

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH
JUDICIAL CIRCUIT
INGHAM COUNTY

KELLEY *ex rel.* MICHIGAN,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED, *et al.*,
Defendants.

Case No. 96-84281-CZ

March 21, 1997

Hon. Lawrence M. Glazer

**PLAINTIFF'S BRIEF IN REPLY TO DEFENDANTS'
OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY DISPOSITION OF DEFENDANTS'
CLAIMS THAT ASSIGNMENT AND/OR
SUBROGATION ARE THE STATE'S EXCLUSIVE
REMEDIES AND TO DEFENDANTS' CROSS-
MOTION UNDER MCR 2.116(I)(2) FOR SUMMARY
DISPOSITION**

I INTRODUCTION

In its opening Motion, the State summarized the factual underpinnings of its lawsuit, noting that this case concerns a decades-long conspiracy of fraud, deceit, misrepresentation and willful and intentional misconduct directed at both the people and the State of Michigan in order that the Defendants wrongfully might shift entirely to the State the harmful externalities of their industry -- the huge costs of public health care programs required to treat tobacco-related disease and ill-health conditions caused by their products, including Medicaid costs. The State demonstrated that the Michigan Medicaid Law did not require the State to pursue subrogation as its only remedy; that the State is entitled to assert, *inter alia*, its own common law equitable claims for restitution based upon unjust enrichment, and indemnity; that the State may seek injunctive relief to protect the interests of Michigan children; and that these claims are not negligence claims sounding in tort, but rather are purely equitable, not dependent upon, nor limited to, the tort claims available to individual smoking victims. The State is bringing its equitable claims directly and in its own right to protect its interests and the interests of the public, and is not suing to vindicate any personal right of any individual smoker harmed by the Defendants' products and wrongful activities.

**II SUBROGATION IS NOT THE STATE'S
EXCLUSIVE REMEDY**

Against this backdrop of decades of deceit, the Defendants now contend that the Michigan Medicaid Statute is exclusive and that it provides an adequate remedy at law such that the State has no common law rights in equity that it can vindicate herein. The Defendants are wrong and here's why:

A. The State Cases.

At the outset they proclaim: "Indeed, four courts in which health-care cost recoupment actions are pending have recently written opinions *dismissing* the types of direct, non-subrogation claims that the State asserts in its Complaint..." (emphasis in original). A closer look at these cases shows that they do not advance the proposition that the Defendants are suggesting here.

The San Francisco Tobacco Case. Incredibly, p. 20 of the very first such opinion attached, the order of the United States District Court for the Northern District of California, Exhibit A to their Memorandum, reveals that the Court specifically *found exactly the opposite* -- that statutory subrogation was *not* the Plaintiffs' exclusive remedy therein:

Defendants also argue that Cal. Gov't Code §§ 23004.1 and 23004.3 provide the counties with their only remedies under the circumstances. Those Government Code sections provide counties with a right of action in subrogation to recover medical costs from tortfeasors who injure their residents. Defendants contend that these sections evidence a legislative choice not to allow derivative suits like the present one. However, the Court finds that it is not clear under California law that these sections operate to supplant common law fraud and negligence claims, rather than to provide a mere alternative to such claims. *Therefore, the Court rejects defendants' argument that Cal. Gov't Code §§ 23004.1 and 23004.3 preclude this suit.* (emphasis added).

Clearly, the San Francisco ruling provides no authority for this Court to preclude the State's equitable claims

herein.¹

The West Virginia Tobacco Case. The Defendants attach a West Virginia trial court letter ruling as their Exhibit B and urge this Court to follow it. That letter ruling is not persuasive authority for this Court to limit the State of Michigan to a statutory subrogation remedy for three reasons: First, the Michigan Attorney General stands on a vastly different footing from the West Virginia Attorney General. In the West Virginia tobacco case, the trial court held that under West Virginia law the West Virginia Attorney General possesses no common law authority or power. Contrast the broad common law powers accorded the Michigan Attorney General, as noted in *Michigan State Chiropractic Ass'n v. Kelley*, 79 Mich. App. 789, 791; 262 N.W.2d 676,677 (1977). ("The Attorney General has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed"). Second, the plaintiffs addressed in the West Virginia trial court letter ruling were two state administrative agencies. The issue framed by the West Virginia trial court in its letter ruling was whether either one of the two administrative agencies - not the state itself - has authority to bring the action. As a preliminary matter, the West Virginia trial court judge specifically noted: "It should be clear to all concerned

that an administrative agency has no authority except that conferred under governing statutes." It is thus readily apparent that the Defendants here are trying to equate apples with desk chairs.

Third, and most significantly, while finding that the agencies were limited to statutory remedies, Judge Berger said the following at p. 5 of her ruling:

Under the facts alleged and assumed to be true, there can be no doubt that our State has suffered great loss in monetary damages and, more importantly, in human lives and the quality of human life. However, without proper legal remedy, there exists no claim [by either of the two agencies] upon which relief can be granted.

