

KELLEY EX REL, MICHIGAN,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED, ET AL.
Defendants

Case No. 96-84281-CZ

February 28, 1997

**PLAINTIFFS' BRIEF IN RESPONSE TO
DEFENDANTS' MOTION TO STRIKE THE
ATTORNEY GENERALS' PUNITIVE DAMAGES
CLAIM AND AD DAMNUM ALLEGATIONS**

I

INTRODUCTION

Cigarette smoking is the leading cause of premature death in the United States. This lawsuit brings the cigarette industry before the bar of this Court -- an industry which the State believes has caused horrific carnage and damages to the citizens and to the State of Michigan on a scale and of a magnitude never before seen in the Courts of this State. This lawsuit is about a conspiracy of lies and deception between and among the country's principal tobacco companies and their agents and others who aided, abetted and assisted them, including their public relations arms, consultants and the local wholesale distributors ("Defendants"). Tens of thousands of Michigan citizens unnecessarily have suffered and died from smoking-related diseases and ill-health conditions.

The concerted activity of the Defendants was begun decades ago and continues to the present day. This campaign of lies, deceit and fraud is an extensive and complex scheme calculated to induce the State of Michigan and its citizens to rely on false and misleading information supplied to them by the tobacco industry regarding health risks associated with smoking and the addictive nature of cigarettes. This

misinformation was and continues to be disseminated through an intricate web of public relations and lobbying efforts. The egregious nature of Defendants' campaign of lies, deceit and fraud is increased by the fact that the Tobacco Companies intentionally manipulated the nicotine levels in cigarettes to addict smokers and thereby secure a continuing market for their products.

The primary goal of this collaborative effort by the Defendants was to protect the industry's profit margin through outright fraud and deceit, without regard for the number of Michigan citizens who suffered and died from smoking-related illnesses. The industry replenished its dwindling and dying consumer base by intentionally targeting children and enticing them to join the ranks of adult smokers. This web of lies, deceit and fraud is the direct cause of the single largest health care crisis in the State of Michigan and the United States as a whole.

The Defendants were able to achieve the goals of their individual misconduct and their conspiracy over a long period of time by intentionally and methodically concealing and distorting the truth about the adverse health consequences of smoking and the highly addictive nature of nicotine. After pledging decades ago to conduct and make public the results of "objective" research by "distinguished" scientists, the Defendants kept secret their actual research, distorting or burying those results in order to case smoking in a more favorable light. With respect to nicotine, Defendants concealed what they had known since at least the early 1960s: "We are then in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." Complaint, ¶¶ 47 & 136. Continuing the deception, as recently as 1994, several of the Defendants' top executives testified under oath before Congress that nicotine is not addictive. As outlined in great detail in the Complaint, the Defendants have engaged in these and other deceptive and fraudulent acts, despite their public statements and promises, starting as early as 1954, that the "people's health [is] a basic responsibility, paramount to every other consideration in our business." Several of the principal Defendants expressly promised to "cooperate closely with those whose task it is to safeguard the public health," but they did exactly the opposite.

The Defendants' deceitful misconduct is uniquely and extraordinarily outrageous, cruel and wanton and exhibits such a total disregard for the quality and value of human life as to shock the conscience. Furthermore, the injury that has resulted, including the State of Michigan's payment of enormous sums to treat indigent residents' smoking-related

illnesses, was completely foreseeable and directly related to the Defendants' deception and their intentional acts. The Defendants wrongfully have benefited from their misconduct and are accountable both in law and in equity to the State. Complaint, ¶¶ 1-16.¹

The Defendants' wanton and malicious actions are so egregious, offensive and outrageous that they rise to an unprecedented level of alleged corporate misconduct in Michigan. The Defendants' misconduct inflicted such widespread disease and death upon tens of thousands of Michigan citizens and caused the State to expend such huge sums on health care as to justify the imposition of punitive damages in order adequately to compensate the State for the harms done and to deter others from engaging in such conduct in the future; and it is the unique severity, magnitude, duration and maliciousness of Defendants' actions set out in detail in the Complaint that give rise to and fully justify the State's request that punitive damages be imposed upon the Defendants.² The State urges the Court to extend, enlarge and apply existing Michigan damages law to permit punitive damages in order adequately to compensate the State and to punish Defendants for their deliberate, wanton, unconscionable and malicious conduct and their intentional fraud and deceit. The protection of all Michigan citizens, especially the children of the State, warrants such a just and logical departure from the judicially created rule³ against the awarding of damages to punish Defendants. Plaintiff respectfully requests the Court to allow Plaintiff's prayer for punitive damages to remain before the Court and that the Court consider proof on the same. In the alternative, Plaintiff requests leave of the Court to amend its Complaint to request exemplary damages from Defendants as additional compensation to the State for its damages which are not susceptible of full and definite monetary compensation by virtue of the societal outrage felt by the State over Defendants' reckless disregard for the

¹ The Complaint alleges six causes of action -- Violations of the Michigan Consumer Protection Act, Violations of the Michigan Antitrust Reform Act, Restitution Based Upon Unjust Enrichment, Indemnity, Breach of Duty Voluntarily Undertaken and Injunctive Relief to Protect Children -- and seeks, *inter alia*, other extraordinary, declaratory and/or injunctive relief as permitted by law and as necessary to assure the State has an effective remedy. Complaint, ¶¶ 193-232.

² Michigan Court Rule 2.114(D)(2) provides, "The signature of an attorney or party . . . constitutes a certification that (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by . . . a good-faith argument for the extension, modification, or reversal of existing law. . . ."

³ See *e.g.*, *Stillson v. Gibbs*, 53 Mich. 280; 18 N.W. 815 (1884).

State's rights.⁴

In addition to its prayer for punitive damages, the State seeks, *inter alia*, restitution and compensatory damages from Defendants. Plaintiff requests at least \$2 billion in restitution from Defendants as a result of medical expenditure losses by the State of Michigan and at least \$2 billion in actual damages for Defendants' violations of State law. Complaint at p. 96. The Defendants claim that the *ad damnum* clause in the complaint might generate unwarranted publicity. Pursuant to M.C.R. 2.115(B), they have moved to strike that clause for failure to comply with M.C.R. 2.11(B)(2) which provides in pertinent part that "a specific amount must be stated if the claim is a sum that can by computation be made certain. . . . Otherwise, a specific amount may not be stated." Given the unique nature of this case and the totality of the detailed allegations of misconduct against these Defendants, the State's claims or damages should stand. In the alternative and in lieu of striking the State's complained of prayer for damages, the State requests leave to amend its Complaint should the Court find such to be justified and necessary in the circumstances.

II.

