

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR KING COUNTY

STATE OF WASHINGTON,
Plaintiff,

v.

AMERICAN TOBACCO CO., INC., et al.,
Defendants.

Case No. 96-2-15056-8 SEA

November 19, 1996

ORDER ON DEFENDANTS' JOINT
MOTION TO DISMISS

George A. Finkle, Judge

I.

ANTITRUST CLAIM
(THIRD CAUSE OF ACTION)

A. Damages Under RCW 19.86.090

The State has alleged that defendants conspired to restrain the trade of tobacco products in violation of the Consumer Protection Act ("CPA"), RCW 19.86.030. The State asserts that the conspiracy prevented the development, manufacture, and sale of safer tobacco products, leaving consumers to choose among unsafe tobacco products, and that such restraint on competition caused an increase in the State's healthcare costs.¹ On their face, these allegations meet the requirements of RCW 19.86.090: "Whenever the state of Washington is injured by reason of a violation of RCW 19.86.030..., it may sue therefore in the superior court to recover the actual damages sustained by it and to recover the costs of the suit including a reasonable attorney's fee." To successfully resist defendants' CR 12(b)(6) motion, the CPA requires only that the State allege (1) a "violation of RCW 19.86.030," (2) an injury that is causally connected to the violation, and (3) resulting "actual damages." RCW 19.86.090. Defendants maintain that, despite the seemingly broad language of RCW 19.86.090, the damages asserted by the State are not recoverable under the CPA.

¹ The State is not claiming damages to the general economic well-being of Washington or in its role of *parens patriae*.

1. Choice of Remedies

Defendants argue that the State's claim is simply a product liability claim wrapped in antitrust language, and that the State's damages, if any, resulted from its citizens' tobacco-related personal injuries, rather than from any lack of competition or conspiracy to restrain trade. However, the fact that the State may have a number of remedies available to it, including subrogation, does not defeat a claim under the CPA. *MacCormack v. Robins Constr.*, 11 Wn.App. 80, 82 (1974) (remedies under CPA are in addition to any other available remedy).

2. "Antitrust Injury" and "Direct Purchaser Rule"

Defendants further argue that the State has failed to allege that it suffered an antitrust injury. The first paragraph of RCW 19.86.090, which authorizes private actions under the CPA, requires private plaintiffs to show an injury to "business or property." Such "business or property" language has been held to restrict compensable injuries under the CPA. *Washington State Physicians Ins. & Exch. Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318 (1993) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). The broader language of the second paragraph of RCW 19.86.090 authorizes damage actions by the State where the State is "injured," without any restriction as to the type of injury. This broader language appears to recognize that the State, with its wide-ranging responsibilities for the health and welfare of its citizens, may incur substantial damages as a result of anti-competitive activity even though the State is not actively engaged in the sphere of business in which an antitrust violation occurred.

Section 4 of the Clayton Act, 15 U.S.C. § 15, contains language that is similar to that authorizing private causes of action under the CPA -- both statutes require injury to "business or property." Limitations on the type of injuries that are compensable under the Clayton Act have been judicially constructed to restrict the broad statutory language of Section 4. In *Associated General Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court noted that Section 4 "is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation" (*Id.*, at 529), but concluded that Congress could not have actually meant to prohibit every agreement that restrains trade, since the essence of every contract is an agreement to exercise restraint (*Id.*, at 531-32).

To avoid an unreasonable, and presumably

unintended, result, the federal courts have construed the requirement of injury to "business or property" to mean "antitrust injury." A variety of tests have evolved to help the courts determine whether a plaintiff has alleged such an injury. Was the injury direct enough to be recoverable? *Illinois Brick Co. v. Illinois*, 431 U.S. 720, rehearing denied, 434 U.S. 881 (1977). Was the injury of the type or character which the legislature intended to remedy through enactment of the Act? *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Was the injury to a business or property within the target area of the alleged conspiracy? *In re Multidistrict Vehicle Air Pollution, M.D.L. 31*, 481 F.2d 122, 128 (9th Cir.), cert. denied, 414 U.S. 1045 (1973). Was the injury proximately caused by the violation, or was it too far removed in the chain of causation? *Hairston v. Pacific-10 Conference*, 893 F. Supp. 1485, 1491 (W.D. Wash. 1994).²

The Washington courts have so far had no opportunity to determine whether the "antitrust injury" and/or "direct purchaser" tests are applicable to a claim brought under the section of the CPA authorizing damage actions by the State whenever it is "injured." The two Washington cases cited by the parties regarding restraint of trade under RCW 19.86.030, *Consolidated Dairy Prod. Co. v. Bar-T Ranch Dairy, Inc.*, 97 Wn.2d.167 (1982) and *Blewett v. Abbott Laboratories*, 1995 WL 798948 (King County Superior Court, October 4, 1995), both involved private plaintiffs whose claims were subject to the "business or property" limitation.

