minn. Stat. §§ 62C.01 *et seq*. (the "Act"). By statute, a "health service plan corporation" provides certain agreed upon health services to subscribers in exchange for a premium or "periodic prepayment" by or on behalf of subscribers to the nonprofit corporation. Minn. Stat. § 62C.02, subd. 6. The "health service plan corporation" then enters into contracts with health service providers to provide covered medical services to subscribers pursuant to a "service plan." Minn. Stat. § 62C.02, subd. 7.

BCBSM, like all other plaintiffs in Minnesota, must plead and prove that it has standing to bring the causes of action alleged in its Complaint. BCBSM's allegations in paragraph 8 of the Complaint suggest that it seeks to establish its standing under three theories:

> BCBSM contends it has sustained economic harm because it contracts with health care service providers in Minnesota and must pay more under those contracts for treatment of smoking-related illnesses because of the conduct of defendants alleged in the Complaint.
>
> BCBSM claims to sue on behalf of "fully insured groups" or subscribers with which BCBSM has contracts. BCBSM alleges that these groups have had to pay increased insurance premiums because of the defendants' alleged conduct.
>
> BCBSM also vaguely alleges that it brings this action in order "to vindicate and further" its "statutory and corporate directives," which it contends are to promote economical health services for the people of Minnesota and "to advance the public health."

For the reasons discussed below, none of these theories can establish BCBSM's standing.

A. Standing Requirements

Plaintiffs in Minnesota must show that they have standing to pursue their claims. *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162, 165 (Minn. 1974); *Byrd v. Independent School Dist. No. 194*, 495 N.W.2d 226, 231 (Minn.App. 1993). As under federal law, the purpose of the standing doctrine in Minnesota is "to guarantee that there is a sufficient case or controversy between the parties so that the issue is properly and competently presented to the court." *Minnesota State Bd. of Health v. City of Brainerd*, 241 N.W.2d 624, 628 (Minn. 1976).

"Under the standing requirement, a party must show 'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 135 (Minn.App. 1990) (adopting the three-part standing analysis of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 462, 102 S.Ct. 752 (1982)). The plaintiff must "allege specific, concrete facts showing she has been personally harmed." *Villars v. Provo*, 440 N.W.2d 160, 162 (Minn.App. 1989). An "abstract concern with a subject" is not enough. *Byrd*, 495 N.W.2d at 231.

A plaintiff also may have standing if a right to sue is expressly conferred by statute. *In re Sandy Pappas Senate Committee*, 488 N.W.2d 795, 797 (Minn. 1992).

B. BCBSM's Allegations Fail To Establish That It Suffered Personal Injury In Fact.

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1. BCBSM Has No Injury In Its Own Right.

BCBSM alleges that, as a purchaser of health care services, it "has paid and will pay substantially higher charges to its contracted health care providers due to the increased cost of providing health care services for treatment of smoking-caused diseases." Complaint ¶ 8(d). BCBSM seeks to recover these "increased costs for health care services caused by the unlawful actions of the cigarette industry." *Id.* ¶ 8(g). However, as a matter of law, these alleged costs are borne by BCBSM's subscribers, *not* by BCBSM.

The Act provides that a nonprofit health service plan corporation, such as BCBSM, receives from subscribers a "periodic prepayment" in exchange for BCBSM's agreement to pay providers who render health services to subscribers. *See* Minn. Stat. § 62C.02, subd. 6. By statute, BCBSM's premium rates are *required* to be adequate to cover the "actuarial projection of the cost of providing or paying for services." Minn. Stat. §§ 62C.15 & 62A.02, subd. 3. Schedules of BCBSM's subscription charges must be filed with the Commissioner of Commerce, including actuarial data needed to justify any increase. Minn. Stat. § 62C.15, subd. 2. Schedule changes are subject to disapproval by the Commissioner "*if the proposed premium rate is… not adequate,*" or if "the actuarial reasons and data submitted do not justify the rate." Minn. Stat. § 62C.15, subd. 2(b); § 62A.02, subd. 3(3)-(4) (emphasis added).

BCBSM therefore is required by law to pass on to its subscribers the increased cost of health care that it contends is due to the alleged "unlawful actions of the cigarette industry." The Complaint acknowledges as much, when it alleges that BCBSM's costs were passed along to the fully insured groups with whom BCBSM has contracts. Complaint ¶ 8(g). BCBSM has not alleged (and has not assumed the burden of proving) that despite its statutory obligation to do so, it was unable to pass on to subscribers any increased health care costs caused by the actions of the defendants. BCBSM really is seeking to recover for harm alleged to have been suffered by its subscribers, and, as discussed below, it cannot establish its own standing on that basis.