PROCEDURAL POSTURE AND LEGAL STANDARD

Pursuant to paragraph 5 of Stipulated Pre-Trial Order No. 1, the Defendants have moved to strike or in the alternative for partial summary disposition of the State's punitive damages claim pursuant to M.C.R. 2.116(C)(8). Additionally, the Defendants request the Court to strike the State's prayer for at least \$2 billion each in restitutionary relief and compensatory damages as violative of M.C.R. 2.111(B)(2). (Def. Brief at pp. 3-4). For all the reasons that follow, the Defendants' Motion should be denied.

The Defendants' Motion under M.C.R. 2.116(c)(8) examines whether the Plaintiff's Complaint alleges a *prima facie* case. The Court must accept all of the State's well-pleaded factual allegations, together with any reasonable inferences or conclusions that can be drawn from the facts, as true and the Court should

⁴ See, *e.g.*, *Joba Construction Company, Inc. v. Burns & Roe Incorporated*, 121 Mich. App. 615, 642-43; 329 N.W. 760, 773 (1982) (plaintiff's status as corporation does not preclude it from receiving exemplary damages); *Jackson Printing Co., Inc. v. Mitan*, 169 Mich. App. 334; 425 N.W.2d 791 (1988) (citing *Hayes-Albion Corp. v. Kuberski*, 108 Mich. App. 642; 311 N.W.2d 122 (1981) and *Shwayder Chemical Metallurgy Corp. v. Baum*, 45 Mich. App. 220; 206 N.W.2d 484 (1973) (exemplary damages may be awarded to corporations in the proper circumstances).

not grant the Defendants' Motion unless the State's claim is so clearly unenforceable as a matter of law that no possible factual development could justify the State's right of recovery on its claim. *See, e.g., Shirilla v. Detroit*, 208 Mich. App. 434; 528 N.W.2d 763 (1995); *Stehlik v. Johnson*, 206 Mich. App. 83; 520 N.W.2d 633 (1994); *ETT Ambulance Service Corporation v. Rockford Ambulance, Inc.*, 204 Mich. App. 392; 516 N.W.2d 498 (1994).

III.

ARGUMENT

A. THE AUTHORITIES CITED BY DEFENDANTS DO NOT REQUIRE THE STATE'S PUNITIVE DAMAGES CLAIMS TO BE STRICKEN GIVEN THE UNIQUE FACTS AND CIRCUMSTANCES OF THIS CASE.

1. The Michigan Cases Cited By the Defendants.

Against the dreadful and horrific factual backdrop presented herein, the Defendants cite a familiar line of Michigan cases for what they characterize as "the indisputable prohibition against punitive damages" in Michigan. But they provide no discussion of these cases short of "black letter" pronouncements and no argument to bring the facts of this case within the orbit of the cases they cite. A closer examination at the factual predicates underlying each of these cases is required to better illuminate the public policy values promoted in those cases, as opposed to the public policy values at stake herein. That closer look demonstrates beyond question that the Michigan Courts have never been confronted with a case whose damages consequences to the plaintiff are as horrific and widespread as in the instant case. There is no god reason to shield these Defendants from the imposition of punitive damages. Punitive damages are necessary in order to adequately foster the State's interests in this case.

In re Disaster at Detroit Metropolitan Airport on August 16, 1987, 750 F. Supp. 793, 805 (E.D. Mich. 1989) involved wrongful death multidistrict litigation against a Minnesota airline and a Missouri airplane manufacturer that arose out of the crash of a commercial airliner in Michigan in which one hundred and fifty-six people were killed. The plaintiffs' claims involved allegations relating to the conduct and training of the flight crew, maintenance of the aircraft, the design, testing and manufacture of the aircraft, and a failure to warn of certain deficiencies related to the aircraft. In its choice of law analysis, the Court observed that a state's decision whether to allow

punitive damages focused not on domicile, but on whether the State adopted "corporate regulatory versus corporate protective policies." The Court noted that Michigan's law prohibiting an award of punitive damages was reflective of a "corporate protective" policy to promote corporate migration into its economy:

The policy, which is reflected in those laws that prohibit an award of punitive damages, is the protection of domiciliary defendants from excessive financial liability. Those states which have refused to impose punitive damages on its defendants have done so in order to promote (1) the financial stability of the businesses that conduct their affairs within its borders, and (2) the overall economic well-being of its citizenry.

Disaster at Detroit, 750 F. Supp. At 805. Equally significant for our purposes, however, is the Court's observation that the case was a wrongful death action and that *neither* punitive nor exemplary damages were available under Michigan's Wrongful Death Act. *Disaster at Detroit, id.*

Kewin v. Massachusetts Mutual Life Insurance Company, 409 Mich. 401; 295 N.W.2d 50 (1980) involved a single insured who brought an action for mental anguish he allegedly sustained as a result of his disability insurance carrier's bad-faith refusal to pay benefits. The Court held that the disability income policy was a commercial contract whose mere breach did not give rise to mental anguish damages. The Court noted:

In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant. *Ten Hopen v. Walker*, 96 Mich. 236, 240; 55 N.W. 657 (1893); *McChesney v. Wilson*, 132 Mich. 252, 258; 93 N.W. 627 (1903). Our review of the precedent indicates that those cases which permit recovery of exemplary damages as an element of damages involve tortious conduct on the part of the defendant. *See, e.g. McFadden v. Tate*, 350 Mich. 84; 85 N.W.2d 181 (1957) (assault and battery); *Scripps v. Reilly*, 38 Mich. 10 (1878) (libel); *Welch v. Ware*, 32 Mich. 77 (1875) (assault and battery). An award of exemplary damages is considered proper if it compensates a plaintiff for the "humiliation, sense of outrage, and indignity" resulting from

injuries "maliciously, wilfully and wantonly" inflicted by the defendant. *McFadden, supra*, 350 Mich. 89; 85 N.W.2d 181. The theory of these cases is that the reprehensibility of the defendant's conduct both intensifies the injury and justifies the award of exemplary damages as compensation for the harm done the plaintiff's feelings.

Kewin, 409 Mich. At 419; 295 N.W.2d at 55.

Gregory v. Cincinnati, 450 Mich. 1; 538 N.W.2d 325 (1995) was a product liability case which involved a single injured worker. The Court noted that the case involved *negligent* design with liability in the case premised on the risk-utility test, and found that focusing on postmanufacture conduct in such a case would shift the focus away from "point-of-manufacture" conduct and risk tainting a jury's verdict regarding a defect. At note 31, the Court observed:

Perhaps proof of such conduct would be relevant and necessary if punitive damages were available in Michigan, but that is not the case. *See Reed v. Ford Motor Co.*, 679 F. Supp. 873 (S.D. Ind. 1988), in which the court approved a recall theory in order to prove recklessness for purposes of punitive damages only.