The lamentable state of affairs in West Virginia noted by Judge Berger stands in stark contrast to the long-standing law of Michigan: "[I]f plaintiff has a clear right and is without a remedy, equity will take jurisdiction under certain circumstances on the principle that equity 'will not suffer a wrong to go without a remedy.'" *Doering v. Baker*, 277 Mich. 683, 688; 270 N.W. 185, 187 (1936), citing Pomeroy, *Equity Jurisprudence*, Vol. 1 (3d Ed.) p. 704.

The Florida Tobacco Case. Next, the Defendants cite *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So. 2d 1239 (Fla. 1996) and the trial court's ruling of September 16, 1996, therein to persuade this Court that the State of Michigan should be forced to pursue tens of thousands of individual lawsuits as its exclusive (and "adequate") remedy at law. But the Defendants do not point out that the Florida Medicaid Third-Party Liability Act being construed by the Florida Supreme Court is unlike any other such Medicaid act in the United States.² The State of Florida is proceeding under this statute and the Court there has not been faced with and the issue of whether that statute provides an exclusive remedy.

The Michigan Medicaid Act provides a subrogation remedy, and by its plain language it also permits the State to institute direct actions.³ The State

¹ Defendants make much of the language at p. 25 of the San Francisco opinion that the Counties will have to prove that "the health care expenses incurred [by plaintiffs] for each individual smoker were a result of that smoker's tobacco use, as opposed to some other factor." The Defendants apparently interpret this mean that Plaintiffs will be required to prove causation on a person-by-person basis. "The only way they can proceed now is to prove that each individual citizen that they're claiming damages for was actually, specifically damaged by smoking, and they can't do that. *It's just not practical; they've got tens of thousands of smokers.*" Comment of Dan Webb, counsel for Philip Morris. Milo Geyelin, *Tobacco Industry Wins a Round In Court Against San Francisco*, Wall. St. J., Feb. 28, 1997, at B15. However, Plaintiff is informed and believes that the issue of the *methodology* by which the Plaintiffs therein may show what amount of money was spent to treat diseases caused by smoking was not specifically addressed before the Court either during argument or in the moving papers. Thus, epidemiological evidence and statistical aggregation techniques may well be permitted to accomplish those ends. Such scientific techniques already have been approved in the Medicaid payment context by Michigan Courts. See *Quality Clinical Laboratories, Inc. v. Dept' of Social Services*, 141 Mich. App. 597; 367 N.W.2d 390 (1985) (statistical methods used to calculate reimbursement figure valid and proper where perusing thousands of files to determine actual reimbursement figure ineffective due to time-consuming nature) citing *Illinois Physicians Union v. Miller*, 675 F.2d 151, 156 (7th Cir. 1982); and *Tomlin v. Dep't of Social Services*, 154 Mich. App. 675; 398 N.W.2d 490 (1986) (use of sampling extrapolation formula not arbitrary, capricious, or invidiously discriminatory where opportunity to rebut afforded).

² "The new and independent tort created in 1994 coupled with the application of market-share theory is truly unique to Florida. It appears no other jurisdiction has a statute comparable to Florida's." *Florida v. American Tobacco Co.*, No. CL 95-1466 AH, slip op at 4 (Fla. Cir. Ct. Oct. 18, 1996) (attached as Exhibit A).

³ M.C.L. 400.106(1)(b)(ii) provides in pertinent part: "[T]he state department, to enforce its subrogation right, may ... institute and prosecute a legal proceeding against a third

contends that the Michigan Medicaid Law does not preclude the State from pursuing equitable remedies outside the Medicaid Law to accomplish the same purpose intended by that Law: collection of Medicaid expenditures in an adequate, practical and efficient manner. While ruling that the new independent cause of action created by the 1994 amendment to the Florida Act was constitutional⁴, the Florida Supreme Court did not specifically address the issue of the viability of equitable remedies in the face of an inadequate remedy at law. Thus, the Florida decision does not bear on the specific issues before this Court.

The Minnesota Tobacco Case. Finally, the Defendants cite *Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996) and note that "the Minnesota Supreme Court...dismissed Blue Cross's direct claim for reimbursement for treating persons who allegedly suffered from smoking-related diseases as 'too remote'"⁵ The Minnesota Supreme Court observed that "There is no claim by Blue Cross that the tobacco companies owed it a duty under any traditional theory of tort law." Instead Blue Cross proceeded only upon a breach of "special duty" claim. 551 N.W.2d at 493. The *Humphrey* Court relied upon a negligence case, *Northern States Contracting Co. v. Oakes*, 191 Minn. 88; 253 N.W. 371 (1934) (employer could not recover

person who may be liable...in state or federal court, either alone or in conjunction with the injured ...person...The state department may institute the proceedings in its own name..." The New Jersey Supreme Court compared its Medicaid Act, which did *not* contain such language expressly authorizing an independent right of recovery, to the Federal Medical Care Recovery Act, 42 U.S.C.A. §2651, and concluded that "[T]he State has two avenues by which it may seek reimbursement for Medicaid payments; it may either institute an action directly against the tortfeasor who is liable for the medical expenses or seek recovery by way of the Medicaid recipient through a right of subrogation...The mandate in 42 U.S.C.A. § 1396(a)(25)(C), directing the states to 'seek reimbursement,' is expressly embodied in our [Medicaid Act]...and must be read in pari materia with the rights existing under the federal scheme for seeking reimbursement, and more specifically, with the independent right of recovery specified in [the Federal Medical Care Recovery Act]." *Hedgebeth v. Medford*, 74 N.J. 360, 365-66; 378 A.2d 226, 228 (1977). See also Michael K. Mahoney, Comment, *Coughing Up The Cash: Should Medicaid Provide For Independent State Recovery Against Third-Party Tortfeasors Such As The Tobacco Industry?*, 24 B.C. Envtl. Aff. L. Rev. 233 (1996) (concluding that legislative history surrounding § 1396 of the Social Welfare Act illustrated Congress's profound interest in expanding, not limiting, the states' avenues of financial recovery) (attached as Exhibit B).