2. BCBSM May Not Establish Standing By Relying On Alleged Injury To Its Subscribers.

An injury must be suffered *personally* by a plaintiff in order to establish the "injury in fact" necessary for standing. *Villars v. Provo,* 440 N.W.2d at 162 (plaintiff must show "personal stake in the outcome"). BCBSM, however, blatantly attempts to recover for injuries that it admits it has not personally sustained. BCBSM seeks to recover for economic injury allegedly incurred by the "fully insured groups" with which it has contracts, which allegedly have had to pay increased health insurance premiums because of defendants' actions. Complaint ¶ 8(g). Such alleged injury is not injury *personal to BCBSM*. It is fundamental that a party "can raise only its own claim," and "does not have standing to raise claims of [others not before the court]." *Fish Hook Ass'n, Inc. v. Grover Bros. Partnership,* 417 N.W.2d 692, 694 (Minn.App. 1988); *see also Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197 (1975) ("plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").[2]

BCBSM has not alleged any "legally-recognized interest in the affairs" of its subscribers that would entitle it to raise its subscribers' claims and recover its subscribers' damages. *State of Minnesota v. Sports & Health Club, Inc.,* 438 N.W.2d 385, 390 (Minn.App. 1989) (no standing to raise claims of others not before court where no "legally-recognized interest" in the other's affairs). BCBSM does insinuate that it somehow has standing to raise those claims because BCBSM "has contracts" with those persons or groups. But this bare allegation is plainly insufficient. Any right BCBSM claims to have to litigate the rights of its subscribers is required by statute to be set forth in writing and filed with the Commissioner of Commerce. The Act requires that the "entire contract between the corporation and the subscriber" be comprised within certain written documents. Minn. Stat. § 62C.14, subd. 6, 9. The Act also requires that subscribers' contracts set forth any provisions for subrogation. *See* Minn. Stat. § 62C.14, subd. 2.

In order to bring suit for injury to its subscribers, BCBSM would need to allege that it is bringing this action pursuant to a "legally-recognized"

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[2]Under certain limited circumstances, a plaintiff may raise *legal arguments* that apply to others not before the court, but this third party standing doctrine (sometimes called "*jus tertii*") does not assist BCBSM in establishing its standing here. First, in order for a plaintiff to raise the interests of third parties in litigating its claim, the plaintiff first must establish its own, personal injury in fact. *Craig v. Boren*, 429 U.S. 190, 194, 97 S.Ct. 451 (1976). As discussed above, BCBSM cannot satisfy this requirement. Second, the doctrine of *jus tertii* is simply a means to allow additional legal arguments to be considered in the litigation. *Id*. (beer vendor injured by state law forbidding sale of 3.2% beer to males younger than 21, was permitted to raise legal arguments about the rights of male beer buyers). BCBSM does not assert an additional legal argument concerning the rights of its subscribers in support of BCBSM's own request for relief. Rather BCBSM improperly seeks to rely on its *subscribers' injury* as a substitute for its own personal injury in fact.

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subrogation or other express right set forth in its subscriber contracts. The Complaint, however, assiduously avoids any mention of subrogation rights, and plaintiffs have stated that they are not pursuing subrogation claims. It is a firmly established principle of law that insurers cannot recover for injuries to their insureds except by subrogation to their insured's cause of action. An insurer that has made payment to an insured does not thereby establish an independent right of action against the third party who injured the insured. An insurer can proceed only by way of subrogation to its insured's claims:

> [T]he authorities and cases unanimously hold that the insurer's recovery [against an alleged tortfeasor] is premised exclusively upon subrogation.... [T]he insurer's right as a compensated indemnitor to recover the loss it has incurred is fixed by the policy's subrogation clause, which in effect makes [the insurer] an assignee subject to whatever defenses the tortfeasor may have against the insured.

Great American Insurance Company v. United States, 575 F.2d 1031, 1033-34 (2d Cir. 1978).[3] This principle is consistently applied in Minnesota statutory and common law. *See, e.g., American Family Mutual Insurance Co. v. Vanman*, 453 N.W.2d 48, 49-50 (Minn. 1990) (insurer who pays under Minnesota No-Fault Insurance Act is not entitled to common law indemnity from an uninsured motorist; the statute "provides the exclusive subrogation remedy"); *Allstate Insurance Co. v. Eagle-Picher Industries, Inc.*, 410 N.W.2d 324, 327-328 (Minn. 1987) (insurer cannot maintain an independent action against a third-party tortfeasor to recover workers' compensation benefits paid to an injured employee); *Illinois Farmers Insurance Co. v. Brekke Fireplace Shoppe, Inc.*, 495 N.W.2d 216, 220 (Minn.App. 1993) (insurer could not pursue a claim under Minnesota consumer protection statute after insured settled its claims; insurer could proceed "solely in its role as subrogee" and thus could not be considered "a 'person injured' for purposes of the consumer protection statutes").

BCBSM, therefore, lacks standing to sue for alleged injury to its subscribers.[4] BCBSM fails to allege any legal right as between itself and a subscriber that empowers BCBSM to sue for injury suffered by that subscriber.

C Even If BCBSM Had Alleged Injury Personal To Itself, It Would Lack Standing Because The Causal Relationship Between Any Such Injury And The Actions Of Defendants Is Too Speculative.