Gregory, 450 Mich. at 23; 538 N.W.2d at 334.

Association Research & Development Corporation v. CAN Financial Corporation, 123 Mich. App. 162; 333 N.W.2d 206 (1983) (*per curiam*) involved corporate litigants and allegations of breach of contract, implied contract, intentional interference with an advantageous business relationship and business slander. The Court refused the corporate plaintiff's urging that it was entitled to punitive damages "to punish and deter" on the intentional interference with a business relationship count, citing several cases, including *Kewin, supra*, and *Stilson v. Gibbs*, 53 Mich. 280; 18 N.W. 815 (1884) (In an action against sheriff for levying on and selling plaintiff debtor's exempt property, jury could not add punitive damages to exemplary and other compensatory damages even though defendant acted willfully and in bad faith.).

Eide v. Kelsey-Hayes Company, 431 Mich. 26; 427 N.W.2d 488 (1988) involved a sexual harassment claim brought pursuant to the Michigan Civil Rights Act in which the plaintiff was awarded exemplary and compensatory damages. The Court found that the

cause of action was statutory and that exemplary damages were not permitted under the Civil Rights Act separate and apart from compensatory damages. In his concurring opinion, Justice Griffin commented that

[i]n the early Michigan decisions, there was authority for assessing exemplary or punitive damages in a civil proceeding for the purpose of punishing a defendant for egregious conduct. However, in 1884 Justice Cooley wrote two opinions [*Stilson v. Gibbs*, 53 Mich. 280; 18 N.W. 815 (1884), and *Watson v. Watson*, 53 Mich. 168; 18 N.W. 605 (1884)] which sharply altered the course of Michigan jurisprudence in this area. . . . Since then, Michigan has been among a minority of jurisdictions which adhere to the rule that exemplary damages may not be awarded to punish. They are available, if at all, only as an element of compensatory damages.

Eide, 431 Mich. at 51; 427 N.W.2d at 498. Additionally, citing Shecter, *Exemplary Damages -- A New Exemplar*, 60 Mich. B.J. 654 (1981) and 2 Speiser, Krause & Gans, *The American Law of Torts*, s. 8:45, p. 801, and Wade, *The Michigan Law of Damages*, p. 27-1, Justice Griffin noted that "The rule in Michigan that exemplary damages must be an element of compensation, not punishment, has been criticized."

Fellows v. Superior Products Co., 201 Mich. App. 155, 158; 506 N.W.2d 534, 536 (1993) (*per curiam*) reported an attractive nuisance wrongful death action occasioned by the death of a child killed while playing on defendant's concrete pipes. The Court reaffirmed that the Michigan Wrongful Death Act provides the exclusive remedies for injuries which result in death, and that the Act "does not provide for punitive or exemplary damages."

Jackovich v. General Adjustment Bureau, Inc., 119 Mich. App. 221; 326 N.W.2d 458 91982) was a "case within a case" occasioned by an engineering firm's removing evidence from the scene of an alleged wrongful death occurrence which resulted in the dismissal of the wrongful death action. The Court reaffirmed that while exemplary damages to compensate plaintiffs for "humiliation, sense of outrage and indignity" were appropriate in cases where a defendant conduct was found to be intentional, punitive damages calculated solely to punish the defendant were not permissible under Michigan law. *Jackovich*, 119 Mich. App. At 234-36; 326 N.W.2d at 463-64.

Postill v. Booth Newspapers, Inc., 118 Mich.

App. 608; 325 N.W.2d 511 (1982) was a libel action which culminated in jury verdicts for punitive damages in favor of two of the plaintiffs for \$500,000 and \$200,000 respectively. The trial judge found the punitive damages awards to be contrary to Michigan law and "so grossly excessive as to shock the conscience of the court." The Court found that the trial court's punitive damage instruction was "against the great weight of Michigan law" and that "Punitive damages in Michigan are allowed only to compensate a plaintiff for his injuries and not as a method of punishment." *Postill*, 118 Mich. App. At 628-29; 325 N.W.2d at 629.

The factual underpinnings of the cases discussed above provide no support for the Defendants' position that punitive damages are unavailable to the State in this case. The State maintains that punitive damages are justified in order to vindicate the State's damages interests in this case. It is clear from these cases that no Michigan Court has even considered, much less decided, the question whether punitive damages would be appropriate in a case with the factual support presented by the complaint herein.

Nor is there any sound policy reason to suggest that the Defendants are entitled to rely on the body of the cases that they cite, given the allegations the State has made against them. *Bricker v. Green*, 313 Mich. 218 218; 21 N.W.2d 105 (1946) overruled Michigan's longstanding rule that the negligence of the operator of a vehicle was imputed to passengers and gave the plaintiff therein a new trial. The Court had this to say concerning the ability of a wrongdoer to rely on an existing rule:

Wisconsin was the last to abandon the rule and, in so doing, used the following language: 'Were it a rule of property we should certainly apply to it the rule of stare decisis. But is not a rule of property. It is a pure judicial decree relating to liability for negligence, and *the court would not for a moment give countenance to an argument that a wrongdoer relied upon it.* We are therefore at liberty to change the rule in the interests of justice and to conform to the overwhelming majority rule.' (citations omitted) (emphasis added).

Bricker, 313 Mich. at 232; 21 N.W.2d at 110. Similarly, this Court should not countenance for a moment any argument by the Defendants that they were in any way entitled to rely on any rule that punitive damages are unavailable to the State during the decades-long

course of willful and intentional misconduct alleged herein. Neither would there be any reason to suppose that the public policy of Michigan would favor a doctrine that would encourage the migration to Michigan of corporate actors of the likes of the Defendants who would then engage in willful, malicious and intentional wrongdoing costing the State hundreds of millions of dollars a year and visiting death and disease upon the citizens of Michigan on a grand scale.

2. The Facts Support The State's Entitlement To Punitive Damages.

The duration and character of the wrongs committed by the Defendants against the State and the people of Michigan warrant the allowance of punitive damages in this case. The allegations levied against the Defendants illuminate in excruciating and painful detail the nature of the wrongs committed against the State, the egregious character of Defendants' conduct, the degree of the Defendants' culpability, and the history of interaction between the State and the Defendants that is so replete with lies and deception -- all demonstrating just how truly outrageous the Defendants' wrongful conduct is to the public sense of justice and propriety. It is particularly important to consider the methods undertaken by the Defendants in a cumulative effort to deceive the State of Michigan. Defendants collaborated to create and embark upon the a complex public relations conspiracy for the sole purpose of concealing from the State and its citizens the truth about the health dangers presented by smoking cigarettes.