⁴ On March 17, 1997, the United States Supreme Court, without comment, denied the Defendants' petition for writ of certiorari in the Florida tobacco case. *Associated Industries of Florida v. Agency for Health Care Administration*, No. 96-915, 1996 WL 723400 (U.S. Fla.).

⁵ The *Humphrey* Court found that Blue Cross did have standing to bring a consumer protection claim, an antitrust claim, and an equitable claim for injunctive relief. 551 N.W.2d at 497-98.

costs of increased worker's compensation premiums from tortfeasor negligently causing death of covered employee), to find that Blue Cross *lacked standing* to pursue its claimed injury in tort -- that this claimed injury was too remote in the absence of a direct duty.

The *Humphrey* Court's rationale in reliance on *Northern States* is not in keeping with the principles of Michigan law articulated in *Dale v. Whiteman*, 388 Mich. 698; 202 N.W.2d 797 (1972). There, an employee of a car wash was injured by a car driven by one of his fellow employees. The injured employee brought an action against the car's owner, and the car's owner filed a third-party complaint against the employer. The employer then filed a cross-claim for reimbursement in the amount of workers' compensation payments. The Court held that the car owner was entitled to indemnity from the employer on equitable principles, despite the exclusive remedy provisions of the Workers' Compensation Act; and that the plaintiff's judgment and the car owner's indemnification were to be reduced by the amount of workers' compensation benefits paid by the employer. Thus, despite the absence of a common liability by the car owner and the employer to the injured worker, and despite any independent duty between the car owner and the employer, the car owner was entitled to indemnity from the employer. The Court noted:

'It is a well-recognized rule that an implied contract of indemnity arises in favor of a person who without any fault on his part is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having a right of action against the latter for indemnity ***.' (42 C.J.S., Indemnity § 21, p. 596).

'This right of indemnity is based on the principle that everyone is responsible for his own negligence***. It exists independently of statute, and whether or not contractual relations exist between the parties, and *whether or not the negligent person owned the other a special or particular legal duty not to be negligent.*' (42 C.J.S., Indemnity § 21, p. 597).

388 Mich. At 705-06; 202 N.W.2d at 800 (emphasis added).

In any event, there can be no serious claim that the State of Michigan lacks standing to bring this case. Here, the State itself, not Blue Cross, *is* alleging that the Defendants owed it a duty and that it was

significantly harmed by a decades-long conspiracy that was calculated to injure the State directly, intentionally, and willfully. The State specifically and unequivocally alleges that the Defendants directly breached duties owing to it and that, "[u]nder time-honored principles of equity, the State of Michigan is entitled to restitution and indemnity for the medical assistance funds it has paid, because under the circumstances, it would be unjust and unconscionable for the Defendants to retain the benefits the State of Michigan conferred upon them or to profit in any way from their illegal course of conduct."⁶ In short, Blue Cross and the State of Michigan differ fundamentally with respect to their relative capacities to bring a third-party cost recoupment action.

The Mississippi Tobacco Case. The Defendants did not attach Chancellor William H. Myers' Findings of Fact, Conclusions of Law and Judgment as to Defendants' Motion for Partial Summary Judgment of March 6, 1996. That ruling clearly rejected their argument that the Mississippi Medicaid law provided Mississippi's exclusive remedy, and upheld the Attorney General's right to pursue only common law claims for equitable relief.⁷ The significance of Chancellor Myers' ruling was emphatically underscored by two recent decisions of the Mississippi Supreme Court which were handed down on March 13, 1997. *In Re: Corr-Williams*, No. 96-M-00115-SCT (Miss. Mar. 13, 1997), in which the Defendants attacked Chancellor Myers' March 6, 1996, ruling and thus challenged, *intra alia*, the jurisdiction of the Chancery Court and the viability of the equitable claims, and *In Re: Kirk Fordice*, No. 96-M-00114-SCT (Miss. Mar. 13, 1997), in which the Governor challenged the Attorney General's right to bring the tobacco lawsuit at all.⁸

There is language in the *Corr-Williams* opinion specifically commenting upon the jurisdiction of the Chancery Court that bears noting:

[T]here has been no showing that the chancery court lacked jurisdiction or made clear errors of law.⁹...While we acknowledge the obvious conflict

⁶ Complaint, ¶ 4. Significantly, the State's claims for restitution embrace much more than just Medicaid expenditures. See Complaint, ¶ 17.c.

⁷ *In Re Mike Moore, Attorney General ex rel. State of Mississippi Tobacco Litigation*, No. 94-1429 (Miss. Ch.Ct. Mar. 6, 1996) (attached as Exhibit C).

