STATE OF MINNESOTA DISTRICT COURT
SECOND JUDICIAL DISTRICT
COUNTY OF RAMSEY

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

and

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

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

Case No. C1 94-8565

February 21, 1995

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

[Tables of Contents and Authorities Omitted Herein]

I.

INTRODUCTION

The State of Minnesota ("the State") and Blue Cross and Blue Shield of Minnesota ("Blue Cross") respectfully submit this memorandum in opposition to defendants' motion to dismiss.

Defendants' attempt to dismiss discrete portions of this action is fundamentally flawed by the omission of key authorities, by the disregarding of basic principles of Minnesota law, and by the failure to address major portions of the complaint. Among other things, the memorandum of defendants:

Requests that this Court dismiss Blue Cross's claim in its entirety -- without citing a single case to support their lead argument regarding the ability to recover "pass on" damages.

Requests that this Court dismiss antitrust claims brought pursuant to the Minnesota Antitrust Law -- without citing the relevant Minnesota statute, which, as defendants are well aware, was specifically amended in 1984 to depart from, and broaden, the federal standard.

Requests that this Court rule -- as a matter of law -- that the 40-year conspiracy of this industry, with its extraordinary power and resources, has had absolutely no effect on its market or on the health and health care expenditures of Minnesotans.

There are three main sections to defendants' motion, and, accordingly, to this reply:

1. *Blue Cross Has Standing to Maintain This Action*: Blue Cross is a unique entity under Minnesota law. Blue Cross, with its affiliates, is the only nonprofit health service plan in Minnesota, incorporated pursuant to a special statute which endows Blue Cross with a broad mandate to "promote a wider, more economical" availability of health services and to "advance public health."

Pursuant to this statutory mandate, Blue Cross enters into numerous contracts under which Blue Cross *directly purchases* health care services from hospitals, clinics and physicians. In this action, Blue Cross sues on its own behalf as a purchaser of health care (1) to recover damages for increased expenditures for health care caused by defendants' unlawful acts, and (2) to obtain equitable relief. In addition, Blue Cross seeks the same equitable relief on behalf of its member groups which receive prepaid health services.

The fact that Blue Cross is a nonprofit corporation does not affect its ability to recover damages. Defendants, of course, would prefer that this action proceed as thousands of individual cases by individual Blue Cross member groups or subscribers since this, of course, would mean that the action could not proceed at all. However, defendants cite no authority to support their contention that Blue Cross lacks standing merely because it may "pass on" increased expenditures. In fact, United States Supreme Court decisions conclusively reject this type of "pass

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on" defense. In one decision, decades ago, the Supreme Court set forth the basic principle that the courts will not inquire into whether there has been a "pass on" of damages. In a more recent decision, several years ago, the Supreme Court reaffirmed this general rule in the context of a regulated utility suing as an antitrust plaintiff. In addition, the Third Circuit Court of Appeals has specifically ruled that a nonprofit Blue Shield corporation is the proper party to assert standing in an antitrust action. In large part, these decisions are premised upon a desire by the courts to streamline litigation and to avoid unnecessarily complicated proceedings to determine and apportion damages.

Nor do defendants cite any Minnesota authority to support their contention that subrogation is the exclusive remedy in this case. The general rule, of course, is that remedies are not exclusive unless specifically mandated by statute. In fact, two of the Minnesota cases cited by defendants were decided under exclusive statutory schemes, workers' compensation and no-fault. The only other Minnesota decision cited by defendants does not support exclusivity; indeed, that decision indicates precisely the opposite by specifically pointing out that the insurance company in the case had never initiated a suit for its own damages.

In the present case, of course, Blue Cross has initiated a suit for its own damages, based upon the direct duty owed to Blue Cross by defendants and based upon the specific causes of action asserted in the complaint. Notably, defendants have failed to contest that an independent duty is owed to Blue Cross. In addition, defendants have not contested the viability of six of the nine causes of action pled in the complaint. Thus, while defendants request that this Court dismiss the entire complaint, defendants specifically address only two antitrust claims and one tort claim. The six other causes of action -- all statutory or equitable -- expand traditional principles of liability. Defendants' attempt to refute Blue Cross's standing with broad-based, generic attacks is simply inadequate, given the unique features of these six specific -- and unchallenged -- claims.

2. *The State and Blue Cross Have Antitrust Standing to Sue for Damages and Equitable Relief*: The antitrust laws are broad, remedial statutes directed against conduct which destroys competition. Defendants attempt to restrict the application of these laws and to argue that "product liability" claims are inappropriate for resolution in an antitrust case. However, the present case is not a product liability or personal injury case. Instead, it is an action brought by two of the largest purchasers of health care services in this state who have been injured in their "business or property" by the wrongful acts of defendants. Repeatedly, the United States Supreme Court has emphasized the broad scope of the antitrust laws, and, indeed, the Supreme Court has specifically stated that, "[e]xceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute." Thus, the effect of competition on prices is only one concern of the antitrust laws. Other objectives include ensuring the free flow of information and the unrestricted distribution of the highest quality and safest goods. In the present case, the unlawful combination and conspiracy involved restraining and suppressing research and information on the harmful effects of smoking and restraining and suppressing the research, development, production and marketing of a safer cigarette. These antitrust violations have led directly to the damages incurred by the State and Blue Cross by causing expenditures for health care to increase dramatically.

In accordance with the broad scope and purpose of the antitrust laws, standing to assert a claim for damages is expansive. There are no black-letter rules, and, instead, the analysis focuses on the particular facts of each case. In their memorandum, defendants cite a hodgepodge of cases from a variety of jurisdictions. However, defendants fail to cite a key decision from the United States Supreme Court -- despite the fact that it is perhaps the leading case on "remoteness," a focus of defendants' argument. In addition, defendants fail to cite to the Minnesota statute which governs the issue of standing in this case. This Minnesota statute was specifically amended in 1984 to depart from federal law and from the law in many other states, and provides standing for any person injured "directly or indirectly" by an antitrust violation.

It is also significant that defendants have challenged only the antitrust claims brought by the State and Blue Cross in their proprietary capacities. Defendants have not challenged the authority of the State to bring an antitrust action in its law enforcement capacity for penalties and equitable relief, which has been specifically pled in this case.

3. *The Cause of Action for Undertaking a Special Duty States a Valid Claim for Relief*: Defendants raise two arguments in their effort to dismiss the claim for undertaking a special duty. First, defendants raise the issue of proximate cause, an issue of fact which cannot be resolved in a motion on the pleadings. Second, defendants contend that recovery under this cause of action is limited to plaintiffs who suffer physical harm. However, numerous Minnesota decisions permit recovery in tort for monetary damages

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notwithstanding the lack of physical harm. Indeed, in a recent decision, the Minnesota Supreme Court expressly authorized a claim in an asbestos case under circumstances strikingly analogous to the present action, where a dangerous product caused a third party to incur the expense of abating a health hazard.

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Finally, a recurring theme throughout defendants' memorandum is an attack on the causal chain between the industry's unlawful conduct and the resulting harm to the State and Blue Cross. However, the mere fact that third parties -- in this case, individual smokers -- are a link in the causal connection is not sufficient to break the causal chain. Well-established principles of Minnesota law recognize that an act or omission is a proximate cause if it had a substantial part in bringing about the harm -- either immediately or through happenings which follow one after another. In fact, foreseeable consequences are always proximate under Minnesota law. In the present case, the actions taken by individual smokers were to purchase and smoke cigarettes -- in a manner not only foreseeable but precisely intended by these defendants. The resulting harm -- death and disease, with the attendant health care expenditures -- also was foreseeable.

Indeed, the conspiracy at issue in this case began precisely because the industry became aware -- at least 40 years ago -- of grave warnings on the health hazards of cigarettes. Faced with this evidence, this industry chose to engage in an unprecedented campaign of misrepresentation and deceit. The industry's message has been targeted at adolescents, a most vulnerable population and, not surprisingly, the group which comprises the overwhelming majority of new smokers. The industry has further maintained its market through intentionally addicting the majority of its customers. In addition, the industry -- in an act of ultimate cynicism -- has withheld safer products from the market.

Before this Court, defendants attempt to argue that all of these efforts by this industry -- with its billions of dollars of resources -- have had no impact on its market. This argument is implausible on its face -- and contradicted by the industry's own internal documents. In these documents, the industry has recognized that its combined efforts have been necessary "for the self-preservation of the industry" and that its strategy was "brilliantly conceived and executed."

Indeed, the defendants' collective conduct has resulted in an unprecedented impact on the public health. The premise of this action is that this industry -- and not the citizens of Minnesota -- should pay for the staggering health care expenditures caused by its actions in violation of the laws of this state.

II.
STATEMENT OF FACTS

The complaint sets forth, in some detail, the nature of the decades-long combination and conspiracy which underlies this action. Virtually all of these factual allegations, summarized below, have been ignored by defendants in their current motion.

A. The Concentration of the Industry

Cigarette manufacturing is one of the most concentrated industries in the United States, with the Big Six manufacturers controlling virtually l00% of the market. Complaint at ¶ 18. In part because of its concentration, the cigarette industry also is one of this country's most profitable businesses, with annual profits in the billions of dollars from domestic sales alone. *Id*. at ¶ l9. The concentration of the industry has allowed the Big Six manufacturers and their two trade associations to engage in a decades-long conspiracy relating to smoking and health and to direct their considerable profits to further that end. *Id*. at ¶ 20

B. The Beginning of the Industry Conspiracy on Smoking and Health

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

The problem was viewed entirely as an issue of public relations, as opposed to a public health concern. The company presidents believed "that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future" and that the industry "should sponsor a public relations campaign which is positive in nature and is entirely 'pro-cigarette.'" *Id*. at 22(c). To accomplish this end, the industry formed two trade associations, the Council for Tobacco Research

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("CTR") and, later, the Tobacco Institute ("TI"). *Id.* at 23.