On December 13, 1996, Florida Circuit Court Judge Harold J. Cohen, presiding judge in the Florida Tobacco Litigation, *The State of Florida, et al. v. The American Tobacco Company, et al.*, Fifteenth Judicial Circuit, Case No. CL 95-1466 AH, entered his Order denying Defendants Motions to Dismiss Counts Five Through Eight of the Third Amended Complaint and Order Denying Defendants' Motion for Clarification or Reconsideration of This Court's Ruling of December 6, 1996, on Count Four. (Exhibit A.) In that Order, Judge Cohen affirmed that the State of Florida would be permitted to maintain civil actions under Florida's Racketeer Influenced and Corrupt Organization Act:

The case at bar is certainly not one alleging 'garden variety' business fraud. In its Third Amended Complaint the State alleges a parade of horrors that would seem to make out a case for the 'mother of all RICO actions.' The State will be required to prove clear and convincing evidence the criminal and evil intent it

has alleged. However, if the State can prove its case, the alleged injuries and damages sought would dwarf any previous RICO claims (public or private) for even the most injurious of common crimes. The extraordinary and grievous damages and injuries alleged patterns of racketeering activity are the type for which the Legislature intended the Florida RICO Act to be applied. What is alleged is so far-reaching and all encompassing that if liability is proven, application of RICO civil relief and recovery would undoubtedly be warranted. No cocaine cartel, gambling empire, or white-collar scheme has even approached the damage allegedly done the State as alleged in the Plaintiffs' case. However, recognizing the stigma an alleged RICO violation carries with it, the Court reminds all parties that *allegations* made and clear and convincing *proof* are two very different things.

Many of the substantive factual allegations in the case at bar parallel the factual allegations in the Florida case.

a. The Tobacco Industry's Campaign Of Deception Regarding Scientific Research On Smoking And Health.

The industry-wide conspiracy was both fueled and sustained by years of false misrepresentations disseminated to the State of Michigan and to citizens of Michigan through a public relations campaign and a concentrated lobbying effort. This campaign of deception was designed to lull the State of Michigan and other public health authorities to rely upon the voluntary smoking and health research by the tobacco industry pledged in the "Frank Statement." Complaint, ¶ 64. This voluntary undertaking was guaranteed by the industry to be conducted with the utmost integrity using only the most objective scientists to advise the State of Michigan and its citizens on the truth about smoking and health. Complaint, ¶ 64. The industry established the Tobacco Industry Research Committee (later renamed The Council for Tobacco Research-U.S.A., Inc., hereinafter "CTR") to conduct testing, research and scientific studies on issues related to smoking and health. Complaint, ¶¶ 61-64. The CTR was in actuality nothing more than a "rump" organization secretly controlled by Tobacco Industry lawyers and by public relations firm of Hill and Knowlton to prevent the public from learning what Defendants already knew about the health risks associated with smoking and the addictive nature of nicotine. Complaint, ¶¶ 3 & 183.

This fact was confirmed by a former CTR employee who, in 1993, publicly admitted, "When CTR researchers found out that cigarettes were bad and it was better not to smoke, we didn't publicize that. The CTR is just a lobbying thing. We were lobbying for cigarettes." Complaint, ¶ 72.

Individual Defendants acted in support of industry-wide objectives. Any research that was conducted which produced disastrous results of cancer and death was immediately shut down, and the project assigned to a lawyer in an attempt to cloak it in confidentiality. All tangible evidence of the same was destroyed or shipped to overseas for protection. Complaint, ¶ 3. This type of activity began with the "Frank Statement" and continued into the future with all the major members of the tobacco industry involved as participants in the conspiracy to deceive the State of Michigan and its citizens. The effects of the Defendants misconduct have caused and will continue to cause unprecedented damage to the State of Michigan and its citizens.

The conspiracy dates back to a secret meeting in 1953 of five of the six largest cigarette manufacturers and the public relations firm of Hill and Knowlton, wherein the strategy to undermine the emerging legitimate science related to the ill-effects of smoking on health was designed and painstakingly drafted. Complaint, ¶¶ 56-69. The Defendants' strategy was designed to protect cigarettes from future decline of tobacco stocks, to confuse the public about the true facts surrounding smoking and health, and forestalling and diluting government regulation of smoking. Complaint, ¶¶ 56-59.

The campaign has continued to grow and flourish successfully through the use of false, deceptive and misleading advertising, sham representations to governmental regulators, monopoly power to suppress legitimate research on the health effects of smoking and addiction, monopoly power to stop the development and marketing of "safe" cigarettes, unfair and deceptive trade practices of disseminating fraudulent information to the public and governmental entities and intentional advertising efforts calculated to promote the illegal sale of cigarettes to children. Complaint, ¶¶ 3 & 56-72. All of which was undertaken with the intent to deceive the State and its citizens.

Particularly illustrative of the Defendants' malicious conduct are their own admissions, contained within their own documents and which conclusively show that what the Defendants said publicly was vastly different than the Defendants' true knowledge about smoking and health:

a. Philip Morris -- 1956 memorandum -- "Decreased carbon monoxide and nicotine are related to decreased harm to the circulatory system as a result of smoking . . . Decreased irritation is desirable . . . as a partial elimination of potential cancer hazard." Complaint, ¶ 91.

b. Philip Morris -- 1958 memorandum -- "[T]he evidence . . . is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors. . . ." Complaint, ¶ 92.

c. Philip Morris -- 1961 document - - *Reduction of Carcinogens in Smoke* . . . "To achieve this objective will require a major research effort, because carcinogens are found in practically every class of compounds in smoke. This fact prohibits complete solution of the problem by eliminating one or two classes of compounds. The best we hope for is to reduce a particularly bad class, i.e., the polynuclear hydrocarbons, or phenols. . . . Flavor substances and carcinogenic substances come from the same classes, in many instances." Complaint, ¶ 93.

d. Philip Morris -- 1963 memorandum -- [classes of compounds in cigarette smoke described as] known carcinogens . . . "Irritation problems are now receiving greater attention because of the general medical belief that irritation leads to chronic bronchitis and emphysema . . . serious diseases involving millions of people. Emphysema is often fatal either directly or through other respiratory complications. A number of experts have predicted that the cigarette industry ultimately may be in greater trouble in this area than in the lung cancer field." Complaint, ¶ 94.

e. Liggett consultant -- 1961 memorandum -- "There are biologically active materials present in cigarette tobacco. These are: a) cancer causing; b) cancer promoting; c) poisonous; d) stimulating, pleasurable, and flavorful."