⁸ The Mississippi Supreme Court decisions are attached as composite Exhibit D.

⁹ *Corr-Williams, supra*, slip op at 4.

between two state officials, this Court finds that the public interest would be better served by the procession of this case to its conclusion in the appropriate forum. At this time, the appropriate forum to handle the presentation of witnesses and make findings of fact, if necessary, would be the Chancery Court of Jackson County.¹⁰

B. The Legislature Did Not Create An Exclusive Subrogation Remedy.

The Defendants patch together quotations from a hodgepodge of cases to assert that whenever the legislature creates any remedy it is exclusive. Accordingly, the subrogation remedy in the Michigan Medicaid Law must be exclusive. The cases they cite and the maxims they use like touchstones do not support their conclusions.¹¹ For example, *State Bd of*

¹⁰ *Corr-Williams, supra*, slip op at 5-6.

¹¹ See *National RR Passenger Corp. v. National Ass'n of RR Passengers*. 414 U.S. 453, 463-64; 94 S. Ct. 690, 696; 38 L. Ed.2d 646 (1974) (legislative history analysis finds authorizing private suits would "completely undercut the efficient apparatus that Congress sought to provide [and] would produce...anomalous result). The Michigan Legislature could not have sought to create a situation where the State would have to bring tens of thousands of individual lawsuits. *Millross v. Plum Hollow Golf Club*, 429 Mich. 178, 184; 413 N.W.2d 17, 19-20 (Dramshop Act was comprehensive, self-contained measure with new remedy and liability carefully balanced such that the common law dealing with subject matter was displaced). The Medicaid Act is neither comprehensive nor self-contained such that it could displace "the common law dealing with the subject matter" of subrogation. *Jackson v. PKM Corp.*, 430 Mich. 262; 422 N.W.2d 657 (1988) is also a Dramshop Act case. *Coveil v. Spengler*, 141 Mich. App. 76, 81; 366 N.W.2d 76, 79-80 (1985) (statutory remedy for enforcement of common law right is only cumulative) "To adopt plaintiff's construction would lead to an absurd result, which this Court is bound to avoid...[C]ourts are bound, whenever possible, so to construe statutes as to give them validity and a reasonable construction;...a construction leading to an absurd consequence should be avoided." *Ohlsen v. DST Industries, Inc.*, 111 Mich. App. 580; 314 N.W.2d 699 (1981) (no common-law right to refuse to work in unsafe conditions existed, such that statutory creation of such right was exclusive). It cannot not be argued that the State of Michigan had no common law right to institute an action in equity to prevent an injury to the public. See discussion of *Attorney General ex rel Emmons v. Grand Rapids*, 175 Mich. 503; 141 N.W. 890 (1913) (Attorney General proper complainant in action to restrain public nuisance created by city), *infra. Mudge v. Macomb County*, 210 Mich. App. 436; 534 N.W.2d 539 (1995) (county possesses only those powers delegated to it by constitution or statute such that only statutory remedies are available in statute that creates liability to county and provides a specific remedy to it). Again, it cannot be reasonably argued either that the Medicaid Act *created* the Defendant's *liability* to the State for an intentional injury to the State or that the State had no common law remedies prior to the enactment of the Medicaid Act.

Educ v. Houghton Lake Community School, 430 Mich. 658, 671; 425 N.W.2d 80, 86 (1988) involved a case where the statute in question clearly authorized a forfeiture of financial aid as the exclusive means of enforcing an instruction standard. The defendants cite the Court's reliance on the maxim *expressio unius est exclusio alterius*, but do not point out that the Court also said: "We are aware that the application of these maxims is not absolute, but we find no countervailing logic to overcome their application." 430 Mich. At 672; 425 N.W.2d at 86. The countervailing logic present in the instant case, aside from the obvious fact that the Medicaid Act does not by its terms remotely suggest that it strips the State of its common law remedies, is that if the Medicaid Act is found to be exclusive, then the State will have no remedy at all, since it cannot bring tens of thousands of individual subrogation suits. The Court's attention is respectfully invited to the comments of Philip Morris' counsel, Mr. Webb, at n. 1, *supra*, on this point.

Luttrell v. Dep't of Corrections, 421 Mich. 93; 365 N.W.2d 74 (1985) upheld the blanket preclusion of drug traffickers from community placement programs against a challenge that the Department exceeded its authority in so doing. The Court's observations are particularly cogent and applicable to the instant case:

It is a recognized rule of statutory interpretation that the courts will not construe a statute so as to achieve an absurd or unreasonable result...[A] rule limiting categories to [violent offenders and first-degree murderers only] would be absurd and unreasonable.

The offenders rely heavily on the rule of *expressio unius est exclusio alterius*...[T]his is a recognized rule of statutory interpretation. But like all other such rule, it is a tool to ascertain the intent of the Legislature. It does not automatically lead to results...[R]eference to the legislative history, the rule of legislative acquiescence and the rule of avoiding absurdity and unreasonableness leads to exactly the opposite result from that which the offenders' rule would. Furthermore, there is nothing upon consideration of the plain language of the statute that would apparently point

in the offenders' direction...See *Mosley v. Federal Department Stores, Inc.*, 85 Mich. App. 333; 271 N.W.2d 224 (1978) (express availability of mental anguish damages in the few circumstances mentioned in the statute did not imply their non-availability in actions unrelated to the statute).