Even if this Court were to conclude that BCBSM has pleaded injury personal to itself, BCBSM still has not established "injury in fact" because the causal connection between the alleged harm and the conduct of the defendants is too attenuated and speculative. Minnesota and federal courts have consistently held that plaintiffs lack standing if the chain of causation between the plaintiff's alleged injuries and the defendant's conduct is too attenuated or speculative. *See, e g., Byrd v. Independent School Dist. No. 194*, 495 N.W.2d 226, 231 (Minn.App. 1993); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 96 S.Ct. 1917 (1976).

In *Byrd*, the leading Minnesota case establishing this principle, an electrical workers' union brought suit against a school district, claiming irregularities in the bid process for electrical work on a construction project. The union alleged that its members would have done the work but for the bidding irregularities. The *Byrd* court dismissed the union's claim for lack of standing. The court reasoned that there was "no certainty" the union's members would have received the work if the project had been rebid. 495 N.W.2d at 231. Because it was "speculative" to conclude that the union had suffered "injury in fact" from the conduct complained of, the court held that the union lacked standing. *Id. Accord, NewMech Companies, Inc. v. Independent School Dist. No. 206*, 509 N.W.2d 579, 582 (Minn.App. 1993) (following *Byrd)*.

In holding that a plaintiff has no standing where it is speculative to conclude that the plaintiff's alleged injury was caused by the defendants' acts, the *Byrd* court relied on the U.S. Supreme Court's decision in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 96 S.Ct. 1917 (1976). In *Simon*, indigent

[3] *See also Williams v. Globe Indemnity Co.*, 507 F.2d 837, 840 (8th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (insurer's rights against alleged tortfeasor "are solely derivative rights of subrogation"); *National Union Fire Ins. Co. v. Continential Illinois Corp.*, 666 F.Supp 1180 (N.D. Ill. 1987) ("an insurer's only right [against an alleged tortfeasor] is derivative as the subrogee of its insured"); *Silva v. Home Indemnity Co.*, 416 A.2d 664, 666 (R.I. 1980) (insurer's only method of recovery against alleged tortfeasor arises "if at all, on the basis of its subrogation to the rights that its insured would have against [the tortfeasor]").

[4] The principle that an insurer can proceed only against a third party as a subrogee of the insured applies to an insurer's claims to recover for its own injury as well as for claims to recover its insured's injury. As discussed above, however, BCBSM has no injury in its own right. See pp. 5-7, *supra*.

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plaintiffs who had been denied hospital care challenged an IRS ruling allowing favorable tax treatment to nonprofit hospitals that offered only emergency room services to indigents. 426 U.S. at 28. The Supreme Court held that the plaintiffs lacked standing because it was "purely speculative" whether their injury -- the denials of hospital service -- could fairly be traced to the tax ruling rather than to decisions made by third-party hospitals without regard to tax implications. *Id.* at 42-43. Because it was purely speculative to conclude that plaintiffs' alleged injury was caused by the challenged tax ruling, plaintiffs did not have standing. *See also Allen v. Wright*, 468 U.S. 737, 757-759, 104 S.Ct. 3315 (1984) (plaintiffs alleged that federal tax exemptions to racially discriminatory private schools undermined their ability to send their children to desegregated public schools; Court held that the chain of causation alleged was too attenuated because it depended on decisions made by officials of racially discriminatory schools and parents of children -- "whose independent decisions *may not collectively have a significant effect*" on the availability of desegregated public schools (emphasis added)); *Warth v. Seldin*, 422 U.S. 490, 505-507, 95 S.Ct. 2197 (1975) (plaintiffs alleged that zoning ordinance excluded persons of low and moderate income from a town; Court held that they lacked standing because whether relief from the zoning ordinance would redress plaintiffs' injury depended on the "willingness of third parties to build low- and moderate-cost housing" and thus "the facts alleged fail to support an actionable causal relationship between [the town's] zoning practices and [the plaintiffs'] asserted injury").

The Complaint in this case alleges that defendants (1) suppressed research and made false statements about adverse health effects of smoking and (2) suppressed research and development of a safer cigarette. The injury that supposedly flowed from this conduct was increased health care costs. But whether health care costs would have been lower absent defendants' alleged wrongful acts is purely speculative. In order to establish the requisite causal chain from defendants' alleged actions to increased health care costs, it is essential to know whether, if defendants had acted differently, persons would have changed their smoking habits in a way that would have made them healthier.

For example, if research about the health effects of cigarettes had not been "suppressed," what findings would scientists have made, and when? How would consumers have reacted to whatever hypothetical publicity would have been given to those hypothetical scientific findings? Would consumers' reactions have differed from their reactions to reports and public pronouncements by the Surgeon General and various public agencies, package warnings, and other information about the risks of smoking?

If research and development of a "safer" cigarette had not been "suppressed," would a "safer" cigarette have been developed? If so when, and how much "safer" would it have been? Would consumers have smoked such cigarettes? If they did, would they have smoked more in light of the relative "safety"? Would more people have smoked, perceiving that smoking was "safer"?