C. Representations and Undertakings by the Industry

With the founding of its first trade group, the cigarette industry began to issue a series of statements in which the industry represented that it would accept and undertake a continuing duty to protect the public health. Over the years, the industry has repeatedly re-affirmed this commitment, stating:

> "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."
>
> "We always have and always will cooperate closely with those whose task it is to safeguard the public health."
>
> "We are pledging aid and assistance to the research effort into all phases of tobacco use and health."
>
> "We recognize that we have a special responsibility to the public -- to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use."
>
> "We shall continue all possible efforts to bring the facts to light."
>
> "The findings are not secret."

Complaint at ¶¶ 25, 27 and 28.

D. The Campaign of Deceit and Misrepresentation

In actuality, the industry's promises of objective scientific research and full disclosure were never fulfilled. Instead, research was undertaken not in pursuit of the scientific truth but to aid the industry in its public relations and litigation battles. Complaint at ¶ 30. Research that might confirm the health risks of smoking was concealed. *Id.* Internal industry documents shed light on the true nature of the industry's actions, as the following quotations demonstrate:

> "It is very important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed."
>
> "Historically, it would seem that the 1954 emergency was handled effec-tively. From this experience there arose a realization by the tobacco industry of a public relations problem that must be solved for the self-preservation of the industry. "
>
> "For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts -- litigation, politics, and public opinion. While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not -- nor was it intended to be -- a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of… creating doubt about the health charge without actually denying it…. In the cigarette controversy, the public -- especially those who are present and potential supporters (*e.g.* tobacco state congressmen and heavy smokers) -- must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor."

Id. at 133.

E. The Conspiracy to Suppress Research and Product Development

Internal documents also begin to detail the conspiracy to suppress research and product development. For example, the documents reference a "gentlemen's agreement" among the manufacturers to suppress independent research on the issue of smoking and health. Complaint at ¶ 36.

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

The industry position on a safer cigarette was confirmed by a memorandum authored by an industry

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attorney, who, noting "joint defense efforts," stated that "[t]he industry position has always been that there is no alternative design for a cigarette as we know them." *Id*. at ¶¶ 44-45.

F. Industry Control of Nicotine Levels

Internally, the cigarette manufacturers quite explicitly view the cigarette as a sophisticated nicotine delivery system. As early as the 1960s, a scientist at one cigarette company stated that "[n]icotine is… a very fine drug" and that the company "is in the nicotine rather than the tobacco industry." Complaint at ¶ 55(a). Similarly, an internal report on a 1972 CIR conference stated:

> Think of the cigarette pack as a storage container for a day's supply of nicotine. . . Think of the cigarette as a dispenser for a dose unit of nicotine.

Id. at ¶ 65.

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

As a result of the industry's actions, as many as 74% to 90% of smokers are addicted. Eight out of l0 smokers say they wish they had never started smoking. Two-thirds of adults who smoke say they wish they could quit. Seventeen million try to quit each year, but fewer than one out of ten succeed. *Id*. at ¶ 69.

G. Maintaining the Market Through Sales to Minors

In addition to ensuring a captive market through addiction, the cigarette industry has maintained its sales by exploiting the knowing attraction of youth. Smoking begins primarily during childhood and adolescence. Nearly all first use of tobacco occurs before high school graduation. Complaint at ¶¶ 71-72.

H. The Effect of the Industry's Unlawful Conduct

As a direct result of the unlawful conduct of the cigarette industry, cigarette smoking has become the most pervasive public- health issue of our time and the single most preventable cause of death in the United States. Complaint at ¶ 76. The number of premature deaths caused by smoking -- more than 400,000 each year in the United States, or one out of every six deaths -- surpasses the combined totals for alcohol, suicide, homicide, AIDS, cocaine, heroine and motor vehicles. *Id*. at ¶ 77. At least one out of every four regular cigarette smokers dies of smoking-related disease. *Id*. In Minnesota, smoking-related diseases cause more than 6,000 deaths a year. *Id*.

The expenditures for treating these diseases is extraordinary. The State of Minnesota has developed a statistical model to measure these expenditures, which has been updated and distributed worldwide by the federal Centers for Disease Control. In Minnesota, the data show that more than $350 million a year is spent each year for health care expenses for cigarette-caused death and disease. *Id*. at ¶¶ 78-79.[1]

III.

ARGUMENT

A. Judgment on the Pleadings Is Inappropriate in the Present Case Because of the Myriad of Facts at Issue

A motion on the pleadings "is not a favored way of testing the sufficiency of a pleading…" *Ryan v. Lodermeier*, 387 N.W.2d 652, 653 (Minn. Ct. App. 1986). The pleadings must be construed favorably to plaintiffs, and all fact inferences also must be drawn in favor of plaintiffs. *Id*.; *see also* Herr and Haydock, 1 Minnesota Practice § 12.9 at 260. Only if the pleadings create no issue of fact may the motion be granted. *Ryan*, 387 N.W.2d at 653.

In the present case, the complaint rests upon a myriad of facts, and, of course, discovery has not yet commenced. Most importantly, defendants have based their motion in large part upon their attempt prematurely to argue the issue of causation. While principles of causation are relevant to a certain extent in analyzing standing, it is well-established that, in general, causation is a quintessential issue of fact. As the Minnesota Supreme Court has stated:

> The question of proximate cause is primarily one of fact. It can best be considered and determined when the actual facts which occurred in a particular transaction have been developed upon trial. Construing the complaint, as we must, favorably to the plaintiff, we feel constrained to hold it

[1]Indeed, the cigarette industry has such a direct and substantial effect on health that an internal industry memo conceded:

> Most Philip Morris products both tobacco and non-tobacco are directly related to the health field.

Id. at ¶ 36.

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> good on this point as against the demurrer.

Morey v. Shenango Furnace Co., 112 Minn. 528, 127 N.W. 1134, 1135 (1910); *c f. Illinois Farmers Ins. Co. v. Tapemark Co*., 273 N.W.2d 630, 633-34 (Minn. 1978) ("As a general matter, issues of… proximate cause are questions of fact and are not susceptible to summary adjudication.").

B. Blue Cross Has Standing to Maintain This Action

Minnesota has adopted an "injury in fact" analysis for standing, which requires only that a party have more than an abstract concern and that its injury be more than "speculative" or "fairly can be traced to the challenged action." *Snyder's Drug Store, Inc. v. Minnesota State Board of Pharmacy*, 301 Minn. 28, 221 N.W.2d 162, 165 (Minn. 1974); *Byrd v. Indep. School Dist. No. 194*, 495 N.W.2d 226, 231 (Minn. Ct. App. 1993); *In re Crown Coco*, 458 N.W.2d 132, 135 (Minn. Ct. App. 1990). Certainly, in the present case, Blue Cross has met this minimal threshold.[2]

Thus, Blue Cross brings this action for damages, on its own behalf, as a purchaser of health care services. Blue Cross also seeks equitable relief, on its own behalf and on behalf of its member groups. The member groups also will benefit from any damages recovered in this action, since Blue Cross is a nonprofit corporation. *See* Complaint at ¶ 8(g) (Blue Cross "brings this action on its own behalf as a purchaser of health care services and on behalf of its fully insured groups with whom it has contracts, who have been required to pay increased premiums for health insurance and who will benefit from any recovery in this action.").

1. Blue Cross Has a Unique Status Under Minnesota Law

a. Blue Cross Has a Statutory Mandate to Provide Broader and More Economical Health Care and to Advance the Public Health

Blue Cross occupies a unique status under Minnesota law. Blue Cross is incorporated pursuant to a special enabling statute, the Minnesota Nonprofit Health Service Plan Corporations Act ("the Act"), Minn. Stat. §§ 62C.01, *et seq*. With its corporate affiliates, Blue Cross is the only nonprofit health service plan incorporated pursuant to this Act. Complaint at ¶ 8.[3]

Providing affordable health care and advancing the public health are part of Blue Cross's statutory mandate. Specifically, the Act provides that nonprofit health service corporations were created "to promote a wider, more economical and timely availability of . . . health services for the people of Minnesota" and to "advance public health." Minn. Stat. § 62C.01, subd. 2. This statutory purpose also is embraced in Blue Cross's articles of incorporation. Complaint at ¶ 8.

b. Blue Cross Is a Purchaser of Health Care

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

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

In the present case, Blue Cross seeks damages as a purchaser of health care for the increased health care expenditures in its group business.

[2]While Minnesota courts look to federal decisions for guidance, it is not clear that the federal doctrine on standing has been completely adopted in this state. Indeed, in *Snyder's Drug Store*, 221 N.W.2d at 165, the Minnesota Supreme Court found that the injury-in-fact concept of standing was "much simpler" than the complicated federal doctrine of standing.

[3]The Blue Cross enabling statute is relevant to the standing inquiry since it establishes the uniqueness of Blue Cross and its organizational purpose germane to this action. However, Blue Cross is not relying on this statute as a specific grant of standing to bring this action.

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Individual subscriber contracts are not at issue in this litigation. See Complaint at ¶ 8(g).[4]

Blue Cross's role as a purchaser of health care distinguishes Blue Cross from a traditional health insurer. Thus, in *Group Life & Health Ins. Co. v. Royal Drug Co*., 440 U.S. 205 (1979), a case involving Blue Shield of Texas, the Supreme Court quoted approvingly from a case which noted this distinction:

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

Id.., 440 U.S. at 228, *quoting Jordan v Group Health Ass'n*, 107 F.2d 239, 247 (D.C.Cir. 1939) (emphasis in Royal Drug opinion). Thus, the Supreme Court concluded that Blue Shield of Texas's provider agreements with participating pharmacies ware merely arrangements for the purchase of goods and services by Blue Shield." *Id*. at 214 (emphasis added). [5]

Similarly, in *Blue Cross & Blue Shield of Michigan v. Demlow*, 270 N.W.2d 845, 848-49 (Mich. 1978), the court noted that Michigan Blue Cross was "a unique creation" and was "not an insurance company in the usual sense of the term." The court stated:

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

Id., 270 N.W.2d at 849 (emphasis added).[6]

2. Blue Cross Has Suffered an Injury-In-Fact as a Purchaser of Health Care Services

As a purchaser of health care, Blue Cross has suffered an injury-in-fact by incurring the expense of paying for health care services for smoking-attributable diseases caused by the unlawful conduct of defendants.