421 Mich. At 106-07; 365 N.W.2d at 81.

It cannot be credibly argued that the Attorney General is without authority to bring the instant common law equitable claims on behalf of the State. See cases collected in the State's Opening Memorandum. See also *Attorney General ex rel Emmons v. Grand Rapids*, 175 Mich. 503; 141 N.W. 890 (1913) (Attorney General proper complainant in action to restrain public nuisance created by city) which quoted from *Missouri v. Illinois*, 180 U.S. 208; 21 Sup. Ct. 331; 45 L. Ed. 497 (1901): "The cases are numerous in which it has been held that the Attorney General may maintain an information in equity to restrain a corporation ...from any abuse or perversion of [its delegated] powers which may create a public nuisance or injuriously affect or endanger the public interests..." (quoting *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361).

Defendants proclaim that the State's right to recover Medicaid expenditures from third parties is a right created by statute. *Attorney General ex rel Emmons v. Grand Rapids*, *supra*, and other cases collected in the State's Opening Memorandum absolutely belie that argument. What the Medicaid Act created was the recipient's right to assistance; it merely codified the State's common-law right to subrogation. It is clear that the State of Michigan possesses the inherent right to institute actions to protect its interests and the public health and safety. The Federal/State partnership represented by Medicaid requires, in simplest terms, that states participating in the scheme seek to collect money paid for medical benefits from responsible third parties. The Federal government does not prescribe *how* to collect that money, and it allows the states to cease collection efforts if such efforts are not cost effective. There is nothing contained in Federal law to suggest that the Federal government has mandated that subrogation be an exclusive remedy for the various states.¹²

¹² Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* ("federal Medicaid law"), authorizes federal grants to States to aid in financing State programs to provide medical assistance and related services to needy individuals. These State programs must be operated in accordance with a State plan, which must meet numerous federal requirements, and must be approved by the Secretary of the U.S. Department of Health

Defendants' cite *Doe v. Dep't of Social Services*, 187 Mich. App. 493, 526; 468 N.W.2d 862 (1991), *rev'd on other grounds* 439 Mich. 650; 487 N.W.2d 166 (1992) for the proposition that "with the Medicaid program, 'the State create[d] a right that did not exist at common law" and that the subrogation remedy is therefore exclusive.¹³ Def. Brf. at 7. This focus is misplaced, as would be apparent had Defendants provided the context for their quotation. *Doe's* principal focus was on the claimant's right and the requirement for claimants to accept the parameters of the Medicaid program:

We recognize that, when the state creates a right that did not exist at common law, such as the Medicaid program, it may impose reasonable procedural conditions as a prerequisite to the benefits of the program...It is said that 'where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are

and Human Services. See generally 42 U.S.C. § 1396a. Federal law requires that the State plan provide "for the establishment or designation of a single State agency to administer or to supervise the administration of the plan." 42 U.S.C. §1396a(a)(5); 42 C.F.R. § 431.10. Under federal law, the State plan must provide that the State or local agency administering the plan "take all reasonable measures to ascertain the legal liability of third parties...to pay for care and service available under the plan." 42 U.S.C. § 1396a(a)(25). See also 42 C.F.R. § 433.138 (agency "must take reasonable measures to determine the legal liability of third parties to pay for services furnished under the plan"). The agency also "must seek reimbursement from a liable third party on all claims for which it determines that the amount it reasonably expects to recover will be greater than the costs of recovery." 42 C.F.R. § 433.139(f).

¹³ To the extent that Defendants point out that the Medicaid Act is in "derogation of the common law," see *Sheppard v. Michigan National Bank*, 348 Mich. 577, 589; 83 N.W.2d 614, 618-19 (1957). [W]e reject, without qualification, the asserted 'general rule of interpretation'...to the effect that 'the workmen's compensation law, being in derogation of the common law, must be strictly construed.' The substitution, for thought, of this legal cliché has rarely had more lamentable result than in this area...No one doubts that statutes in derogation of the common law are to be construed. But the maxim is not a corpus juris. Nor does it, like one of the Ten Commandments, contain within its limited borders either an unalterable moral principle or an inflexible command. It has, in truth, a companion, from which it cannot be separated, save by the feckless or the reckless: that statutes must be interpreted to accomplish their legislative purpose. The proper statement, then runs something like this: 'The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.' *Jamison v. Encarnacion*, 281 U.S. 635; 50 S. Ct. 440, 442; 74 L. Ed. 1082.

to be employed in determining that right, a [person] in the position of [appellants] must take the bitter with the sweet.'

187 Mich. App. At 526; 468 N.W.2d at 877. (citations omitted).

C. Historical Inability To Recover Public Assistance Benefits From Individual Recipients Or The Insane, Or Charity Payments From Paupers, Or Routine Provision Of Fire, Police And Emergency Services From Negligent Tortfeasors Is Not Relevant To State's Ability To Recover Damages From Intentional Wrongdoers As Alleged Herein.