One would need to answer all of these questions in order to even attempt to address the ultimate question whether, absent defendants' alleged wrongdoing, smokers would have quit in greater numbers or switched to a "safer" cigarette, and what effect, if any, those third parties' actions would have had on aggregate health care costs. Any causal connection between the alleged actions of the defendants and the level of health care costs (or the cost of health insurance) is considerably *more* speculative and attenuated than the causal link in the Minnesota and Supreme Court cases discussed above.

D. BCBSM's Allegations Of Injury To Its Statutory Purpose Do Not Support Its Standing.

Apparently recognizing that its alleged economic injuries fail to establish that it has personally sustained an "injury in fact," BCBSM appears to contend that standing has somehow been conferred on it by statute. BCBSM selectively quotes Minn. Stat. section 62C.01, subdivision (2) in an attempt to establish that BCBSM's own statutory "purpose and intent" is "'to promote a wider, more economical and timely availability of… health services for the people of Minnesota' and to 'advance the public health.'" Complaint ¶ 8.

It is well-settled under Minnesota law that a party has standing only (a) if he has suffered personal injury in fact, or (b) if standing is expressly conferred by statute. *In re Sandy Pappas Senate Committee*, 488 N.W.2d 795, 797 (Minn. 1992). As discussed above, BCBSM has not met the injury in fact requirement. To the extent BCBSM sues to protect some vague right to improved public health, such a generalized grievance is insufficient to confer standing. *See Valley Forge*, 454 U.S. at 472 (organization's asserted interest in a particular subject does not support standing). The law is clear in Minnesota that "an organization's abstract concern with a subject does not substitute for the injury-in-fact requirement." *Byrd*, 495 N.W.2d at 231.

Nor has BCBSM alleged a proper basis for statutory standing. Minnesota courts refuse to find

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statutorily-conferred standing absent clear legislative language that expressly grants the plaintiff a right to sue. *Minnesota Public Interest Research Group v. Minnesota Dept. of Labor & Indus.*, 249 N.W.2d 437, 441 (Minn. 1976) (party has statutorily-conferred standing where governing statute "sets clear standing requirements" and contains a "specific provision" concerning standing); *In re Sandy Pappas*, 488 N.W.2d at 797 (party may not rely on Ethics in- Government Act as the basis for its standing because the Act contains no express standing provision).

The Act includes no express statutory grant of standing for nonprofit health service plan corporations to bring lawsuits in order to promote economical health services or "to advance the public health." As the full text of section 62C.01 of the Act makes clear,[5] that statute merely states that its purpose of promoting economical health services is to be achieved "through" statutory authorization of nonprofit health service plans and regulation of such plans as set forth in the Act. Thus, as in *Sandy Pappas*, the Act "does not confer standing upon complainants," 488 N.W.2d at 797, and BCBSM's references to supposed statutory purposes add nothing to BCBSM's efforts to establish its standing.

In summary, BCBSM has no standing to maintain this action. It has not alleged specific, concrete facts establishing that it has personally suffered an injury in fact. Instead, BCBSM seeks to rely on alleged injury to unspecified, non-existent statutory rights, or alleged economic injury either that BCBSM has not suffered personally, or that is too remote from the alleged actions of the defendants to establish an injury in fact under Minnesota law. This Court should dismiss BCBSM for lack of standing.

III.

PLAINTIFFS' ANTITRUST CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFFS FAIL TO ALLEGE ANTITRUST INJURY AND LACK ANTITRUST STANDING.

Counts 2 and 3 of the Complaint allege that defendants violated Minnesota's Antitrust Law. Complaint ¶¶ 89-100. Count 2 alleges that defendants conspired to restrain trade in the cigarette market by suppressing the development and marketing of a safer cigarette and information about the harmful effects of smoking. *Id*. ¶ 92. Count 3 alleges that defendants used their collective monopoly power over the cigarette market to affect competition in the same manner. *Id*. ¶ 98. Plaintiffs appear to contend that this anticompetitive conduct caused more smoking, which in turn caused more adverse health effects, which in turn caused plaintiffs to incur additional health care expense. *Id*. ¶¶ 92, 97.

But plaintiffs fail to allege an essential element of an antitrust claim -- antitrust injury. The alleged increased health care costs plaintiffs claim to have suffered are not injury of the sort the antitrust laws were designed to prevent. Such costs do not flow from competitive harm in the market for cigarettes (an interest protected by the antitrust laws) but rather from purchasers' *use* of defendants' products. The antitrust laws never were intended to rectify harms caused by use of a product -- that is the province of product liability laws.

Moreover, even if plaintiffs had alleged an antitrust injury, their alleged harm is too causally remote from the alleged conduct of defendants to support antitrust standing.