Defendants argue that Blue Cross has not suffered injury because Blue Cross "passed on" to its subscribers the increased expenditures for health care services. Defendants' Memorandum at 5-6. However, defendants fail to cite a *single* case to support this contention.

The reason for defendants' conspicuous omission of legal authority is clear, as this argument has been conclusively rejected by the United States Supreme Court.

In the leading case of *Southern Pacific Co. v. Darnell-Taenzer Lumber Co*., 245 U.S. 531 (1918), the Supreme Court held that a lumber company could recover overcharges from a railroad, even though the company had passed on the charges to its customers. Justice Holmes, writing for the Court, rejected the defendant's argument that the lumber company had not suffered injury, stating:

> The only question before us is… whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. *The general tendency of the law, in regard to damages, at least, is*

[4]Member groups consist primarily of private employers and political subdivisions. Complaint at ¶ 8(b). In its contracts with member groups, Blue Cross must purchase comprehensive health care services for all members of the group -- smokers and nonsmokers alike, pursuant to the requirements of Minnesota's mandated benefits laws. *See* Minn. Stat. §§ 62E.01 *et seq.; Insurers' Action Council, Inc. v. Markman*, 490 F. Supp. 921, 923 (D. Minn. 1980), *aff'd*, 653 F.2d 344 (8th Cir. 1981); *see also* Complaint at ¶ 8(c).

[5]The issue in *Royal Drug* was whether provider contracts between Blue Shield of Texas and pharmacists were the "business of insurance" under the McCarran-Ferguson Act. The Court was careful to focus on the specific aspect of Blue Cross which was at issue in the case, that is, the provider contracts. The Court stated, "This is not to say that the contracts offered by Blue Shield to its policyholders, as distinguished from its provider agreements. . ., may not be the 'business of insurance' within the meaning of the Act." 440 U.S. at 230, n. 37.

[6]Two decisions from the United States District Court, District of Minnesota also recognize prepaid health service plans as purchasers of health care. *See Wildenauer v. Blue Cross and Blue Shield of Minnesota*, 737 F. Supp. 64, 67 (D. Minn. 1989) (Blue Cross is a "health-care purchaser"); *Hoffman v. Delta Dental Plan of Minnesota*, 517 F. Supp. 564, 568 (D. Minn. 1981) (Delta Dental, a Blue Cross affiliate and a nonprofit dental service plan, "acts as a third party payor in purchasing dental services for its group subscribers.... ").

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> *not to go beyond the first step*. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. *Their claim accrued at once in the theory of the law, and it does not inquire into later events*.

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

Similarly, in the present case, the increased cost of purchasing health care is borne in the first instance by Blue Cross, pursuant to its provider contracts. Under *Southern Pacific*, Blue Cross suffered an injury-in-fact when it directly paid the providers, from Blue Cross's own funds, for the health care services. Blue Cross's "claim accrued at once" and the Court need "not inquire into later events." *Id*., 245 U.S. at 534.

The "pass on" argument also has been rejected where a plaintiff is required, by law or state regulation, to pass on its damages. In *Kansas v Utilicorp United, Inc*., 497 U.S. 199 (1990), the Supreme Court held that a regulated public utility had standing in a price-fixing case, rejecting the defendants' argument that "pursuant to state and municipal regulations and tariffs filed with state regulatory agencies, the utilities had passed through the entire wholesale cost of the natural gas to their customers." 497 U.S. at 205 (emphasis added). The Supreme Court noted that allowing the utility to sue -- as opposed to consumers -- would alleviate concerns about the difficulty of apportioning damages among numerous plaintiffs, the risk of multiple recoveries, and the diminished incentive to bring an antitrust claim in a case where the damages award would be reduced and divided among multiple plaintiffs. *Id*. at 208-209.[7]

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

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

Id. at 276 (emphasis added). The court also recognized that the subscribers would lack the incentive to bring a claim, another factor in favor of granting Blue Shield standing. *Id*. at 277. In addition, the court noted that granting standing to Blue Shield -- as opposed to subscribers -- would keep the trial "within judicially manageable limits." *Id*. at 277, *quoting, Associated General Contractors v. Carpenters*, 459 U.S. 519, 543 (1984).[8]

Certainly, Blue Cross's member groups will benefit from any recovery in this action since Blue Cross is a nonprofit organization. *See* Complaint at ¶ 8(g); *see also Utilicorp*, 497 U.S. at 214 ("even if state law would require a utility to reimburse its customers for recovered overcharges, a utility may seek treble damages...."). However, it is still Blue Cross -- as the purchaser of health care -- which is the proper party to bring this action.[9]

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[7]In Utilicorp, the states of Kansas and Missouri also argued that they had standing to sue on behalf of and as consumers. However, in two previous decisions, *Hanover Shoe, Inc. v. United Shoe Machinery Corp*., 392 U.S. 481 (1968) and *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), the Supreme Court had rejected the "pass on" defense and had found that indirect purchasers did not have standing to recover damages for price-fixing. It should be noted that in contrast to federal law, the Minnesota Antitrust Law provides standing for persons injured both directly and indirectly. *See* Minn. Stat. § 325D.57; Section III.B.3., *infra*.

[8]As an alternative basis for standing, the court in P*a. Dental* noted that Blue Shield also had presented evidence of lost sales and income. *Pa. Dental*, 815 F.2d at 276.

[9]In their memorandum, defendants assert that "as a matter of law, these alleged costs are borne by BCBSM's subscribers, not by BCBSM." Defendants' Memorandum at 5. It is not clear to which "subscribers" defendants refer. To the extent that defendants refer to member groups, this argument is refuted by the cases and analysis cited above. To the extent that defendants refer to individual subscribers, i.e. individual smokers, two additional points are relevant. First, in this action, Blue Cross is only seeking damages for its member groups -- and not damages relating to persons covered by individual, as opposed to group, health service plan contracts. Second, Minnesota law generally provides that any recovery for medical expenses ultimately belongs to the payor of those expenses. In fact, the collateral source statute, Minn. Stat. § 548.36 (1986), requires a deduction in most circumstances from an injured person's verdict for all medical expenses paid by another source, unless a subrogation right has been asserted. *Id*. at subd. 2. If a subrogation right is asserted, an injured person may claim damages for the medical expenses, but any recovery by way of verdict for those expenses then goes to the payor. The injured person, of course, is entitled to those elements of damages which are personal to himself or herself, such as bodily and mental harm and loss of earnings.

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3. Blue Cross Also Has Associational Standing to Sue for Equitable Relief on Its Own Behalf and on Behalf Of Its Group Members

In addition to its claim for damages, Blue Cross also seeks equitable relief on its own behalf and on behalf of its member groups.

Defendants argue that Blue Cross cannot derive an injury by relying on the injury to its subscribers. However, while defendants focus on the fact that a party generally does not have standing to assert the claims of third-parties, there is a well-recognized exception to this rule for associational standing.

Thus, an organization such as Blue Cross can sue based on injuries to itself or based on injuries to its members. *See No Power Line, Inc. v. Minn. Envtl. Quality Council*, 311 Minn. 330, 250 N.W.2d 158, 160 (1976) (nonprofit corporation may "derive standing from its members"); *Teachers Local 59 v. Special School Dist. No. 1*, 512 N.W.2d 107, 109 (Minn. Ct. App. 1994) ("An organization can derive standing from its members when those members have an interest that is directly at stake."). Similarly, in *Snyder's Drug Stores v. Minnesota Bd. of Pharm*., 301 Minn. 28, 221 N.W.2d 162 (1974), the Minnesota Supreme Court granted standing to two nonprofit corporations, the Metropolitan Senior Citizens Federation and Minnesota Public Interest Research Group, to challenge a state regulation prohibiting pharmacists from advertising prescription drug prices. The Court found that the lack of advertising could prevent their members from purchasing prescription drugs at the lowest prices.

Finally, Blue Cross also has standing to sue for equitable relief on its own behalf because it has suffered an injury-in-fact and because defendants' unlawful conduct has impaired the ability of Blue Cross to fulfill its statutory mandate to promote "a wider, more economical and timely availability of . . . health services" and to "advance public health." Minn. Stat. § 62C.01, subd. 2.[10]

4. Blue Cross Has Alleged a Sufficient Causal Link Between Its Injuries and Defendants' Conduct

While principles of causation are relevant in analyzing "injury in fact," only in extreme cases where there is literally no showing of any causal connection is it appropriate under Minnesota law to dismiss on the basis of standing. This, of course, is consistent with the fundamental rule that issues of proximate cause are questions of fact and "are not susceptible to summary adjudication." *Tapemark*, 273 N.W.2d at 633-34.

Accordingly, Minnesota decisions adopt an expansive definition of the causal element of standing. For example, in *Crown Coco, supra*, the Minnesota Supreme Court stated:

> 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."

458 N.W.2d at 135 (citations omitted); *see also Byrd*, 495 N.W.2d at 231 (injury must not be "speculative").[11]

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[10]Defendants argue that Blue Cross's action represents a "generalized grievance insufficient to confer standing." Defendants' Memorandum at 13. However, the harm in this case has resulted in the frustration of Blue Cross's specific statutory mandate. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977) ("the Commission's attempt to remedy these injuries ... is central to the Commission's purpose ...."); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (organization suffered injury in fact and had standing to seek damages because defendants' activities "perceptibly impaired" the association's ability to fulfill its organizational mandate of securing open housing for low- and moderate-income homeseekers; "[s]uch concrete and demonstrable injury to the organization's activities -- with the consequent drain on the organization's resources -- constitutes far more than simply a setback to the organization's abstract social interests.").