The Defendants cite numerous cases pertaining to the Federal Government's lack of a common law right to pursue collections for public assistance without acknowledging the fundamental reasons for it. The decision in *United States v. Standard Oil Co.*, 332 U.S. 301; 67 S. Ct. 1604; 91 L. Ed. 2067 (1947) reflects the limited power of federal courts to make federal common law. As Justice Rutledge wrote:

We would not deny the Government's basic premise of the law's capacity for growth, or that it must include the creative work of judges. Soon all law would become antiquated strait jacket and then dead letter, if that power were lacking. And the judicial hand would stiffen in mortmain if it had no part in the work of creation. But in the federal scheme our part in that work, and the part of the other federal courts is more modest than that of the state courts, particularly in the freedom to create new common law liabilities, as *Erie R. Co. v. Tompkins* itself witnesses.

332 U.S. at 313; 67 S. Ct. at 1611. The court also referred to the "narrower scope, as compared with that allowed courts of general common-law jurisdiction, for the action of federal courts in such matters." *Id.* Thus, *Standard Oil* involved the absence of a federal statute authorizing an action for reimbursement, the federal courts' limited ability to fashion common-law remedies and the Court's deference to the Congress in federal fiscal matters. As such, *Standard Oil* and its federal progeny are inapposite to the Michigan policy issues before the Court.¹⁴

¹⁴ *United States v. Trammel*, 899 F.2d 1483, (6th Cir. 1990) (Kentucky no-fault law applied in FCMRA action such that there was no tort liability for medical costs less than \$10,000.00); *Pennsylvania National Mutual Casualty Ins. Co.*

Similarly, Defendants cite cases reflective of the common-law rule that the *indigent recipients* of charity were not required to reimburse the donor, but they do not discuss the underlying rationale of the cases: that those receiving such charity under false pretenses would stand in a very different light. "[I]f aid and assistance are voluntarily furnished by the charitable and credulous, *without deception* to such person, we know of no rule that enables the persons giving to recover back from the object of their benevolence the moneys so advanced to him." *Albany v. McNamara*, 117 N.Y. 168, 174-75; 22 N.E. 931,933 (1889).¹⁵ While *Albany* clearly suggests that a pauper who positioned himself to receive alms through false pretenses or fraud would be treated differently at the common law, the inability of charities to recover unsolicited alms from honest indigent recipients has no bearing on the issues before the Court. The Defendants cite these cases in terms of "absolutes" which are just not present.

Similarly, the Defendants' citation to cases holding that governments are unable to recover the costs of *routine* fire, police or emergency services from *negligent* tortfeasors are not persuasive authority that conspirators who intentionally and willfully inflict harm on the State are somehow insulated from the costs of their misconduct. In fact, Michigan has carved out a *specific* exception to the "fireman's rule" and permits suits by public safety officers to recover damages for personal injuries sustained as a result of willful, wanton or intentional misconduct, although not for injuries negligently inflicted. *Wilde v. Gillard*, 189 Mich. App. 553; 473 N.W.2d 718 (1991).¹⁶

V. Barnett, 445 F.2d 573 (5th Cir. 1971)(absent assignment by veteran to U.S., workmen's compensation carrier not obliged to repay VA hospital); *United States v. Harleysville Mut. Cas. Co.*, 150 F. Supp. 326 (D. Md. 1957) (no federal common law right to recover government medical expenses from tortfeasor).

¹⁵ *Baker v. Sterling*, 39 N.Y.2d 397, 348 N.E.2d 584 (1976) (recipient of public assistance not obliged to repay at common law) (citing *Albany v. McNamara*); *Dep't of Human Services v. Brooks*, 412 N.W.2d 613 (Iowa 1987) (recipient of public assistance not obliged to repay at common law) (citing *Baker v. Sterling*).

¹⁶ *Flagstaff v. Atchison, Topeka and Santa Fe Ry Co.*, 719 F.2d 322 (9th Cir. 1983) is cited by the Defendants for the proposition that the "city could not recover emergency medical costs at common law." Def. Mem. At p. 9, n. 10. The Court did reach that result with regard to the city's attempt to collect costs for an evacuation occasioned by tank cars derailed in an accident, but it also observed: "This is not to say that a governmental entity may never recover the cost of its services...Recovery has been allowed where the acts of a private party create a public nuisance which the government seeks to abate, ...and where the government incurs expenses to protect its own property." 719 F.2d at 324. (citations

The Defendants cite *Wiseman v. State*, 94 S.W.2d 265 (Tex. Civ. App. 1936) for the proposition that "the state had no common law right to reimbursement for the care and maintenance of a *patient*." Def. Mem. At p. 9, n. 10 (emphasis added). The case dealt specifically with the absence of a common law remedy to recoup payments from the solvent insane.¹⁷

D. Routine Tort Subrogation Cases Do Not Control The Instant Case Brought On Equitable Principles For Intentional Injuries Suffered By The State.

The Defendants' citation to cases involving "garden variety"¹⁸ medicaid subrogation cases is not persuasive that the State's equitable claims are precluded. This case represents the first time that the State has brought an action in equity for its aggregate injuries occasioned by the Defendants' alleged intentional misconduct, but this suit is not the first suit ever brought in equity where a litigant's legal remedy was inadequate. Cases collected in the Plaintiff's Opening Memorandum at pp. 22-24 illustrate this well-defined principle in Michigan law.