A. Plaintiffs Have Not Met The Threshold Antitrust Injury Requirement.

To prevail on their antitrust claims, plaintiffs must show more than injury causally linked to an antitrust violation. They must allege (and prove) "antitrust injury." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690 (1977); *Midwest Communications v. Minnesota Twins*, 779 F.2d 411, 450-51 (8th Cir. 1985) *cert. denied*, 476 U.S. 1163 (1986) (plaintiff unable to show antitrust injury lacked standing under both federal and Minnesota antitrust laws).[6] Antitrust injury is defined as:

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts

[5]"Purpose. *It is the purpose and intent of Laws 1971, chapter 568 [i.e., 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, while reasonably regulating the formation, continuation, operation, and termination of such service plans by establishment and enforcement of reasonable and practical standards of administration, investments, surplus and reserves."

Minn. Stat. § 62C.01, subd. 2 (emphasis added).

[6]Minnesota construes its antitrust law consistently with the federal antitrust statutes and cases interpreting those statutes unless differences in statutory language compel a contrary result (an exception not relevant here). *See, e.g., Campbell v. Motion Picture Machine Operator's Union of Minneapolis, et al.*, 186 N.2. 781, 784 (1922); *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W.2d 888, 894 (Minn. App. 1992), *aff'd* , 500 N.W.2d 788 (Minn. 1993).

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> unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick, 429 U.S. at 489. The purpose of the antitrust injury requirement is to ensure that plaintiff's injury "corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 342, 110 S.Ct. 1884 (1990). The antitrust injury requirement is a "threshold inquiry" because it is "potentially dispositive." *Midwest Communications,* 779 F.2d at 450.

1. Plaintiffs Cannot Allege Antitrust Injury Because They Are Not Participants In The Relevant Market.

The antitrust laws were designed to "protect[ ] the economic freedom of participants in the relevant market." *Associated General Contractors. Inc. v. California State Council of Carpenters,* 459 U.S. 519, 538, 103 S.Ct. 897 (1983); *United States v. Stauffer Chemical Co.,* 1983-2 Trade Cas. (CCH) ¶ 65,749 at 69,817 (D. Minn. 1983) (antitrust laws "not enacted to protect all potential antitrust plaintiffs but… participants in the relevant market"). For this reason, generally only actual market participants (*i.e.,* consumers or competitors) are able to allege "antitrust injury". *Associated General Contractors,* 459 U.S. at 538-39; *S.D. Collectibles, Inc. v. Plough. Inc..* 952 F.2d 211, 213 (8th Cir. 1991) ("standing is generally limited to actual market participants, that is, competitors or consumers").

Plaintiffs' antitrust claims attempt to allege a restraint in the market for cigarettes. Complaint, ¶¶ 89-100. But plaintiffs do not allege that they are participants in that market, and they allege no injury in that market. Instead, plaintiffs seek to recover health care expenditures for smoking-related illnesses. *Id*. ¶¶ 92, 97. Plaintiffs therefore lack the type of injury required to assert an antitrust claim because they have not alleged injury to their status as consumers or competitors in the cigarette market.

A similar antitrust claim was dismissed in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122 (9th Cir.) *cert. denied,* 414 U.S. 1045 (1973). In that case, farmers sued automobile manufacturers and their trade associations under the federal antitrust laws for conspiring to eliminate competition in the research and development of pollution control equipment, claiming that increased pollution directly damaged their crop yields. *Id*. at 124-25. The court held that the farmers lacked standing to seek antitrust damages because the defendants' alleged anticompetitive conduct was directed at the sector of the economy concerned with developing pollution control devices -- a market in which the farmers had no commercial interest. *Id*. at 129.[7] The court explained that proper antitrust claims might be asserted by inventors and manufacturers of pollution control devices claiming losses from an inability to market their product. *Id*. at 129.

Similarly, plaintiffs here have not alleged that they are participants in the market where the alleged anticompetitive activity took place. At most, their alleged injuries are "purely an incidental result of [alleged] anticompetitive activity in another segment of the economy." *State of South Dakota v. Kansas City Southern Industries,* 880 F.2d 40, 48 (8th Cir. 1989), *cert. denied* 493 U.S. 1023 (1990). Accordingly, the antitrust claims should be dismissed.

2. Plaintiffs' Alleged Harm Is Not Antitrust Injury Because It Does Not Reflect The Anticompetitive Effect Of The Alleged Violation.

Plaintiffs' alleged harm also is not antitrust injury because it does not reflect the anticompetitive effect of the alleged conspiracy to suppress either a safer cigarette or information about the harmful effects of smoking. *Brunswick,* 429 U.S. at 489. An antitrust "plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atlantic Richfield Co.,* 495 U.S. at 344 (emphasis in original). Plaintiffs do not allege that this conspiracy caused them to pay inflated prices for cigarettes or hindered their ability to purchase or market either defendants' cigarettes or competing products. Indeed increased competition would have led to lower cigarette prices which, according to plaintiffs, would have resulted in more smoking and would have caused *increased* health care costs.