[11]The two Minnesota Court of Appeals decisions cited by defendants on the issue of standing and causation involved no evidence of harm to plaintiffs. Both cases involved claims brought by unions whose members allegedly lost employment opportunities because of the improper awarding of contracts. In *Byrd, supra*, the Minnesota Court of Appeals found that the union's claim was "speculative" and that "[t]here is *no* record evidence to support IBEW's position." 495 N.W.2d at 231 (emphasis added). Similarly, in *Newmech v. Independent School Dist. No. 206*, 509 N.W.2d 579 (Minn. Ct. App. 1993), the Court found that "[t]he union presented no such evidence." *Id.* at 582 (emphasis added). The federal cases cited by defendants use the general test of whether the injury "fairly can be traced to the challenged action," and, accordingly, are decided under a detailed analysis of the particular facts of each case. *Compare Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976) (in case cited by defendants, Court found no standing where plaintiffs "allege[d] no injury to themselves as organizations") with *Duke Power Co. v. Carolina Environmental Study Group. Inc*., 438 U.S. 59, 72-78 (1978) (in case not cited by defendants, Court found standing -- after discovery and after the trial court held four days of hearings on standing and ripeness -- for plaintiffs

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In the present case, Blue Cross's injuries are not "speculative" and "fairly can be traced to the challenged action." Indeed, the injuries flow inexorably from the wrongful conduct of defendants. These defendants have engaged in a conspiracy of unprecedented dimension. For decades, defendants have concealed critical scientific information and misrepresented the hazards of smoking. This pervasive disinformation campaign was specifically designed to "creat[e] doubt about the health charge" and to influence the public -- particularly smokers -- to "perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor." Complaint at ¶ 33(f). To a large extent, the industry's message has been targeted at youth and adolescents. *Id*. at ¶¶ 71-72. Along with sowing the seed of doubt about health risks, the industry has further maintained its market through intentionally addicting its customers. *Id*. at ¶¶ 64-69. The industry also has withheld safer products from the market. *Id*. at ¶¶ 38-45.

Faced with this record -- compiled even without the benefit of any discovery in this action -- the industry's recourse and response are to contend that its extended and expensive efforts have had absolutely no impact on its market. It is difficult -- from a common-sense perspective -- to believe that this industry would devote such extensive efforts to a wholly ineffectual campaign. Indeed, the industry's own internal documents boast of its success. *See e.g*., Complaint at ¶ 33(d) (the "public relations problem . . . must be solved for the self-preservation of the industry."); *Id*. at 33(f) (industry strategy "was brilliantly conceived and executed.").

The unlawful conduct of this industry caused millions of persons to begin to smoke; caused millions of persons to continue to smoke; caused adverse health effects in millions of smokers, and caused expenditures for medical care to increase dramatically. *Id*. at ¶ 75. In fact, because of the magnitude of the harm, cigarette smoking is the most extensively documented cause of disease ever investigated in the history of biomedical research, and statistical models have been developed to measure health care expenditures for smoking-attributable disease. *Id*. at 76, 79.[12]

In their memorandum, defendants posit a number of hypothetical and speculative questions in an attempt to focus this litigation on the conduct of smokers as opposed to the industry's own conduct -- and to break the causal chain. *See* Defendants' Memorandum at 12. However, as the United States Supreme Court stated in *Duke Power, supra*:

> Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief.

438 U.S. at 78.

Moreover, it is a basic premise of Minnesota law that proximate cause is an act or omission "which causes the injury 'directly or immediately, or through a natural sequence of events ....'" *Lennon v. Pieper*, 411 N.W.2d 225, 228 (Minn. Ct. App. 1987) (emphasis added) (citations omitted). *See also Cooper v. Hoeglund*, 221 Minn. 446, 22 N.W.2d 450, 453 (1946) ("It is sufficient that [defendant's] negligence set in motion the chain of events that proximately caused the ultimate harm.); Minnesota Jury Instruction Guides 3d, JIG 140 ("A direct cause is a cause which had a substantial part in bringing about the harm . . . either immediately or through happenings which follow one after another."); 13B Dunnell Minn. Dig. 2d Neg. § 6 at 306 (3d ed. 1981) ("probable or foreseeable consequences are always natural and proximate.").

Thus, the actions of a third party will not break the causal chain and become a superseding cause if, *inter alia*, such actions were "brought about by the original negligence" of the wrongdoer and were "reasonably foreseeable by the original wrongdoer." *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 915 (Minn. 1983); *see also* JIG 142.

In the present case, the smokers have done nothing more than purchase and smoke cigarettes exactly as defendants intended. Clearly, these actions were foreseeable.[13]

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challenging the constitutionality of a federal act limiting liability for nuclear accidents).

[12]The industry's conspiracy has been so effective that cigarettes have remained virtually unregulated, avoiding regulation under the federal Food, Drug and Cosmetic Act, the Consumer Product Safety Act, the Hazardous Substances Act, the Fair Labeling and Packaging Act, and the Toxic Substances Act. Complaint at ¶ 83. As Joseph Califano, former Secretary of Health, Education and Welfare, recently stated, "the president of the United States, the secretary of HEW and the surgeon general were all victims of the concealment of the tobacco companies. " *Id.* at ¶ 82.

[13]Moreover, in cases such as this involving intentional wrongdoing, courts traditionally expand the scope of liability:

> There is a definite tendency to impose greater responsibility upon a defendant whose conduct was

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5. Blue Cross is Not Limited to Pursuing a Claim in Subrogation

Blue Cross (and the State) pled direct causes of action in their complaint. Blue Cross chose to proceed in this manner because from a practical perspective it is the only manner in which its rights can be enforced; because as the plaintiff it is its prerogative to select its own causes of action; because defendants breached direct duties owed to Blue Cross and are directly liable under specific causes of action -- and because, contrary to the arguments of defendants, subrogation is not an exclusive remedy.

a. Absent a Specific Statutory Restriction, Subrogation Is Not an Exclusive Remedy

As a general rule, remedies are not exclusive, and the fact that one cause of action may be available to a plaintiff does not preclude the assertion of a different cause of action. Thus, in *Davis & Michel v. Great Northern Ry. Co*., 128 Minn. 354, 151 N.W. 128 (1915), the Minnesota Supreme Court stated:

> It is well settled in this state, as well as in all states where the common-law distinction between forms of action has been abolished, that a complaining party may resort to any judicial remedy for the enforcement of his rights, legal or equitable, which is adequate and appropriate to the relief sought.

Id. at 129.[14]

Generally, a cause of action will not be abrogated except by the "express wording or necessary implication" of a statute. *Wirig v. Kinney Shoe Corp*., 461 N.W.2d 374, 377-78 (Minn. 1990); *see also Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76, 82 (1924) ("[W]e recognize that no legislative adoption is necessary to affirm the existence of the common law, but that statutory enactment is essential to repeal, abrogate, or change the rules or doctrine of the common law. ").

Not surprisingly, two of the Minnesota cases cited by defendants in their attempt to argue that subrogation is exclusive are in the context of comprehensive -- and exclusive -- statutory schemes. In one case, *Allstate Insurance Co. v. Eagle-Picher Industries, Inc*., 410 N.W.2d 324 (Minn. 1987), the Minnesota Supreme Court held that there was no right to seek indemnity under the workers' compensation statutes. However, the Court specifically limited its holding to workers' compensation cases, stating, "[m]ore than twenty years ago this court held that the traditional principles of indemnity were inapplicable in the workers' compensation setting." *Id*. at 327-38. The second case, *American Family Mutual Insurance Co. v. Vanman*, 453 N.W.2d 48 (Minn. 1990), involved a claim for indemnity under the Minnesota No-Fault Insurance Act. Again, the Minnesota Supreme Court recognized that the comprehensive statutory scheme for no-fault "provides the exclusive subrogation remedy," which did not envision a common law indemnity action. *Id*. at 49-50.

The only other Minnesota case cited by defendants in their attempt to argue exclusivity is *Illinois Farmers Insurance Co. v. Brekke Fireplace Shoppe, Inc*., 495 N.W.2d 216 (Minn. Ct. App. 1993). In citing this case, defendants selectively quote a portion of one sentence and erroneously represent that the court held the insurer could proceed under Minnesota's consumer protection statutes "'solely in its role as subrogee.'" Defendants' Memorandum at 9, quoting Illinois Farmers, 495 N.W.2d at 220. However, the full quotation makes it clear that the insurance company had specifically chosen to assert only a subrogation claim. The court stated, in full:

> "*Any action Farmers now asserts is* solely in its role as subrogee."

Id. (emphasis added). Indeed, the Court underscored the fact that it was the insurance company's own choice to proceed solely in subrogation, stating:

> "At no time did Farmers ever initiate a suit for its own damages."

Id. at 219.

> intended to do harm, or was morally wrong. More liberal rules are applied as to the consequences for which the defendant will be held liable, the certainty of proof required, and the type of damage for which recovery is to be permitted, as well as the measure of compensation.

Prosser and Keeton on the Law of Torts § 8 at 37 (5th ed. 1984); *see also* Restatement (Second) of Torts § 870 ("One who intentionally causes injury is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."); comment to JIG 142 (no superseding cause instruction in cases involving intentional torts).

[14] *See also* Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings, at 9-11; *Monroe v. Thulin*, 181 Minn. 496, 499, 233 N.W. 241, 242 (1930); *Corey v. Corey*, 120 Minn. 304, 312, 139 N.W. 509, 512 (1913).

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In the present case, of course, Blue Cross has initiated a suit for its own damages, as impliedly authorized by *Illinois Farmers*, based upon the direct duty owed to Blue Cross (and the State) by defendants and based upon the specific causes of action asserted in the complaint.[15]

b. Defendants Owe a Direct Duty to Blue Cross and Are Directly Liable Under the Causes of Action Pled in the Complaint

Defendants have not contested that an independent duty is owed to Blue Cross (and the State) and have not contested their liability to Blue Cross (and the State) under six of the nine causes of action pled in the complaint.