Complaint, ¶ 96.

f. Liggett consultant -- 1961 memorandum -- "Basically, we accept the inference of a causal relationship between the chemical properties of ingested tobacco smoke and the development of carcinoma, which is suggested by the statistical association shown in the studies of Doll and Hill, Horn and Dorn with some reservations and qualifications and even estimate by who much the incidence of cancer may possibly be reduced if the carcinogenic matter can be diminished, by a appropriate filter, by a given percentage." Complaint ¶ 97.

g. Philip Morris -- 1968 memorandum -- "We have reason to believe that in spite of gentleman's agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities. . . . Most Philip Morris products, both tobacco and non-tobacco, are directly related to the health field."

b. Intentional And Illegal Targeting Of Children.

To maintain its customer base and ensure profits, the Defendants intentionally target children, adding them to the ranks of addicted adult smokers. Complaint, ¶¶ 153-192. The Defendants conducted surveys and studies into the lifestyles and value systems of young people in the 15-24 age range, in order to devise ways to advertise and increase the demand for tobacco products among young people. Complaint, ¶¶ 165-66. This course of intentional misconduct and misrepresentation by the tobacco industry on the issue of child targeting must be examined in the context of the industry's decades-long pronouncements and sworn testimony that it does not intend for children and adolescents to smoke, and that it does not target children.

There is compelling evidence to the contrary. R.J. Reynolds identified and targeted advertising in stores in proximity to the youth market. Complaint, ¶ 161. In the campaign to attract the youth market, R.J. Reynolds Division Manager for Sales wrote all sales representatives requesting that they identify stores in proximity to high schools and colleges. A follow up letter was sent requesting that the focus be on all

accounts located across from, adjacent to, or in the general vicinity of high schools or college campuses. Complaint, ¶ 161. The gentleman who portrayed the "Winston Man" for R.J. Reynolds testified before Congress: "I was clearly told that young people were the market that we were going after. It was made clear to us that this image was important because they like to role play, and we were to provide attractive models for them to follow . . . I was told I was a live version of GI Joe. . . ." Complaint, ¶ 164. In 1981 Philip Morris was able to surpass R.J. Reynolds in market share by taking control of the cigarette market through the targeting of children. Through the year 1988, nearly three-fourths of teenage smokers used Marlboro cigarettes. Complaint, ¶ 167.

For years, the youth market has been a priority target for cigarette manufacturers. Complaint, ¶¶ 167-182. "Joe Camel" emerged in 1987 as an R.J. Reynolds creation aimed directly at America's youth. Complaint, ¶ 174. Joe Camel is "credited" with elevating R.J. Reynolds' share of the children's market from 0.5% to 32.8% within just a few years. Complaint, ¶ 175. In 1988, the tobacco industry reaped \$221 million in profits from \$1.25 billion in sales to children under the age of 18.

In late 1990, the tobacco industry began a public relations campaign designed to convince the public that it wished to discourage young people from smoking. In fact, these campaigns were calculated to make smoking desirable to teens as a pleasurable adult activity, and did nothing to tell teens that smoking is highly addictive and harmful to human life. These public relations campaigns have the effect of instilling in children that smoking is a way to show their independence -- to act grown-up. Complaint, ¶ 178.

c. Willful Misrepresentation Of The Addictive Nature of Cigarettes And The Intentional Manipulation Of The Nicotine Levels In Cigarettes To Get And Keep Consumers Addicted.

The Defendants publicly maintain that cigarettes are not addictive. In fact, cigarettes are extremely addictive, even as addictive as cocaine. Complaint, ¶ 47. This fact has been well known to Defendants since the early 1960s. Complaint, ¶¶ 47 & 132-144. Scientists employed by the Defendants conducted studies and research that conclusively prove this to be true. Complaint, ¶¶ 47 & 107-113. Tobacco Industry executives have referred to the tobacco industry as being in the business of selling nicotine, an addictive drug. Complaint, ¶ 47. The extent to which the industry has recognized nicotine as their product is shown through a 1972 Philip Morris

report on a CTR conference provides:

a. As with eating and copulating so it is with smoking. The physiological effect serves as the primary incentive, all other incentives are secondary. The majority of the conferees would go even further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking.

b. Why then is there not a market for nicotine per se, eaten, sucked, drunk, injected, inserted or inhaled as a pure aerosol? The answer, and I feel quite strongly about this, is that the cigarette is in fact among the most awe-inspiring examples of the ingenuity of man. Let me explain my conviction. The cigarette should be conceived not as a product but as a package. The product is nicotine.

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

However when asked under oath for the truth regarding nicotine and addiction, tobacco industry executives swear that cigarette smoking is not addictive. Complaint, ¶ 46. This is all part of the campaign of deception embarked upon by the Defendants to sow confusion and misinformation about the true health effects of smoking. Complaint, ¶ 48.

While denying it publicly, the industry has taken affirmative steps to exploit the known addictive nature of nicotine and to manipulate the nicotine levels in cigarettes to make them even more addictive. Complaint, ¶¶ 132-134, 145 & 146, 149, 151-152. Ammonia is, likewise, added to cigarettes to enable them to administer more potent nicotine to the smoker. Complaint, ¶¶ 147-148 & 149b. Defendants' ability to manipulate nicotine levels is shown in part through their patent applications. Defendants admit that processed tobacco can be manufactured to provide a product with varying nicotine levels. Complaint, ¶ 152. This type of willful fraud has been the cornerstone of the Defendants' conspiracy -- public denial of facts well-known to the industry.

The totality of the facts alleged herein clearly demonstrate that the State must be entitled to seek

punitive damages from the Defendants in order properly to vindicate its interests in this case. The Defendants are an industry driven by greed and deceit in order to increase their customer base and to protect their profits. Damages designed to hold the Defendants accountable for their actions -- to punish for past misdeeds and to deter future wrongs -- are clearly appropriate in this case in the face of facts so calculated, deliberate and wanton.

B. THE STATE'S REQUEST FOR THE COURT TO ENLARGE AND EXTEND MICHIGAN DAMAGES LAW TO PERMIT DAMAGES CALCULATED TO PUNISH THE TRULY EGREGIOUS MISCONDUCT ALLEGED HEREIN IS FULLY JUSTIFIED UNDER MICHIGAN PUBLIC POLICY AND THE COMMON LAW.

1. History And The Common Law.

Punitive damages are an integral part of American common law. *Pacific Mutual Life Ins. Co. v. Haslip et al.*, 499 U.S. 1, 24; 111 S. Ct. 1032, 1046; 113 L. Ed.2d 1 (1991). "Where gross fraud, malice, or oppression appears, the jury are not bound to adhere to strict line of compensation, but may by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community." Sedgwick, Theodore, *Measure of Damages* 522 (4th ed. 1868).