The antitrust laws were enacted to protect competition and economic freedom among market participants. *See, e.g., Associated General Contractors,* 459 U.S. at 538. They were not designed to protect consumers or their insurers from the health effects of a product. That is the function of product liability law. The antitrust laws should not be used to redress such harm, particularly where there is an extensive and well-established body of law designed

[7]The court found that the farmers had standing to sue for injunctive relief, holding that it merely required a showing of "injury cognizable in equity." 481 F.2d at 130. The farmers would lack such standing today because the antitrust injury requirement applies to claims for injunctive relief. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 107 S.Ct. 484 (1986).

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precisely for this purpose. *See, e.g., Brook Group, Ltd. v. Brown and Williamson Tobacco Corp.,* 113 S.Ct. 2578, 2588-89 (1993) (antitrust laws should not be used to convert torts or other causes of action into antitrust claims); *Monk v. Island Creek Coal Co.,* 1979-2 Trade Cas. (CCH) ¶ 62,821 at 78,762 (W.D. Va. 1979) (antitrust laws do not provide a cause of action for an alleged conspiracy to boycott women; "[t]he antitrust statutes, while broad in their scope, were not intended as a panacea for all social ills"); *NAACP v. New York Clearing House Ass'n* 431 F.Supp. 405, 411 (S.D.N.Y. 1977) (antitrust laws do not afford remedy for discrimination claims, especially where "such discrimination can be redressed by various statutes specifically enacted to prevent it").

Plaintiffs should not be allowed to contort their product liability claims into antitrust causes of action. The antitrust laws do not "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Brook Group,* 113 S.Ct. at 2589 (*quoting Hunt v. Crumbach,* 325 U.S. 821, 826 (1945)).

3. Plaintiffs' Harm Is Not Antitrust Injury Because It Flows From The Alleged Adverse Health Effects Of Cigarettes -- Not From Anticom-petitive Conduct.

Although plaintiffs claim a causal connection between their health care expenses and defendants' alleged suppression of a safer cigarette, their injury is not antitrust injury because it flows from the alleged adverse health effects of cigarettes, not from anticompetitive conduct in the cigarette market. *Kansas City Southern Industries,* 880 F.2d at 48 (plaintiff lacked antitrust injury where "injuries did not result from anticompetitive nature of [activity]" but "'were purely an incidental result of [it]'").

In *Boisjoly v. Morton Thiokol,* 706 F.Supp. 795 (D. Utah 1988), an employee of a manufacturer of rocket motors used on the Challenger space shuttle sued his employer for the economic consequences of emotional injury suffered from the shuttle's explosion, alleging that the employer's anticompetitive exclusive dealing arrangement led to a design defect that caused the accident. The court ruled that the employee's alleged harm was not antitrust injury because it flowed from the accident as opposed to the alleged anticompetitive conduct. 706 F.Supp. at 805. Similarly, plaintiffs' harm here flows from personal injuries allegedly sustained from smoking -- not from lack of competition in the cigarette market.

Courts consistently have held that the antitrust laws do not provide a remedy for the economic consequences of personal injuries. *See, e.g., Reiter v. Sonotone Corp.,* 442 U.S. 330, 99 S.Ct. 2326 (1979); *Young v. Colonial Oil Co.,* 451 F.Supp. 360, 361 (M.D. Ga. 1978); *Hamman v. United States,* 267 F.Supp. 420, 432 (D.C. Mont. 1967); *Holzrichter v. County of Cook,* 595 N.E.2d 1237, 1243 (Ill. App. 1992), *appeal denied,* 610 N.E.2d 1263 (Ill. 1993) ("[c]learly, plaintiffs' physical and mental suffering, however severe and unfortunate, is not the type of 'marketplace' injury normally compensable under the antitrust laws"). Accordingly, plaintiffs' health care expenditures for smoking-related injuries cannot constitute "antitrust injury."

B. Plaintiffs' Alleged Harm Is Too Causally Remote To Establish Antitrust Standing.

Even if plaintiffs had alleged the threshold requirement of antitrust injury, they still would lack antitrust standing because their alleged harm is too causally remote from defendants' challenged conduct. *See, e.g., Associated General Contractors,* 459 U.S. at 542 (plaintiff lacked standing in part because injury was remote and may have been produced by independent intervening causes).

Plaintiffs contend that defendants' suppression of a safer cigarette and information about the harmful effects of smoking caused more smoking, which in turn caused more adverse health effects, which in turn caused plaintiffs to incur additional health care expense. Complaint, ¶¶ 92, 97. As discussed more fully above, this extended causal chain would require plaintiffs to prove, among other things, how consumers would have reacted to a safer cigarette alternative, assuming it were feasible, based on taste, physiological effects, price comparisons and a host of other complex marketing and purchasing considerations.