Under basic principles of Minnesota law, the existence of a legal duty is determined based upon the facts of the case, including, most prominently, the foreseeability of the harm. The magnitude of the foreseeable harm also affects -- and extends -- the scope of the duty. Considerations of public policy also are relevant to the recognition of a duty. Although the existence of a duty is a question of law, the Minnesota Supreme Court has repeatedly emphasized that the analysis is heavily dependent upon a close examination of the particular facts of each case. *See, e.g., Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n. 1 (Minn. 1989) ("The existence of a legal duty depends on the factual circumstances of each case."); *Andrade v. Elleson*, 391 N.W.2d 836, 841 (Minn. 1986) ("[T]here is no bright line, and each situation will require its own analysis.").[16]

Under the facts of this case, the existence of a duty is manifest. This duty, of course, is in addition to any duty that may be owed to individual smokers. See 13B Dunnell Minn. Dig. 2d Neg. § 2.01 at 155 ("A person may be required to perform more than one duty at any given moment."); *Id.* at 157 ("One may owe two distinct duties in respect to the same thing….").

In the present case, clearly -- indeed, unquestionably -- the harm to Blue Cross was foreseeable. This establishes the critical element of duty. As the Minnesota Supreme Court stated in *Lundgren v. Fultz*, 354 N.W.2d 25 (Minn. 1984):

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

Id. at 28, *citing Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928). *See also* 13B Dunnell Minn. Digest 2d Neg. § 2.01 at 151 ("The common-law test of duty is the probability or foreseeability of injury to the plaintiff, and this is true even though the plaintiff is injured as a result of the defendant's failure to exercise due care toward another.").[17]

Moreover, as the magnitude of the foreseeable harm increases, so does the scope of the duty. As the Minnesota Supreme Court stated in *Illinois Farmers Insurance Co. v. Tapemark Co., supra*:

> Special circumstances which impose a greater potentiality of foreseeable risk or more serious injury, or require a lesser burden of preventative action, may be deemed to impose an unreasonable risk on, and a legal duty to, third persons.

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

In the present case, the magnitude of the harm is unparalleled. Smoking has become the most

[15]The cases cited by defendants from other jurisdictions also are inapposite. Defendants' cases involve the narrow issue of whether an insurance company must choose subrogation, as opposed to a closely-related claim for indemnity, when asserting a derivative claim. In the present case, plaintiffs have not sought to bring a claim for indemnity or for subrogation. In addition, the defendants' cases do not involve the assertion by plaintiffs of the breach of an independent duty, which has been asserted by Blue Cross and the State, or all of the specific causes of action pled in the present case. Finally, two of the cases cited by defendants acknowledged that -- under different circumstances -- an indemnity claim may be viable. *See Great American Insurance Co. v. United States*, 575 F.2d 1031, 1035 (2d Cir. 1978); *Williams v. Globe Indemnity Co.*, 507 F.2d 837, 840 (8th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

[16]The analysis of duty is so fact intensive that in close cases, with disputed facts, it may be appropriate for the factual basis for establishing duty to be resolved by a jury, with the legal decision of whether a duty exists then determined by the court based upon those facts. *See Johnson v. Urie*, 405 N.W.2d 887, 891 n. 5 (Minn. 1987).

[17]The relationship among the parties may also be a factor in establishing duty, for example, in cases involving a duty to control the actions of a third party, particularly the criminal actions of a third party. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168-69 (Minn. 1989); Lundgren, 354 N.W.2d at 27.

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pervasive public health issue of our time. Complaint at ¶ 76. In fact, the effects of cigarette smoking are so staggering -- and so certain -- that statistical models have been developed to measure health care expenditures. *Id*. at ¶ 78-79. *See Tapemark*, 273 N.W.2d at 637 n. 7 ("Some courts have relied on statistical studies to conclude that there is generally a high risk....").

Even assuming, *arguendo*, that these exceptional circumstances are not sufficient to establish a duty, there is an additional and decisive factor in the present case -- the defendants' own voluntary assumption of a duty. These defendants assumed a duty to render services for the protection of the public health and a duty to those who advance and protect the public health, including Blue Cross. In large part, defendants assumed this duty through their public statements and representations that they would undertake to accept an interest in the public's health as a basic and paramount responsibility and that they would research the issue of smoking and health and report all facts to the public. *See e.g*., Complaint at ¶ 25(d) ("We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."); *Id*. at ¶ 25(f) ("We always have and always will cooperate closely with those whose task it is to safeguard the public health."); *Id*. at 25(g) ("We are pledging aid and assistance to the research effort into all phases of tobacco use and health."). As Justice Cardozo stated long ago:

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

Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922). *See also Isler v. Burman*, 305 Minn. 288, 232 N.W.2d 818, 822 (1975) ("[O]ne who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so.").[18]

Public policy also overwhelmingly supports the existence of a duty in the present case. *See Erickson*, 447 N.W.2d at 169. ("Ultimately, the question [of whether a duty is imposed] is one of policy."). The policy considerations in this case include:

> *The preservation of public health and the containment of health care costs*. *See Forster v. R.J. Reynolds Tobacco Co*., 437 N.W.2d 655, 658 (Minn. 1989) ("This state has a vital interest in protecting the health and safety of its citizens."); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663, 664 (1919) ("The health of the people is an economic asset.").
>
> *The intentional wrongdoing and moral culpability of defendants*. *See Forster*, 427 N.W.2d at 662 (finding that cigarette companies do not have "a license to lie" and noting "this state's deep concern for honesty as well as health."); Prosser, § 8 at 37 ("There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong.").
>
> *The unavailability of an alternative reasonable and adequate remedy*. *See Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597, 602 (1975) ("One of the paramount interests of the members of an organized and civilized society is that they be afforded protection against harm to their persons, properties, and characters."); Minn. Const. art. I, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs...."); Minn. Const. art. I, § 7 ("No person shall… be deprived of life, liberty or property without due process of law.").

In sum, the existence of a direct duty in the present case is merely a consequence of the industry's own egregious acts over the past four decades. Given these unique and unprecedented facts, the recognition of a direct duty is clearly mandated.

In addition, Blue Cross (and the State) have pled several causes of action -- statutory and equitable -- which expand traditional tort principles. Yet defendants have failed to challenge Blue Cross's claims under any specific causes of action other than antitrust and undertaking of special duty.

Thus, Blue Cross has asserted causes of action for violation of Minnesota's consumer protection and deceptive trade practices statues -- Count Four ("Consumer Fraud"), Count Five ("Unlawful Trade Practices"), Count Six ("Deceptive Trade Practices") and Count Seven ("False Advertising"). *See* Complaint at ¶¶ 101-120. These statutes are remedial in nature and are construed liberally in favor of protecting the public. *See State of Minnesota v. Alpine Air Products, Inc*., 500 N.W.2d

[18] *See also* Section III.D., *infra*., discussing undertaking of special duty.

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788, 790 (Minn. 1993) ("In passing consumer fraud statutes, the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law."); *Love v. Amsler*, 441 N.W.2d 555, 559 (Minn. Ct. App. 1989) ("Because the Act is remedial it should be '[c]onstrued liberally for advancement of the remedy.'") (citations omitted). In addition, standing to enforce these statutes is broadly defined in Minn. Stat. § 8.31, subd. 3a.[19]

Blue Cross also has pled two causes of action in equity for restitution " Count Eight ("Performance of Another's Duty to the Public") and Count Nine ("Unjust Enrichment"). Em Complaint at ¶¶ 121-129. Both claims remain unchallenged by the defendants, and both are recognized under Minnesota law. *See Indep. School Dist. No. 197 v. Grace*, 752 F. Supp. 286, 303 (D. Minn. 1990) (recognizing cause of action for the cost of asbestos abatement under Section 115 of the Restatement of Restitution); *Klass v. Twin City Fed. Sav. & Loan. Ass'n*, 291 Minn. 68, 190 N.W.2d 493, 495 (1971) (cause of action for unjust enrichment may be based on "situations where it would be morally wrong for one party to enrich himself at the expense of another") (citations omitted).

Indeed, Minnesota has long recognized the need for equity to ensure that no wrong will be without a remedy. As noted by the Minnesota Supreme Court in *Brown v. Maplewood Cemetery Ass'n*, 85 Minn. 498, 89 N.W. 872, 879 (1902), "The very origin of equity . . . was that there was never a wrong for which there was no remedy, or no adequate relief at law." *See also Swooger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955) ("Equity . . . functions as a supplement to the rest of the law where its remedies are inadequate to do complete justice."); *Beliveau v. Beliveau*, 217 Minn. 235, 245, 14 N.W.2d 360, 366 (1944) ("It is traditional and characteristic of equity that it possesses the flexibility and expansiveness to invent new remedies or modify old ones to meet the requirements of every case and to satisfy the needs of a progressive social condition.").

C. The State And Blue Cross Have Standing To Seek Damages And Equitable Relief Under The Antitrust Laws

1. Antitrust Laws Are Intended to Protect Competition in Order to Promote Unrestricted Production and the Highest Quality and Safest Goods

The antitrust laws -- state and federal -- are broad, remedial statutes directed against conduct which unfairly tends to destroy competition. As the United States Supreme Court has stated:

> The heart of our national economic policy long has been faith in the value of competition.

Standard Oil Co. v. F.T.C., 340 U.S. 231, 248 (1951); *see also Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade.")[20]

In their memorandum, defendants have not challenged plaintiffs' substantive claims under the Minnesota Antitrust Law. However, a basic understanding of the purpose of antitrust law is necessary to properly analyze the issue of standing.

By protecting competition the antitrust laws seek to accomplish a variety of objectives. The effect of competition on prices is only one concern. Other objectives, relevant to the present case, include ensuring the unrestricted production of goods and the distribution of the highest quality and safest goods. *See Allied Tube & Conduit Corp. v. Indian Head. Inc.*, 486 U.S. 492, 500 (1988) ("Agreement on a product standard is… implicitly an agreement not to manufacture, distribute, or purchase certain types of products" and has "a serious potential for anticompetitive harm."); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.... The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."); *Northern Pacific*, 356 U.S. at 4-5 ("[T]he unrestrained interaction of competitive forces will yield ... the highest quality...."); *Berry v. United States*, 312 U.S. 457, 466 (1940) (antitrust laws prohibit "limit[ing] production" and "deterioration in quality.").