The Defendants' argument that the State is limited to the remedy of subrogation, by analogy to conventional insurance companies is flawed. The Defendants are plainly wrong because "the relationship between a hospital receiving reimbursement under Medicaid or Medicare and the government is not analogous to an insurance contract. Medicare and Medicaid are not funded by

omitted). See also *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (1984) (accidental plane crash).

¹⁷ Similarly, *In re Davis' Estate*, 330 Mich. 647; 48 N.W.2d 151 (1951) involved questions surrounding the recoupment of old age gratuities under a statute authorizing the same. The Court noted that the gratuities were vested benefits, and that questions of fraud or misrepresentation surrounding their payment were resolved adverse to the State at the trial. 48 N.W. 2d at 154. The opinion clearly suggests that the outcome would have been different had willful misconduct by the recipient been involved in the procurement of the grants.

¹⁸ See, e.g., cases cited in Def. Mem. at pp. 11-12, including *Hicks v. Citizens Ins. Co.*, 204 Mich. App. 142; 514 N.W.2d 511 (1994) (payments mistakenly made by DSS repaid by insurance carrier); *Botsford Gen Hosp v. Citizens Ins. Co.*, 195 Mich. App. 127; 489 N.W.2d 137 (1992) (right of subrogation of DSS intended to ensure it does not bear primary responsibility for payment of benefits); *Amerisure Ins. Co. v. Folts*, 181 Mich. App. 288; 448 N.W.2d 829 (1989) (DSS asserted subrogation claim for insurance payments in personal injury case).

beneficiaries' premium payments, but by a payroll tax. This is not the form of conventional insurance." *United States v. University Hospital*, 575 F.Supp. 607 613 (E.D. N.Y. 1983).

Whether an "insurer" is entitled to equitable remedies such as indemnity, as opposed to the more limited remedy afforded by subrogation, depends on whether the obligation to the insured arises from (i) contract or (ii) by operation of law. If insurance is provided by contract, where a risk is assumed for a fee or premium, the insurer may be entitled only to be subrogated to the claims of the insured. The remedy is entirely different, however, when the "insurer's" obligation is imposed by law or statute. In that case, the insurer is entitled to the equitable remedies asserted by the plaintiff here, which are broader than subrogation.¹⁹

E. Recognized Principles Of Statutory Construction Demonstrate That The Subrogation Provision Of The Michigan Medicaid Law Is Not The State's Exclusive Remedy.

As noted in the Plaintiff's Opening Memorandum at pp. 15-19, the Medicaid Law does not evidence the clear intent of the Legislature to restrict the state's ability to recovery Medicaid funds from responsible third parties. The Legislature did not clearly strip the State of its traditional common-law equitable remedies and require an exclusive remedy of

¹⁹ One of the principal cases cited by the defendants clearly draws this distinction, which depends on the nature of the "insurer":

[S]ince the insurer's obligation to pay is due solely to its *contract*, it presumably received consideration for agreeing to bear the risk; allowing indemnity gives the insurer a windfall. Implied indemnity is not intended for such persons. As a general rule, "[t]he right to indemnity inures to a person who, without active fault on his part, is compelled by *reason of legal obligation* or relationship to pay damages which have been caused by the acts of another"

Industrial Risk Insurer v. Creole Production Serv., 746 F.2d 526,528 (9th Cir. 1984) (emphasis added and citation omitted); see also *Great American Ins. Co. v. United States*, 575 F.2d 1031, 1034-35 (2d Cir. 1978) ("Appellant here has confused the principle of indemnity which underlies subrogation with an implied action for indemnification -- which is completely distinguishable....The insurance carrier's relationship with his insured is not one imposed by operation of law or statute; it is a contractual relationship in which the carrier has deliberately accepted a risk for a fee.").

subrogation. Absent such clear language in the Medicaid Act, traditional rules of statutory construction reveal that the State maintains all such common-law remedies. This is especially so given the absurd result that such a construction of the Act would yield. *See* discussion at pages 9-11, above.

F. The Lack Of An Adequate Remedy At Law Entitles The State To Seek Relief In Equity.

It has long been the law in Michigan that Attorney General is empowered to act on behalf of the State to protect the public interest, and the Defendants' characterization of this fundamental principle as a "time-worn canard" diminishes it not in the least. See Plaintiff's Opening Memorandum at pp. 20-21 and discussion of *Attorney General ex rel Emmons v. Grand Rapids* at pp. 11-12, *supra*.²⁰ Additionally, the Defendants' argument that statutory subrogation under the Medicaid Act is clearly an adequate remedy at law should strain the credulity of this Court. Def. Mem. at p. 20. Common sense teaches that it would not be efficient or practical for the State to initiate tens of thousands of individual recoupment actions in the Circuit Courts of Michigan in redress of the grievances that the State has levied against the Defendants. The Defendants' true position on this score was articulated by Mr. Webb, counsel for Philip Morris: "It's just not practical; they've got tens of thousands of smokers." See n. 1, *supra*. Also, the Defendants' "time-worn canard" that the Medicaid Act is "in derogation of the common law and should be strictly construed" is unpersuasive. See n. 11 at p. 9, *supra*.