A plaintiff's alleged harm is too remote to justify antitrust standing where, as here, it is "separated from the defendants' actions by the complex marketing and purchasing decisions of the actual participants in the relevant market." *Omega Homes, Inc. v. Citicorp Acceptance Co.,* 656 F.Supp. 393, 402 (W.D. Va. 1987). *See, e.g., Pocahontas Supreme Coal Co. v. Bethlehem Steel,* 828 F.2d 211, 219-20 (4th Cir. 1987) (plaintiff claiming lost royalties from termination of contract between defendants and plaintiff's business partner denied standing because harm was too remote and damages speculative); *United States v. Stauffer Chem. Co.,* 1983-2 Trade Cas. (CCH) ¶ 65,749 (D. Minn. 1983) (chain of causation too tenuous to support antitrust standing where it essentially required a separate finding of tort liability). Plaintiffs have failed to allege injury of the sort cognizable under the

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antitrust laws the threshold requirement of "antitrust injury." In addition, the harm plaintiffs claim to have suffered is too causally remote to support antitrust standing. Accordingly, Counts 2 and 3 of the Complaint must be dismissed.

IV.

THE FIRST CAUSE OF ACTION FAILS TO STATE A CLAIM FOR GOOD SAMARITAN LIABILITY.

Count 1 of the Complaint alleges that the tobacco industry "undertook a special and continuing duty to protect the public health by representing that it would conduct and disclose unbiased and authenticated research on the health risks of smoking." Complaint ¶ 24; *see also id*. ¶ 85. These representations were allegedly contained in advertisements dating from as early as 1954. *Id*. ¶¶ 25-29. Plaintiffs allege that, contrary to these statements, the industry concealed information about the harmful effects of smoking. *Id*. ¶¶ 30-34. As a result, more people allegedly began and continued smoking, *Id*. ¶ 75, causing increased expenditures for the medical care of smokers, *Id*. ¶ 79.

Plaintiffs try to squeeze these allegations into the good samaritan rule of Restatement (Second) of Torts § 324A:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for *physical* harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care *increases the risk* of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of *reliance* of the other or the third person upon the undertaking.

(Emphasis added.)

Plaintiffs allege that the tobacco industry is liable for undertaking a duty to render services in the form of unbiased research. Although the alleged duty was to the public generally, plaintiffs claim that they are third persons injured by the industry's failure to perform those services reasonably, because they paid the injured parties' medical bills.

This claim fails for two independent reasons. First, plaintiffs do not allege that the industry's negligence increased the risk of harm or that they detrimentally relied upon the tobacco industry to conduct and disclose research. Second, Minnesota courts have expressly held that the Restatement rule imposes liability only where the plaintiff seeks to recover for his or her own *physical* harm. Because the State and BCBSM allege that they suffered economic damages only, their claim fails.

A. Plaintiffs Have Failed To Satisfy The Requirements Of The Restatement Because They Do Not Allege Facts Showing Increased Risk Of Harm Or Reliance.

To state a claim under § 324A, plaintiffs must satisfy one of its three subsections. Subsection (b) is inapplicable on its face, because the Complaint does not allege that defendants assumed a duty owed by another person. To prevail, therefore, plaintiffs must show either that defendants' failure to carry out their alleged duty "increase[d] the risk of such harm," Restatement § 324A(a), or that plaintiffs were injured through reliance on defendants' statements, *Id*. § 324A(c). Plaintiffs satisfy neither requirement.

1. Plaintiffs Cannot Show Increased Risk Of Harm.

In order to satisfy subsection (a), a plaintiff must plead and prove that, as a result of the defendant's undertaking the "special duty," the risk of harm was increased over what it would have been had the defendant not undertaken the duty at all. The Sixth Circuit recently elaborated on the meaning of the "increased risk" requirement:

> The test is not whether the risk was increased over what it would have been if the defendant had not been negligent. *Rather a duty is imposed only if the risk is increased over what it would have been had the defendant not engaged in the undertaking at all*. This must be so because the preliminary verbiage in Section 324A [and 323] assumes negligence on the part of the defendant and further assumes that this negligence caused the plaintiff's injury. If we were to read subsection (a) as plaintiffs suggest, *i.e*., that a duty exists where the negligence increased the risk over what it would have been had the defendant

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> exercised due care, a duty would exist in every case. Such a reading would render subsections (b) and (c) surplusage and the apparent purpose of all three subsections to limit application of the section would be illusory.

Myers v. United States, 17 F.3d 890, 903 (6th Cir. 1994) (emphasis added).

This point is illustrated by *Gunsalus v. Celotex Corp.*, 674 F.Supp. 1149 (E.D. Pa. 1987). The court held (as an alternative ground for its decision) that plaintiffs were unable to show that the tobacco defendants had "increased the risk of harm to plaintiff" by allegedly breaching a "duty to perform research and provide plaintiff with information regarding the dangers of cigarette smoking." 674 F.Supp. at 1157. It was not enough for plaintiff to assert that "if he had known of the dangers of cigarette smoking earlier, he would have tried to quit," especially since plaintiff had been warned of the risks of cigarette smoking from other sources. *Id*. at 1157.

Minnesota law is consistent with *Myers* and *Gunsalus*. In *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 808 (Minn.App. 1987), the Supreme Court held that there could be no increased risk of harm when an inspection failed to detect a dangerous condition. The court reasoned that the risk of harm was the same before and after the inspection. 279 N.W.2d at 808; *see also In re Norwest Bank Fire Cases*, 410 N.W.2d 875, 879 (Minn.App. 1987) ("[A]n inspection that fails to detect dangers does not by itself enlarge the risk of harm."); *Andrade v. Ellefson*, 391 N.W.2d 836, 843 (Minn. 1986) (if inspector discovered the alleged existing danger, "it may be plaintiffs would not have been harmed, but that is *a failure to decrease, not increase the risk of harm*" (emphasis added)).