If ever there existed a case to impose punishment on the Defendants and make them an example for the community, this is the case. Defendants' willful conduct is a glaring and horrifying example of gross fraud, malice and oppression levied against the State of Michigan with the profit motive as their only guide. Due to the extreme and aggravating circumstances of Defendants' wanton conduct, the State of Michigan requests this Court to extend, enlarge and apply existing Michigan damages law to permit punitive damages in order adequately to compensate the State and to punish Defendants for their deliberate, wanton, unconscionable and malicious conduct and their intentional fraud and deceit.

The majority of the states⁵ provide for

⁵ The following States allow punitive damages for the purpose of punishing defendants and deterring future wanton conduct for the protection of their citizens. Representative decisions include: ALABAMA, *Pacific Mutual Life Insurance Co. v. Haslip et al.*, 499 U.S. 1, 111 S. Ct. 1032 (1991); ALASKA, *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979); ARIZONA, *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 907 P.2d 506 (Ariz. Ct. App. 1995); ARKANSAS, *Smith v. Hansen*, 323 Ark. 188; 914 S.W.2d 285 (Ark. 1996); CALIFORNIA, *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688; 201 Cal. Rptr. 528, 537-538 (1984); COLORADO, *Giampapa v. Amer. Family Mut. Ins.*, 919 P.2d 838 (Colo. Ct. App. 1995);

damages calculated to punish and deter in order to advance the laudable policy of protecting their citizens from willful and wanton misconduct of others. Similarly, England⁶ permits the imposition of damages.

CONNECTICUT, *Alaimo v. Royer*, 188 Conn. 36; 448 A.2d 207 (1982) (punitive damages limited to expenses of litigation less taxable costs); DELAWARE, *Oliver B. Canon & Son, Inc. v. Fidelity and Casualty Co. Of New York*, 484 F. Supp. 1375, 1387-1388 (1980); DISTRICT OF COLUMBIA, *Woodner Co. v. Breedon*, 665 A.2d 929 (D.D.C. App. 1995); FLORIDA, *Nales v. State Farm Mut. Auto Ins. Co.*, 398 So. 2d 455, 457 (Fla. Dist. Ct. App. 1981); GEORGIA, *State Farm Mutual Automobile Ins. Co. v. Smoot*, 381 F.2d 331, 338-339 (5th Cir. 1967); HAWAII, *Lussier v. Mau-Van Dev., Inc.*, 4 Haw. App. 359, 667 P.2d 804 (1983); IDAHO, *Linscott v. Ranier Nat'l Life Ins. Co.*, 606 P.2d 958, 964 (Idaho 1980); ILLINOIS, *Stambaugh v. International Harvester Co.*, 106 Ill. App. 3d 1, 26; 435 N.E.2d 729, 746-47 (1982); INDIANA, *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 362 (Ind. 1982); IOWA, *Higgins v. Blue Cross of Western*, 319 N.W.2d 232, 235 (Iowa 1982); KANSAS, *Binyon v. Nesseth*, 231 Kan. 381, 383-390; 646 P.2d 1043, 1044-1047; KENTUCKY, *Feathers v. State Farm Fire & Casualty Co.*, 667 S.w.2d 693, 696-697 (Ky. App. 1983); MARYLAND, *Caruso v. Republic Insurance Co.*, 558 F. Supp. 430, 434-435 (D. Md. 1983); MINNESOTA, *Wilson v. City of Eagan*, 297 N.W.2d 146 (Minn. 1980); MISSISSIPPI, *Standard Life Insurance Co. of Indiana v. Veal*, 354 So. 2d 239, 247-248 (Miss. 1977); MISSOURI, *Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119, 138 (Mo. 1979); MONTANA, *Miller v. Fox*, 571 P.2d 804, 808 (Mont. 1977); NEVADA, *Cagle v. Raynel Campers, Inc.*, 90 Nev. 341, 526 P.2d 334 (1974); NEW HAMPSHIRE, *Lawson v. Great Southwest Fire Ins. Co.*, 392 A.2d 576, 579-580 (N.H. 1978); NEW JERSEY, *Leimgruder v. Claridge Assoc.*, 73 N.J. 450, 458; 375 A.2d 652, 655 (1977); NEW MEXICO, *Chavez v. Chenoweth*, 89 N.M. 423; 553 P.2d 703, 709 (1976); NEW YORK, *Greenspan v. Commercial Insurance Co.*, 57 A.D.2d 387; 395 N.Y.W.2d 519, 520-521 (3d Dept. 1977); NORTH CAROLINA, *United Labs, Inc. v. Kuykendall*, 335 N.C. 183, 191; 437 S.E.2d 374, 379 (1993); NORTH DAKOTA, *Smith v. American Family Mutual Insurance Co.*, 294 N.W. 2d 751 (N.D. 1980); OHIO, *Biery v. Belden & Blake Corp., et al.*, 1995 WL 782903 (Ohio App. 7 Dist. 1995); OKLAHOMA, *Christian v. American Home Assurance Co.*, 577 P.2d 899, 904-905 (Okla. 1977); OREGON, *Hager v. Tire Recyclers, Inc.*, 136 Or. App. 439; 901 P.2d 948 91995); PENNSYLVANIA, *Johnson v. Pilgrim Mutual Insurance Co.*, 425 A.2d 1119 (Pa. Super Ct. 1987); RHODE ISLAND, *Bibeault v. Hanover Insurance Co.*, 417 A.2d 313, 319 (R.I. 1980); SOUTH CAROLINA, *Jones v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171; 456 S.E.2d 429 (1995); SOUTH DAKOTA, *Black v. Gardner*, 320 N.W.2d 153, 161 (S.D. 1982); TENNESSEE, *Hutchison v. Pyburn*, 567 S.W.2d 762, 765-66 (Tenn. Ct. App. 1977); TEXAS, *National Bank of Commerce v. May*, 583 S.W.2d 685 (Tex. Civ. App. 1979); UTAH, *Nash v. Craig*, 585 P.2d 775, 778 (Utah 1978); VERMONT, *Phillips v. Aetna Life Ins. Co.*, 473 F. Supp. 984, 989-990 (D. Vt. 1979); VIRGINIA, *Poulston v. Rock*, 467 S.E.2d 4 (Va. 1996); WEST VIRGINIA, *Wells v. Smith*, 297 S.E.2d 872, 881 (W. Va. 1982); WISCONSIN, *White v. Rudity*, 117 Wis. 2d 130; 343 N.W.2d 421 (Ct. App. 1983); WYOMING, *Parker v. Artery*, 889 P.2d 520 (Wy. 1995).