Limitations on the flow of information also are

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

[20]The State and Blue Cross have pled two antitrust claims, pursuant to two separate sections of the Minnesota Antitrust Law. *See* Counts II and III, Complaint at ¶¶ 89-100, citing Minn. Stat. §§ 325D.51 and 325D.52. These two statutory provisions underscore the broad scope of the antitrust laws.

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a concern of the antitrust laws. Thus, in *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the Supreme Court found an unreasonable restraint of trade involving a conspiracy among dentists and their trade group to refuse to provide x-rays to dental insurers for use in evaluating claims. The Court found that the defendants' collective activities resulted in "the denial of information" to insurers and dental patients. 476 U.S. at 457.

In view of this authority, defendants' contention that "[p]laintiffs should not be allowed to contort their product liability claims into antitrust causes of action" is misplaced. *See* Defendants' Memorandum at 19-20. In this argument, defendants rely on cases involving individuals with personal claims of discrimination or emotional or personal injury -- not injury to "business or property," which is a basic requirement of federal antitrust law. *See* 15 U.S.C. § 15; *See also Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) ("The phrase 'business or property' . . . would, for example, exclude personal injuries suffered.").[21]

Despite defendants' persistent attempts to re-write the complaint, the present case does not involve personal injury claims. Instead, the State and Blue Cross seek recovery of health care expenditures incurred in their capacity as two of the largest purchasers of health care in Minnesota. See Complaint at ¶¶ 7-8. Clearly, this is a loss to the State and Blue Cross in their business or property. *See Reiter*, 442 U.S. at 340 ("A person whose property is diminished by a payment of money wrongfully induced is injured in his property.") (citations omitted).

Certainly, plaintiffs do not dispute the proposition that not every tort claim also is an antitrust claim. Just as clearly, however, the fact that the anti-competitive behavior involves unsafe products does not -- as a matter of law, or as a matter of policy -- exempt it from the antitrust laws. Indeed, as the Supreme Court emphatically stated in *National Soc'y of Professional Engineers, supra*:

> *Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute*. In our complex economy the number of items that may cause serious harm is almost endless -- automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. *The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers*.

435 U.S. at 695-96 (emphasis added).

Thus, the present case -- involving concerted activity, restraint of trade, monopoly power, restrictions on output and information, and even suppression of a safer product -- involves the quintessential elements of an antitrust claim.

2. Federal Antitrust Standing Reflects the Broad, Remedial Purpose of the Antitrust Laws

In accordance with the broad scope and purpose of the antitrust laws, standing to assert a claim for damages is expansive under the federal statute. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws… shall recover threefold the damages by him sustained.

Citing this broad language, the United States Supreme Court has emphasized the extended reach of the federal antitrust laws. For example, in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the Supreme Court stated:

> "On its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.

Id. at 472-73 (citations omitted).

McCready involved a class action antitrust claim alleging that a group health plan's practice of refusing to reimburse subscribers for treatment by

[21]Defendants' cases include *Boisjoly v. Morton Thiokol, Inc*., 706 F.Supp. 795 (D. Utah 1988) (no antitrust standing for engineer who alleged emotional injury as result of space shuttle disaster and a campaign to discredit him); *Young v. Colonial Oil Co*., 451 F.Supp. 360, 361 (M.D. Ga. 1978) ("Emotional distress to an individual is not a 'business injury' which is contemplated by the antitrust laws...."); *Hamman v. U.S*., 267 F.Supp. 420, 429, 432 (D. Mont. 1967) ("incorporeal property right in the marital relationship" is not "property" within the meaning of the federal antitrust laws).

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psychologists, while providing reimbursement for psychiatrists, was an unlawful restraint of competition. 457 U.S. at 467. After describing the broad parameters of antitrust standing, the Court recognized two types of limitations. *Id*. at 473. The first related to the potential for duplicative recovery, an issue which defendants in the present case have not raised. *Id*. at 473-75.[22] The second limitation related to the remoteness of the injury. *Id*. at 476. This is an argument raised by defendants in the present action, although defendants failed to cite *McCready*, perhaps the leading case on this issue.

In *McCready*, the Court found that in analyzing "remoteness" the courts "are forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'…" *Id*. at 477. In holding that the plaintiff had standing in *McCready*, the Supreme Court:

> Rejected the defendants' argument that "because the alleged conspiracy was directed… at psychologists, and not subscribers to group health plans, only psychologists might maintain suit." *Id*. at 478.
>
> Rejected defendants' contention that the decision of the plaintiff's employer to retain the health plan's coverage was an intervening cause of plaintiff's injury, even though the employer's decision was "in some sense a factor that contributed independently to McCready's injury...." *Id*. at 480 n. 17.
>
> Stated that "[a]lthough McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think that McCready's injury 'flows from that which makes defendants' acts unlawful'… and falls squarely within the area of congressional concern. " *Id*. at 484.[23]

One year after the decision in *McCready*, the Supreme Court issued its opinion in *Associated General Contractors, supra*, which elaborated on the various factors involved in the analysis of antitrust standing. *Associated General Contractors* involved an action by a union alleging that an employer association and its members coerced third parties to contract with nonunion firms. 459 U.S. at 520. As in *McCready*, the Court in *Associated General Contractors* noted the similarity between the common-law concepts of proximate cause and the test for standing under federal antitrust law. *Id*. at 535-36. The Court stated:

> In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

Id. at 536-37.

The factors identified in *Associated General Contractors* included the causal connection between the antitrust violation and the harm, an improper motive, the directness or indirectness of the injury, whether the injury was of a type that Congress sought to redress with antitrust laws, the speculative nature of damages, the risk of duplicative recoveries or complex apportionment of damages, and whether the denial of standing would leave a significant violation unremedied. *Id*. at 537-46.[24]

In the present case, these factors clearly support the standing of the State and Blue Cross. Unquestionably, it was the wrongful acts of the cigarette industry which have caused the harm to the State and Blue Cross. For decades, defendants engaged in a combination and conspiracy intended to promote a product which, when used as intended, causes premature death and disease in unprecedented numbers. Obviously, health care expenditures

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[22]In the present case, various aspects of Minnesota law would protect against any potential for duplicative recovery. *See e.g.*, footnote 9, *supra; see also* Minn. Stat. § 325D.57 ("In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.").

[23]The individual subscriber had standing in *McCready* because, *inter alia*, the subscriber had paid the psychologist's bills herself after the health care plan failed to provide reimbursement. 457 U.S. at 475.

[24]The Court in *Associated General Contractors* found no standing on the particular facts of the case. Among the facts cited by the Court were that the union's allegations were "both brief and vague," *Id.* at 522, that the union "was not even alleged any marketwide restraint of trade," *Id.* at 539 n. 40, that "[i]t is not clear whether the Union's interests would be served or disserved by enhanced competition in the market," *Id.* at 539, and that "[d]enying the Union a remedy . . . is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* at 542.

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increased as a direct result, and, indeed, statistical models have been developed to measure these damages. Thus, there are no unforeseeable -- or superseding -- acts to break the causal chain between defendants and the State and Blue Cross. Indeed, the harm to the State and Blue Cross is "inextricably intertwined" with the injury to the smokers. *McCready*, 457 U.S. at 484; *see also Perkins v. Standard Oil Co*., 395 U.S. 642, 647-648 (1969) (even when there is "an additional link" in the causal chain, "[i]f there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury.").

Other than "remoteness," defendants' only other argument against antitrust standing is that the State and Blue Cross have not suffered an antitrust injury. In this argument, defendants contend that (1) plaintiffs' injuries do not reflect the anticompetitive conduct of defendants, and (2) plaintiffs are not participants in the relevant market.

The leading case on antitrust injury is *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477 (1977). In this case, the Supreme Court stated:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489 (emphasis in original). Thus, in *Brunswick*, the Court found that plaintiff had not suffered antitrust injury because the conduct that it complained of actually increased competition. *Id*. at 484 ("the sole injury alleged is that competitors were continued in business. . . ."); *see also Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 338 (1990) (no antitrust injury when competitor cut prices, which Soften is the very essence of competition"); *Cargill, Inc. v. Monfort of Colorado, Inc*., 479 U.S. 104, 122 (1986) ("showing of loss or damage due merely to increased competition does not constitute [antitrust] injury").

By contrast, in the present case, the State and Blue Cross have been injured by conduct that decreased competition in the development and production of a safer cigarette and in the research and dissemination of information regarding the harmful effects of smoking. This is precisely the type of anticompetitive activity prohibited by the antitrust laws. Thus, the injuries suffered by the State and Blue Cross -- increased expenditures for health care -- "flows from that which makes defendants' acts unlawful." *Brunswick*, 492 U.S. at 489.[25]

Defendants' argument that plaintiffs are not participants in the relevant market also is unavailing. Long ago, the Supreme Court stated:

> The statute does not confine its protection to consumers, or to purchasers, or to sellers.... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms. Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); *See also McCready*, 457 U.S. at 472 (quoting *Mandeville*). Thus, while market participation is a factor in analyzing antitrust standing, the Supreme Court has not found it to be decisive. As the Supreme Court recognized in *McCready*, although the plaintiff "was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id*., 457 U.S. at 484.[26]

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[25]Defendants' arguments that the harm does not result from the anticompetitive effect of the antitrust violations are fundamentally misguided. First, defendants argue that increased competition would have led to lower prices which would have resulted in more smoking. Defendants' Memorandum at 18. However, the anticompetitive conduct at issue in this case is not price competition -- but restraining and suppressing research, information and the marketing of a safer cigarette. Second, defendants argue that plaintiffs' injuries flow "from the alleged adverse health effects of cigarettes, not from anticompetitive conduct in the cigarette market." Defendants' Memorandum at 19-20. This statement is a half-truth. It is true that the adverse health effects of cigarettes are a cause of plaintiffs' harm. But it is also true that this harm flows directly from the defendants' anticompetitive conduct in restraining and suppressing research, information and a safer cigarette.