The Eighth Circuit, applying Minnesota law, reached the same conclusion in a case that is closely analogous to the situation at hand. In *Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 562 (9th Cir. 1979), the plaintiff claimed that the FDA had undertaken to collect information and inform that public about a particular drug. Rejecting this claim, the court held that "any failure of the FDA to furnish the public full information concerning xylocaine, an allegedly 'misbranded' and 'dangerous' drug, would not increase the hazards presented by that already marketed product." *Id*. at 562. The court concluded that the complaint failed to state a claim under Minnesota law.

Similarly, here, plaintiffs do not allege that defendants made smoking *more dangerous* by supposedly undertaking a special duty "to conduct and disclose unbiased and authenticated research." All that plaintiffs allege is that the risk of harm would have been reduced if defendants had not performed their "special duty" negligently -- *i.e.*, if they had conducted more "unbiased" research and disclosed more of the results. Complaint ¶ 87. But defendants' alleged failure to make cigarette smoking *safer* is irrelevant. To be liable, defendants must have increased the risk of smoking, not simply failed to decrease the risk. The allegations of the Complaint fail to meet the Restatement's requirements.

2. Plaintiffs Cannot Show Reliance.

Plaintiffs likewise cannot satisfy the remaining subsection of Section 324A: that they relied to their detriment on defendants' alleged undertaking to conduct and disclose research on smoking and health. In other words, they must plead and prove that they were "deterred from investigating the dangers of cigarette smoking" by defendants' advertisements. *Gunsalus*, 674 F.Supp. at 1157 (finding no reliance).

The comments to the Restatement make clear that such reliance must induce a plaintiff to "forgo other remedies or precautions against such a risk." Restatement § 324A comment e (1965). The case law reflects this rule. *See, e.g., Myers*, 17 F.3d at 903 (plaintiffs failed to allege that miners gave up their own inspections based on United States' supplemental inspection of mine); *Patentas v. United States*, 687 F.2d 707, 717 (3d Cir. 1982) (plaintiffs failed to show that Coast Guard inspections caused them to "forgo" other precautions against the risk of explosion).

Here, the State and BCBSM do not even claim to have seen the 1954 "Frank Statement" or any other advertisements that provide the basis for defendants' purported undertaking. Much less do plaintiffs claim that they chose to "forgo" investigating or publicizing the health risks of smoking in reliance on defendants' alleged undertaking. Any such claim would be patently frivolous. Plaintiffs have been aware since 1964 of the Surgeon General's Report finding smoking to be hazardous. They have been aware since 1966 of health warnings on cigarette packages. And they have been aware since 1985 of Minnesota's own legislative finding that "smoking causes diseases and excess medical care costs." Minn. Stat. § 144.391.

In sum, plaintiffs do not allege that defendants' alleged undertaking to "conduct and disclose unbiased and authenticated research" increased the risks of smoking, *or* that they relied to their detriment on any such undertaking. They therefore have not satisfied the Restatement's

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requirements for stating a "special duty" claim.

B. Plaintiffs Do Not Allege That They Suffered Physical Injury.

The Restatement by its terms permits recovery for "negligent undertaking" liability only by plaintiffs who suffer *physical* harm. Restatement (Second) of Torts §§ 323 & 324A. *See Walsh v. Pagra Air Taxi Inc.* 282 N.W.2d 567, 570-71 (Minn. 1979). Here, plaintiffs have not claimed that they themselves suffered physical injuries. Rather, they bring this action "to vindicate the State's proprietary interest in enforcing the State's rights to damages for economic injuries to the State." Complaint ¶ 7. The alleged injuries to the State and BCBSM are purely economic harms -- not physical injuries -- and no Minnesota case has permitted recovery under the special duty doctrine for such harms.

Courts in other states also have followed the language of the Restatement and required physical harm. *See Devine v. Roche Biomedical Lab.,* 637 A.2d 441 (Me. 1994) (no recovery for emotional distress unaccompanied by physical harm); *Sound of Market Street v. Continental Bank Int'l,* 819 F.2d 384, 392 (3d Cir. 1987) (no recovery for economic losses); *Palco Linings v. Pavex Inc.,* 755 F.Supp. 1278, 1280 (M.D. Pa. 1990) (no authority supports applying Section 324A to purely economic losses). Because plaintiffs have suffered only economic loss, they may not proceed under the special duty doctrine.

Count 1 of the Complaint should be dismissed because it fails to allege the required elements of a claim for good samaritan liability.

V.

CONCLUSION.

For the foregoing reasons, BCBSM should be dismissed for lack of standing, and Counts 1, 2 and 3 should be dismissed for failure to state a claim.

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