⁶ *Wilkes v. Wood*, 95 Eng. Rep. 766 (K.B. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763); Commentators have traced punitive damages as far back as 13th century England when the King imposed monetary penalties, referred to as amercements, as punishment for offensive conduct directed towards the crown. See *Browning-Ferris Indust. of Vt., Inc. v.*

Punitive damages are, likewise, available in appropriate cases in a majority of jurisdictions when equitable relief is granted.⁷

2. The Growth Of The Common Law In Michigan

Michigan jurisprudence does not require the rigid application of rules of law to the changing needs of society when such application would work an obvious injustice in a given case at bar whose facts justify a different rule. The following examples serve to illustrate this principle:

Bricker v. Green, 313 Mich. 218; 21 N.W.2d 105 (1946) abandoned the imputed negligence rule in Michigan. The language of the Court illustrates the need to avoid a rigid obedience to existing but outmoded rules of law:

This [imputed negligent] rule, which exists only in Michigan, has been consistently applied in this State since . . . 1872, and it has been just as consistently criticized both within and without this jurisdiction.

* * *

Kelco Disposal, Inc., 492 U.S. 257, 287-88 (1989) (O'Connor J., concurring in part and dissenting in part) (stating punitive damages originated from amercements); see also Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages; Some Lessons From History*, 40 Vand. L. Rev. 1233, 1251 (1987) (noting amercements most commonly assessed as civil sanctions).

⁷ The following States allow punitive damage awards when equitable relief is granted: ARIZONA, *Hubbard v. Superior Court of Maricopa County*, 111 Ariz. 585; 535 P.2d 1302 (1975); CALIFORNIA, *Rivero v. Thomas*, 86 Cal. App. 2d 225, 194 P.2d 533; GEORGIA, *General Refractories, Co. v. Rogers*, 240 Ga. 228; 237; 239 S.E.2d 795, 800 (1977); HAWAII, *Lussier v. Mau-Van Dev., Inc.*, 4 Haw. App. 359, 392; 667 P.2d 804, 825 (1983); IDAHO, *Lewiston Pistol Club, Inc. v. Imthurn*, 94 Idaho 264; 486 P.2d 275 91971); INDIANA, *Hedworth v. Chapman*, 135 Ind. App. 129; 192 N.E.2d 649 (1965); IOWA, *Holden v. Construction Machinery Co.*, 202 N.W.2d 348 (Iowa 1972); KANSAS, *Capitol Federal Sav. & Loan Ass'n v. Hohman*, 235 Kan. 815; 682 P.2d 1309 (1984); MISSISSIPPI, *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 464 (Miss. 1983); MISSOURI, *Martin v. Swenson*, 335 F. Supp 765, 768 (W.D. Mo. 1971); NEVADA, *Tahoe Village Realty v. DeSmet*, 95 Nev. 131, 139; 590 P.2d 1158, 1161 (1979); NEW YORK, *Berkovits v. Hanley*, 40 App. Div.2d 921; 338 N.Y.S.2d 339 (1972); OKLAHOMA, *Z.D. Howard Co. v. Cartwright*, 537 P.2d 345, 347 (Okla. 1975); OREGON, *Klinicki v. Lundgren*, 298 Or. 662, 695 P.2d 906 (1983); SOUTH DAKOTA, *Black v. Gardner*, 320 N.W.2d 153 (1982); TENNESSEE, *Hutchinson v. Pyburn*, 567 S.W.2d 762 (Tenn. App. 1977); TEXAS, *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963); WISCONSIN, *White v. Rudity*, 117 Wis. 2d 139; 343 N.W.2d 421 (Ct. App. 1983).

Ever since 1872 we have adhered to the imputed negligence rule. We have recognized from time to time the changes brought about by the innovations of science and engineering, and we have carefully considered at much length the implications of the rule, its application, and the effect of its abandonment. As a result of our study and observation *we are convinced that in the long run the application of the rule is more harmful than helpful and results in more injustice than it prevents*; and that we should not continue the invariable application of the so-called imputed negligence rule merely and solely on the ground that the injured person was a voluntary, gratuitous passenger in an automobile, the driver of which was guilty of negligence which was a contributing proximate cause of an accident and injury to such passenger. (emphasis added).

Bricker, 313 Mich. at 227-28, 235; 21 N.W. at 108, 111.

Notwithstanding existing authority that "held flatly" that the awarding of interest was statutory and the workmen's compensation act did not provide for interest, the Circuit Court for Kent County granted interest on an award in a workmens compensation case in *Wilson v. Doehler-Jarvis Division of National Lead Company*, 358 Mich. 510; 100 N.W.2d (1960). In affirming the circuit court's decision, the Court commented that "We do not believe that the doctrine of stare decisis means that this Court and the evolution of the law should be controlled by the 'dead hand from the past.'" 358 Mich. at 514; 100 N.W.2d at 227-228.

Parker v. Port Huron Hospital, 361 Mich. 1; 105 N.W.2d 1 (1960) abolished the rule that charity hospitals were immune from liability for injuries caused by the negligence of their employees. In doing so, the Court concluded

that there is today no *factual justification* for immunity in a case . . . [where a 31 year-old mother of four died due to the negligent mistyping of her blood], and that *principles of law, logic and intrinsic justice* demand that the mantle of immunity be withdrawn. The almost unanimous view expressed in the recent decisions of our sister States is that insofar as the rule of immunity was ever justified, changed conditions have

rendered the rule no longer necessary.
(emphasis added).

361 Mich. at 25, 105 N.W.2d at 13.

Womack v. Buuchhorn, 384 Mich. 718; 187 N.W.2d 218 (1971) overruled precedent and held that an action does lie under Michigan common law for negligently inflicted prenatal injury. In arriving at its decision, the Court quoted from *Woods v. Lancet*, 303 N.Y. 349, 354; 102 N.E.2d 691, 694 (1951), the New York Court of Appeals decision that overruled similar New York precedent:

What, then, stands in the way of a reversal here? Surely, as an original proposition, we would, today, be hard put to it to find a sound reason for the old rule. Following *Drobner v. Peters*, *Supra*, would call for an affirmance but the chief basis for that holding (lack of precedent) no longer exists. And it is not a very strong reason, anyhow, in a case like this. Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, *but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals?* Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our Court said, long ago, that it had not only the right, but the duty to reexamine a question where justice demands it. . . .

384 Mich. at 724; 187 N.W.2d at 222.

The Court noted that it had followed the same legal philosophy in *Bricker v. Green*, 313 Mich. 21, 232; 21 N.W.2d 105, 110 (1946) when it adopted similar language from the Wisconsin Supreme Court:

Were it a rule of property, we should certainly apply to it the rule of *Stare decisis*. But it is not a rule of property. It is a pure judicial decree relating to liability for negligence, *and the court would not for a moment give countenance to an argument that a wrongdoer relied upon it.* (emphasis added).