III. THE STATE'S CLAIMED INJURIES ARE NEITHER REMOTE NOR DERIVATIVE.

The Defendants' argument that the State is barred from maintaining a direct cause of action to recover "derivative economic injuries that occur as a result of harm inflicted on a third party by a defendant tortfeasor" is completely unavailing and ignores the allegations of the complaint. The State brings this lawsuit on its own behalf and seeks relief, *inter alia*, for intentional wrongs specifically alleged to have been directed at the State. The Defendants pull snippets form a group of cases -- almost all sounding in negligence and not pertinent to the issues herein -- stretch the holdings to suit their needs and fashion an "argument" made from whole cloth. For example, the

²⁰ See also, *Brandon Township v. Jerome Builders, Inc.*, 80 Mich. App. 180; 263 N.W.2d 326 (1977) (essential elements of valid quasi contractual obligation are the receipt of a benefit by defendant from plaintiff which benefit it is inequitable for the defendant to retain) (citing Restatement Restitution, § 115).

quoted language from *Holmes v. SIPC*, 503 U.S. 258; 112 S. Ct. 1311; 117 L. Ed.2d 532 (1992) with respect to a "plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts" can have absolutely no bearing on this case. The Defendants' refusal to read the Complaint does not diminish its importance to the lawsuit.

The Defendants cite *Fifield Manor v. Finston*, 54 Cal. 2d 632; 354 P.2d 1073; 7 Cal. Rptr. 377 (1960) for the proposition that "permitting nursing home that paid decedent's medical expenses to bring direct action against tortfeasor who caused decedent's injuries 'would constitute an unwarranted extension of liability for negligence.'" That's true enough, but what is more enlightening is the Court's discussion of the fact that an action would lie for the "intentional interference by a third person with a contractual relation either by unlawful means or by means otherwise lawful in the absence of sufficient justification." 354 P.2d at 1075. Clearly, the outcome would be different if the cause of action were based on intentional, not negligent, interference with the plaintiff's contractual rights. Virtually every authority discussed by the Defendants on this point involves either negligent misconduct, or conduct otherwise directed at a party other than the plaintiff.²¹ Most illustrative of the Defendants failure properly to analyze the cases they cite is *Nemo Foundations, Inc. v. New River*, 155 W. Va. 149; 181 S.E.2d 687, 689 (1971). The defendants cite the case thusly: "The courts, however, have quite uniformly treated such damages [the payment of medical care and related costs of other persons] as too remote and too indirect to support a recovery." Had they read just one sentence further, they would have seen the following: "It is only where an injury is intentionally calculated to harm the employer in his contractual obligations that recovery may be had." This distinction between negligent and intentional conduct distinguishes many of the Defendants' authorities and negates any argument of remoteness of damages.

IV. CONCLUSION

The subrogation remedy contained in the

²¹ See, e.g., *Anthony v. Slaid*, 52 Mass. (11 Met) 290 (1846) (no evidence that perpetrator of assault knew of plaintiff's contract to support poor or that assault was intended to increase plaintiff's costs); *Connecticut Mut. Life Ins. Co. v. New York & NH RR Co.*, 25 Conn. 265; 65 Am.Dec. 571 (1856) (negligent killing of insured gave rise to no cause of action in favor of insurance company); *IJ Weinrot & Son, Inc. v. Jackson*, 40 Cal. 3d 327; 708 P.2d 682; 220 Cal. Rptr. 103 (1985) (statute codifying common law of family relations and injuries to servants in master's household gave no cause of action to corporate employer due to negligent injury of employee).

Michigan Medicaid Act is neither exclusive nor adequate. It would be impossible for the State to bring tens of thousands of individual Medicaid subrogation actions, and such an absurd result could not have been the intent of the Legislature. The State's complaint alleges a decades-long conspiracy of intentional and willful misconduct calculated to harm the State, thus giving rise to a direct action in equity against the Defendants. The State respectfully request the Court to enter an Order finding that the Defendants' assertions that assignment and/or subrogation are the State's exclusive remedies do not constitute a valid defense to the State's claims, denying the Defendants Cross-Motion for Summary Disposition, and for such other and further relief to which the State of Michigan may otherwise be entitled.

Respectfully submitted,

Frank J. Kelley
Attorney General

Stewart H. Freeman (P13692)
Craig Atchinson (P23953)
Brian D. Devlin (P34685)
Assistant Attorneys General
Attorneys for Plaintiff
Environmental Protection Division
600 Law Building
525 West Ottawa Street
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-7780

Richard F. Scruggs
W. Steve Bozeman
Special Assistant Attorneys General
Attorneys for Plaintiff
Scruggs, Millette, Lawson, Bozeman & Dent, P.A.
734 Delmas Avenue
Post Office Drawer 1425
Pascagoula, Mississippi 39568-1425
(601) 762-6068

Ronald L. Motley
Frederick C. Baker
Special Assistant Attorneys General
Attorneys for Plaintiff
Ness, Motley, Loadholt, Richardson & Poole, P.A.
151 Meeting Street, Suite 600
Charleston, South Carolina 29401
(803) 577-6747