[26]In *McCready*, there was a dispute between the parties as to whether the plaintiff was a consumer in the market that had been restrained. 457 U.S. at 479-80. The Supreme Court, however, underscored the fact that antitrust standing may be based on two separate but intertwined markets, stating:

> If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, . . . we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

457 U.S. at 484 n. 21. There is some confusion among lower federal courts regarding the issue of market participation. *Compare Sullivan v. Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994)

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Similarly, in the present case, the injury suffered by the State and Blue Cross is "inextricably intertwined" with the injury the defendants inflicted upon smokers. As one defendant acknowledged in an internal memo:

> Most Philip Morris products both tobacco and non-tobacco are directly related to the health field.

Complaint at ¶ 36.[27]

Finally, defendants fail to address another factor in the antitrust standing analysis, that is, whether the denial of standing would leave "a significant antitrust violation undetected or unremedied." *Associated General Contractors*, 459 U.S. at 542. As the Supreme Court stated in *McCready*:

> Only by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully observed.

457 U.S. at 473 n. 10. Thus, the standing issue generally is not *whether* there will be private enforcement of the antitrust laws; instead, the issue is *who* among the potential victims is the most efficient enforcer to seek damages under the antitrust laws. *See California v. ARC America Corp*., 490 U.S. 93, 103 n. 6 (1989) (recognizing concern "that at least some party have sufficient incentive to bring suit.").

In the present case, however, defendants do not argue that there is a more efficient enforcer of the antitrust laws than the State and Blue Cross. This is a further -- and compelling -- reason for allowing the State and Blue Cross to proceed in an action for damages.[28]

3. Minnesota Has Expanded the Scope of Antitrust Standing

The Minnesota Antitrust Law, which governs the present case, is even more expansive in defining standing than the federal statute. In fact, the Minnesota statute was amended in 1984 to broaden the federal standard by specifically including "indirect" injuries within the scope of antitrust protection. The statute, as amended, states:

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

Minn. Stat. § 325D.57 (emphasis added).[29]

This 1984 amendment followed the United States Supreme Court decision in *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), which limited antitrust standing in a price-fixing case to direct purchasers. As a result, Minnesota amended -- and broadened -- its standing statutes and is now one of only about 15 states which specifically encompass "indirect" injuries in their antitrust statutes. *See ARC America Corp*., 490 U.S. at 98 n. 3.

Because of their marked departure from federal law, several of these state statutes, including the 1984 Minnesota act, have been challenged on the grounds that the federal statute preempts state law. This issue reached the United States Supreme Court in *ARC*

(discussing conflicting decisions) with *Gulfstream III Associates v. Gulfstream Aerospace*, 995 F.2d 425, 429 (3d Cir. 1993) (plaintiff must be competitor or consumer in the relevant market or demonstrate that the harm is "'inextricably intertwined' with the antitrust conspiracy."). However, given *McCready* and *Mandeville* -- and, as noted below, the Minnesota Antitrust Law's broadened coverage -- this apparent confusion among the circuits need not be addressed.

[27]This admission by defendants is one factor distinguishing *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), a case cited by defendants. Unlike in *Multidistrict Vehicle*, where farmers were denied standing for a conspiracy involving pollution control equipment, in the present case the health care field is -- as acknowledged above and as demonstrated by statistical data -- "within that area of the economy which is endangered by a breakdown of competitive conditions." *Id.* at 129. In addition, while certain portions of the *Multidistrict Vehicle* decision may still be valid in interpreting federal law, *See McCready*, 457 U.S. at 480-81, others have been superseded by the more recent line of Supreme Court authority and, of course, by the amended Minnesota Antitrust Law, discussed below.

[28]As noted above, defendants have failed to challenge the standing of the State of Minnesota in its law enforcement capacity to seek equitable relief and penalties under the Minnesota Antitrust Law. *See* Minn. Stat. §§ 8.31 and 325D.59. An action for damages also is necessary to ensure that defendants "disgorge the 'fruits of their illegality'". *McCready*, 457 U.S. at 473 n. 10; *See also American Society of Mechanical Engineers v. Hydrolevel Corp*., 456 U.S. 556, 572 n. 10 (1982) ("private suits are an important element of the Nation's antitrust enforcement effort....").

[29]*See also* Minn. Stat. § 8.31, which authorizes suits for damages and equitable relief by the Attorney General and private parties for violation of a number of statutes, including the Minnesota Antitrust Law.

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America, supra, where the Court affirmed the validity of the Minnesota statute. The Court stated:

> Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States. . .
>
> It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law.

490 U.S. at 101-02, 103.

Given the unique features of the Minnesota statute and the statute's obvious relevance to this case, it is inexplicable that defendants chose to omit any reference to this statute in their brief. Indeed, defendants represented that:

> 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).

Defendants' Memorandum at 16 n. 6.

Plaintiffs agree that, in general, Minnesota antitrust law is interpreted consistently with federal law. *See State of Minnesota v. Alpine Air Products, Inc*., 490 N.W.2d 888, 894 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993). However, in the present case, the Minnesota Legislature specifically chose to depart from federal law on the issue of standing, and the "difference in statutory language" is directly relevant and "compel[s] a contrary result."[30]

Defendants are well aware of the significance -- and the "differences in statutory language" -- of the 1984 amendment to the Minnesota antitrust statute. Two of the defendants specifically referenced this 1984 amendment in their answers.[31] A third defendant -- Liggett -- specifically cited this Court to the importance of the amended antitrust statute in moving for the disqualification of Robins, Kaplan, Miller & Ciresi ("RKM&C"). Indeed, Liggett argued that this very statute, because it was cited in RKM&C's prior representation of Liggett in a price-fixing case, was "a fundamental overlapping legal issue." *See* Memorandum in Support of Liggett Group Inc.'s Motion to Disqualify RKM&C, October 6, 1994, at 14.[32]

Defendants' failure to address the Minnesota statute places plaintiffs in an untenable position. This action was specifically filed under the Minnesota antitrust statute, and defendants have moved to dismiss the Minnesota antitrust claims on the sole basis of standing yet defendants failed to cite the relevant statute and failed to articulate a single reason why the State and Blue Cross are not, at a minimum, injured "Indirectly" under Minn. Stat. § 325D.57.[33]

As a result, plaintiffs are forced to speculate as to arguments defendants might assert in their reply brief -- to which, of course, plaintiffs have no response. The only argument plaintiffs can conceive of that defendants might assert is that the Minnesota statute encompasses only indirect "purchasers" -- and that the

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[30]The uniqueness of the Minnesota statute was underscored in a recent decision by the United States District Court, District of Minnesota, which declined to certify a nationwide class of indirect purchasers. In *City of St. Paul v. FMC Corp*., 1991-1 Trade Cases 69,305 (D. Minn. 1990), the court stated that "Minnesota antitrust law is in conflict with other states' antitrust laws" and that "[m]ost importantly, only fifteen jurisdictions allow indirect purchaser suits...." *Id.* at 65,148. *See also Cellular Plus v. Superior Court*, 18 Cal.Rptr.2d 308, 313 (Cal. App. 1993) ("[T]he more restrictive definition of 'antitrust injury' under federal law does not apply" under the California antitrust statute.); *Obstetrical & Gynecological Assoc. v. Landig*, 384 N.W.2d 719, 723-24 (Wis. App. 1986) ("There is no need to make the direct-indirect distinction under our statute. [The Wisconsin statute] explicitly allows any person injured directly or indirectly to sue upon this statute. Similar language is not found in the federal law.").

[31]*See* Philip Morris Incorporated, Twenty-Ninth Affirmative Defense ("Without in any way admitting the plaintiffs have any standing to bring the claims pleaded in Counts 2 and 3 of the complaint, plaintiffs lack any right or standing to bring the claims pleaded in Counts 2 and 3 for any conduct that occurred prior to the 1984 Amendments to Minn. Stat. § 325D.57 because they are not direct purchasers."); R.J. Reynolds Tobacco Company Eleventh Affirmative Defense ("Without admitting that plaintiffs have standing to bring the claims pleaded in Counts 2 and 3 of the Complaint, Reynolds states that those claims are barred to the extent that they are based on conduct that occurred prior to 1984, because the plaintiffs are not direct purchasers. ").

[32]The issue under this statute in RKM&C's prior representation of Liggett in the price-fixing case was whether the 1984 amendment would be applied retroactively, an issue which was resolved by the Court of Appeals in that case. *See Keating v. Philip Morris, Inc*., 417 N.W.2d 132, 136 (Minn. Ct. App. 1987).

[33]The only standing cases defendants cite under the Minnesota Antitrust Law were both decided under the pre-1984 statute. *See Midwest Communications v. Minnesota Twins*, 779 F.2d 444, 450-51 (8th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986); *United States v. Stauffer Chem. Co*., 1983-2 Trade Cas. (CCH) ¶ 69,815 (D. Minn. 1983).

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State and Blue Cross, while they are purchasers of health care, are not purchasers of cigarettes. This, of course, is contrary to the clear mandate of the statute, which authorizes standing for "any person" -- not just any purchaser -- "injured directly or indirectly."[34]

It is true that a specific impetus for the amendment of the Minnesota statute was the *Illinois Brick* decision regarding indirect purchasers. However, the Minnesota amendment went beyond indirect purchasers to encompass "any person" injured "directly or indirectly." If the Legislature intended to limit standing to indirect purchasers, it obviously could have done so in the statute itself. In fact, several other states did specifically limit the scope of their statutes by using the phrase "indirect purchasers."[35]

The Minnesota Legislature, however, chose to follow a different path -- in clear and explicit terms. The State and Blue Cross were injured -- directly or indirectly -- by unlawful conduct of defendants and unquestionably have standing under the Minnesota Antitrust Law.[36]

D. The State and Blue Cross Have Pled a Cognizable Action in Tort for Undertaking of Special Duty

Count I of the complaint sets forth the basic elements of a tort action. Defendants attempt to characterize this claim as resting entirely upon the Restatement (Second) of Torts § 324A and then to argue that specific elements of Section 324A are missing in the present case. However, while the rationale underlying Section 324A lends considerable support to Count I -- particularly with respect to defendants' assumption of a duty the present claim is based upon fundamental principles of Minnesota tort law. Thus, the two substantive arguments raised by defendants -- proximate cause and recovery in the absence of physical harm -- are defeated by basic principles of Minnesota tort law.