384 Mich. at 724-25; 187 N.W. at 222.

The common law doctrine of governmental immunity of the State and its instrumentalities from tort liability was abrogated in *Pittman v. Taylor*, 398 Mich. 41; 247 N.W.2d 512 (1976). There, the Court found that the analysis contained in *Parker v. Port Huron Hospital*, discussed above, wherein the Court abrogated the common law immunity of charitable institutions was appropriate: "It is our conclusion that there is today no *factual justification* for immunity in a case such as this, and that principles of law, logic and intrinsic demand that the mantle of immunity be withdrawn." (emphasis added). 398 Mich. at 49; 247 N.W.2d at 515.

Placek v. Sterling Heights, 405 Mich. 638, 650; 275 N.W.2d 511, 514 (1979) held that "in the interest of justice for all litigants in this state" the doctrine of pure comparative negligence. In so doing, the Court noted that "[t]here is little dispute among legal commentators that the doctrine of contributory negligence substantial injustice since it was first invoked in England in 1809." 405 Mich. at 652; 275 N.W.2d at 515.

In *Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406; 320 N.W.2d 843 (1982), the Court abandoned the rule of *lex loci delicti*:

Review of the arguments for *lex loci* and the alternative choice-of-law methodologies convinces us that slavish devotion to the rigidities of *lex loci* no longer is either the reasonable policy to follow or the generally accepted law in the United States.

413 Mich. at 425; 320 N.W.2d at 850.

In re Edgar, 425 Mich. 364; 389 N.W.2d 696 (1986) involved questions surrounding the validity *vel non* of a spendthrift trust in which the income and principal were given to the same person. Affirming the decision of the Wayne Probate Court which had upheld the validity of the challenged trust against the weight of precedent, the Court again eschewed the mechanistic application of existing rules and overturned that precedent:

We are then confronted with a choice of mechanically applying the *Rose-Ford* language or carefully considering the underlying implications. We find that the rule state in *Ford* is not in accord with the important rule of furthering the desires of the testator, has no rational policy basis, and is at odds with the law in the majority of States. Furthermore, in declining to be bound by our earlier

language in *Rose* and *Ford*, we are not arbitrarily departing from *stare decisis* because the basis of the *Ford* rule has disappeared and, furthermore, overruling the rule puts us in line with the majority of states.

425 Mich. at 377-78; 389 N.W.2d 702.

IV. GIVEN THE TOTALITY OF THE ALLEGATIONS IN THE COMPLAINT PLAINTIFF'S *AD DAMNUM* CLAUSE WILL NOT GENERATE UNWARRANTED PUBLICITY AND DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S *AD DAMNUM* CLAUSE SHOULD BE DENIED.

In addition to its prayer for punitive damages, the state seeks, *inter alia*, restitution and compensatory damages from Defendants. Plaintiff requests at least \$2 billion in restitution from Defendants as a result of medical expenditure losses by the State of Michigan and at least \$2 billion in actual damages for Defendants' violations of State law. Complaint at p.96. The Defendants complain that the *ad damnum* clause in the complaint might generate unwarranted publicity. Pursuant to M.C.R. 2.115(B), they have moved to strike that clause for failure to comply with M.C.R. 2.11(B)(2), which in turn provides in pertinent part that "a specific amount must be stated if the claim is a sum that can by computation be made certain. . . . Otherwise, a specific amount may not be stated." Given unique nature of this case and the totality of the detailed allegations against these Defendants, the State's claim for damages is reasonable and should not be stricken. For example, the Complaint alleges that the impact of cigarette smoking on the nation is staggering, with 1990 smoking related illness costing the United States taxpayers approximately \$68 billion. The complaint alleges that Michigan bears its share of the horrible human and financial costs of cigarette smoking, with thousands of Michigan citizens dying each year from smoking-related diseases and the State spending hundreds of millions of dollars a year providing health care for its citizens with smoking-related diseases. The Complaint alleges that Michigan provides health care coverage for 1.1 million of Michigan's 9 million citizens and that the State spends over \$4 billion per year for health care. Complaint, ¶¶ 14-15. Given the permissive language of M.C.R. 2.115(B), the Defendants' Motion should be denied and the State's claim for damages should stand. In the alternative and in lieu of striking the State's complained of prayer for damages, the State requests leave to amend its Complaint should the Court find such to be justified and necessary in the circumstances.

CONCLUSION

The facts of the instant case clearly warrant the availability of punitive damages in order to ensure that the State has an adequate damages remedy and to ensure that the Defendants will not continue in the decades-long pattern of misconduct described in the Complaint. Proper vindication of the economic and societal injuries and outrage occasioned by the uniquely egregious, intentional, willful and wanton acts of the Defendants requires the availability of punitive damages as well as compensatory damages.⁸ Additionally, the State's prayer for at least \$8 billion in restitution from Defendants as a result of medical expenditure losses by the State and at least \$2 billion in actual damages for Defendants' violations of State law is reasonable under the circumstances of this case. The totality of the allegations in the complaint and the unique nature of this case make it highly unlikely that the State's *ad damnum* allegations will generate unwarranted publicity or prejudice any right of the Defendants. Accordingly, the Defendants' Motion to Strike the Attorney General's Punitive Damages Claim and *Ad Damnum* Allegations should be denied.

In the alternative, if the Court should find that punitive damages will not be available to the State, the Plaintiff requests the Court to grant it leave to amend the Complaint to assert a claim for exemplary damages, pursuant to the authorities collected in footnote 4 above, for the purpose of compensating Plaintiff for the outrage and other injuries sustained by the State as a direct result of Defendants willful, wanton and egregious conduct; and, in the alternative, if the Court should find the *ad damnum* allegations deficient, to amend the *ad damnum* allegations.

M.C.R. 2.118(A)(2) provides that "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires." *See e.g., Taylor v. Detroit*, 182 Mich. App. 583, 586; 452 N.W.2d 826 (1989); *Patillo v. Equitable Life Assur. Soc. Of the U.S.*, 199 Mich. App. 450; 502 N.W.2d 696 (1992) (court should freely grant leave to amend complaint when justice requires).

⁸ In the Florida case against many of the same defendants, the plaintiffs submitted a voluminous proffer, including a 442-page brief and approximately 27,000 pages of video transcripts, documents and affidavits, on the issue of the State's entitlement to punitive damages. While not conceding there was a reasonable basis for recovery of punitive damages therein, the defendants waived their right to contest Plaintiff's claim for punitive damages. Defendants' waiver of Rights Under section 768.72 and Request for Entry of Attached Order dated January 9, 1997, *The State of Florida, et al. v. The American Tobacco Company, et al.*, 15th Judicial Cir., Fla., No. CL 95-1466 AH (Exhibit B).

Respectfully submitted,

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_x(Signed)

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