1. Section 324A Is Not the Exclusive Basis For an Action Involving an Assumed Duty

In Minnesota, the essential elements of a tort action are: 1) a legal duty owed by defendant to plaintiff; 2) a breach of that duty; 3) injuries proximately caused by the breach; and 4) damages. *R.A.P. v. B.J.P.*, 428 N.W.2d 103, 106 (Minn. Ct. App. 1988) (*citing Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982)). These elements are met in Count I.

With respect to the first element, as noted previously, defendants undertook a duty through their affirmative acts and statements that they would undertake to accept an interest in the public's health as a paramount responsibility and that they would research the issue of smoking and health and report all facts to the public. As repeatedly stated by the Minnesota Supreme Court:

> [O]ne who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so.

Isler v. Burman, 232 N.W.2d at 822, *citing Glanzer v. Shepard*, 133 N.E. at 276 (N.Y. 1922); *see also Thelen v. Spilman*, 251 Minn. 89, 86 N.W.2d 700, 706 (1957); *Mulroy v. Wright*, 185 Minn. 84, 240 N.W. 116, 117 (1931).

In their memorandum, defendants do not challenge the existence of a duty. Rather, defendants mistakenly presume that because this claim involves the undertaking of a duty, that the action must rest exclusively upon Section 324A. However, Section 324A does not provide the exclusive authority for an action involving an assumed duty, and the broad principles enunciated by Justice Cardozo in *Glanzer* and adopted in Minnesota have not been so narrowly construed. Indeed, a number of Minnesota decisions underscore that an undertaking action need not fall precisely within Section 324A's provisions.

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[34] *See* Minn. Stat. § 645.08 ("In construing the statutes of this state…, [w]ords and phrases are construed according to rules of grammar and according to their common and approved usage...."); Minn. Stat. § 645.16 ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.") Of course, the Minnesota Antitrust Law does encompass indirect "purchasers," *See Keating*, 417 N.W.2d at 136, but is not limited to only that specific class of persons.

[35] *See, e.g.*, Ill. Stat. ch. 740, Act 10, § 7 ("No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages."); Haw. Rev. Stat. § 480-14(c) ("No person other than the attorney general of the State shall be authorized to bring a class action for indirect purchasers asserting claims under this chapter."); D.C. Code § 28-4509(a) ("Any indirect purchaser in the chain or manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured within the meaning of this chapter.").

[36] Finally, although defendants' barely touch on the issue of equitable relief, it is well established that certain standing requirements are more broadly interpreted in this context. Of course, the State in its law enforcement capacity has unquestioned standing to pursue equitable relief and penalties. *See* Minn. Stat. §§ 8.31 and 325D.59. Moreover, for private parties such as Blue Cross, only a threat of antitrust injury, at most, is sufficient to establish standing. *See Cargill*, *supra*, 479 U.S. 104 (1986); *see also* Minn. Stat. §§ 8.31 and 325D.58.

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For example, in *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979) and *Andrade v. Ellefson*, 391 N.W.2d 836 (Minn. 1986), the Minnesota Supreme Court held that municipalities could be found liable for undertaking a duty. In neither case did the Court base its decision exclusively on Section 324A, although in *Cracraft* the Court did note the analogy to Section 324A. *Cracraft*, 279 N.W.2d at 807 n. 9, 11. The Court stated in *Cracraft* that "special duty" is "nothing more than convenient terminology… for the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance." *Id*. "Special duty," the court noted, "therefore, could also effectively be termed 'assumed' duty." *Id*.[37]

Similarly, Minnesota courts have recognized viable actions in tort for negligent misrepresentations based on an assumed duty. In *M.H. v. Caritas Family Services*, 488 N.W.2d 282 (Minn. 1992), for example, the Minnesota Supreme Court held that an adoption agency, while under no duty to disclose initially, could be liable for damages for disclosing that a child had a background of incest without further disclosing that the child's parents were brother and sister. In so holding, the court stated, "[E]ven if one has no duty to disclose a particular fact, if one chooses to speak he must say enough to prevent the words from misleading the other party." 488 N.W.2d at 288.[38]

2. Issues of Proximate Cause Are Not Appropriate for Decision at This Time

Defendants erroneously argue that Count I fails because 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." Defendants' Memorandum at 23. In fact, however, plaintiffs have specifically pled that "[d]efendants' failure to exercise such reasonable care increased the risk of harm and the cost of health care" and that "[a]s a direct and proximate result of defendants' conduct, plaintiffs have suffered and will continue to suffer substantial injuries and damages. " Complaint at ¶¶ 87-88.

Moreover, since the issues of reliance and increased risk of harm are issues of proximate cause, resolution on a motion on the pleadings is improper. *See* Sections III.A. and III.B.4., *supra*; s*ee also Andrade*, 391 N.W.2d at 843 ("… Anoka County argues that if it owes plaintiffs a special duty, any negligence on its part was not a proximate cause of plaintiffs' injuries as a matter of law. This argument is premature.").

3. Physical Harm Is Not a Requirement For Recovery in This Action

Defendants also claim that plaintiffs' undertaking count fails because "[t]he Restatement [324A] by its terms permits recovery for 'negligent undertaking' liability only by plaintiffs who suffer physical harm." Defendants' Memorandum at 27. Again, defendants' reliance upon 324A is misplaced, and numerous Minnesota decisions have allowed plaintiffs to recover in tort for monetary damages notwithstanding the lack of "physical harm." *See e.g.*, *Caritas*, 488 N.W.2d at 288 (allowing recovery for misrepresentations made in adoption proceedings); *Bonhiver v. Graff*, 311 Minn. 111, 248 N.W.2d 291 (1976) (allowing recovery in action against accounting firm for information negligently supplied); *Mulroy*, 240 N.W. at 117 (citing the undertaking principle in *Glanzer* and allowing recovery for damages in tort for the negligence of a city clerk who furnished an untrue certificate showing no special assessments).

Moreover, in this case, defendants'

[37]In *Cracraft* and *Andrade* the court recognized four, non-exhaustive factors relevant to the analysis of whether a special or assumed duty exists: 1) actual knowledge of a dangerous condition; 2) reasonable reliance on the undertaking; 3) creation of a duty of care by statute or ordinance; 4) use of due care to avoid increasing the risk of harm. *See Cracraft*, 279 N.W.2d at 806-07; *Andrade*, 391 N.W.2d at 841. However, there is no bright-line test and not all of these factors must be met in order to establish a duty. Thus, in *Andrade* the Court found a county had a duty for its negligence in licensing and supervising a day care home despite the fact that two factors -- including reasonable reliance -- were probably not met. *Id.* at 842-43. Although Cracraft and Andrade involved assumed duties by municipalities, these cases illustrate that Minnesota does not require a plaintiff to "squeeze" its negligence count into the provisions of Section 324A simply because the duty alleged in the complaint is an assumed one. *See* Defendants' Memorandum at 22.

[38]In their memorandum, defendants cite a variety of cases from other jurisdictions. A number of these decisions involved motions for summary judgment, and not, as in the present case, a motion on the pleadings. *See, e.g., Gunsalus v. Celotex Corp*., 674 F.Supp. 1149 (E.D. Pa. 1987); *Sound of Market Street v. Continental Cable Int'l*, 819 F.2d 384 (3d Cir. 1987); *Palco Linings, Inc. v. Pavex, Inc*., 755 F. Supp. 1278 (M.D. Pa. 1990). In addition, given differences in the law of the different states, these cases offer no useful precedental guidance to this Court. For example, in *Gunsalus*, involving a cigarette personal injury claim, the court stated that, "Pennsylvania courts have not yet extended 'good samaritan' liability to companies for failure to comply with corporate purposes or promises made in advertising." 674 F. Supp. at 1157. This is strikingly at odds with both the common law and statutes of Minnesota. Indeed, Minnesota has enacted consumer protection statutes which form the basis of several claims in this case and which underscore this state's policy of holding wrongdoers liable for misrepresentations in, *inter alia*, advertisements.

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wrongdoing did, in fact, cause physical harm to Minnesota citizens, and public health issues rest at the heart of this action. Under similar facts, the Minnesota Supreme Court has expressly authorized recovery in tort even in the absence of physical harm to the plaintiff. Thus, in *80 S. 8th St. Ltd. Partnership v. Carey-Canada, Inc*., 486 N.W.2d 393 (Minn. 1992), amended 492 N.W.2d 256, a building owner sought to recover in negligence and strict liability for the costs of asbestos removal from its building. Defendants argued that plaintiff's loss was purely economic and thus, an action in tort was barred by the decision in *Superwood v. Siempelkamp*, 311 N.W.2d 159 (Minn. 1981).[39] The Supreme Court stated:

> 80 South Eighth does not seek damages for personal injuries and there are no allegations of personal injuries caused by the asbestos-containing fireproofing used in the building.
>
> In seeking the costs of maintenance, removal and replacement, 80 South Eighth seeks the costs of eliminating the risks of injury and of making the building safe for all those who use and occupy this property.

486 N.W.2d at 395, 397 (emphasis added). In holding that the building owner could recover in tort, the Court noted the rationale underlying tort law and stated:

> Rather than waiting for an occupant or user of the building to develop an asbestos related injury, we believe building owners should be encouraged to abate the hazard to protect the public. We believe our decision today will do so.

Id. at 398. As in *Carey-Canada*, the State and Blue Cross have, in essence, sought to abate a grave hazard in order to protect the public. This hazard -- the disease and death caused by smoking -- was created and sustained by the decades of wrongful conduct by defendants. Public policy and the fundamental principles of tort law are fostered by plaintiffs' claims.

IV.

CONCLUSION

For all of the foregoing reasons, the State and Blue Cross respectfully request that this Court deny defendants' motion in its entirety.

Respectfully submitted,

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[39] In *Superwood*, the court held that "[E]conomic losses that arise out of commercial transactions except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence and strict products liability." *Id*. at 162.

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