In the absence of controlling state authority, defendants urge the court to adopt the reasoning of the federal cases, directing the court to RCW 19.86.920: "in construing [the CPA], the courts [are to] be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters...." Washington courts, however, are not conclusively bound by federal antitrust precedents. *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 271 (1973). While RCW 19.86.920 provides an existing and extensive body of interpretive law to be applied to the CPA and instructs

that the state courts should be guided by the interpretations of the federal statutes after which the CPA was patterned (*State v. Burlison*, 38 Wn.App. 487, 490, review denied, 103 Wn.2d 1002 (1984)), "[I]n the final analysis, the interpretation of [the Act] is left to the state courts." *State v. Reader's Digest Ass'n. Inc.*, 81 Wn.2d 259, 275 (1972), appeal dismissed, 411 U.S. 945 (1973). Where the language of the federal and state statutes are different, the interpretations may be different. See *State v. Black*, 100 Wn.2d 793, 802-03 (1984); *Servais v. Port of Bellingham*, 72 Wn.App. 183, 192-93 (1993), *aff'd*, 127 Wn.2d 820 (1995).

As noted above, the language of the CPA applicable to the present case is not the same as the language of Section 4 of the Clayton Act. The phrase "business or property" in Section 4 has been interpreted to limit the types of injuries recoverable under that Act; the broader term "injury" in RCW 19.86.090, paragraph 2, has not yet been interpreted. Further, the federal judiciary's concern that a liberal interpretation of the Clayton Act would prevent or impinge on the normal conduct of business is satisfied by the application of RCW 19.86.920, a provision which has no corollary in the federal act. RCW 19.86.920 states that it is "the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business...." In an action brought under the CPA, therefore, the statute itself prohibits its application where the defendant's conduct is a reasonable business practice. Defendants have not made such a showing. Where the State has adequately pled a cause of action under RCW 19.86.090 that would not contravene the intentions set forth in RCW 19.86.920, no justification appears to exist for dismissing the claim. In sum, blind adherence to federal precedent is inappropriate.

3. Statutory Interpretation

In construing the language authorizing State damage actions under the CPA, the court turns to basic principles of statutory interpretation. Statutory construction and reference to legislative history are unnecessary where the language of the statute is unambiguous. *State v. McCraw*, 127 Wn.2d 281, 288 (1995). "The court should assume that the legislature means exactly what it says. Plain words do not require construction." *Snohomish v. Joslin*, 9 Wn.App. 495, 498 (1973). The Washington legislature stated, in straightforward terms, that whenever the State is injured by a conspiracy in restraint of trade, it may sue to recover its actual damages under the CPA. Whatever the policy reasons for restricting recovery by private plaintiffs, the second paragraph of RCW 19.86.090 is clear. The court is not persuaded that the

² To the extent that some of these cases, such as *Multidistrict Vehicle Air Pollution*, *supra*, refer to these various tests as a gloss on the phrase "by reason of," rather than as an inquiry regarding the type of injury that is alleged, it should be noted that the United States Supreme Court has phrased the issue as a policy choice: "which persons have been injured" (*Illinois Brick*, 431 U.S. at 728 n.7) and which persons have such a small stake in the lawsuit that their injury should go unremedied. *Id.*, at 747. The issue is not one of standing. *Id.*, at 728 n.7.

limitations of Section 4 of the Clayton Act and the first paragraph of RCW 19.86.090, should be imposed upon the State's claim.

Even if the provision authorizing actions by the State when it is "injured" were ambiguous, the statutory purpose of the CPA supports the validity of the State's claim. RCW 19.86.920 states, "The legislature hereby declares that the purpose of this act is to complement the body of federal [antitrust] law...in order to protect the public and foster fair and honest competition" and instructs the courts to provide a liberal construction to the Act's provisions. In furtherance of this objective, the legislature provided a separate, broadened, authorization for State damage actions.³ In the present case, the State has alleged a conspiracy to preclude the development of and competition in certain safer tobacco product lines, thereby limiting the choices available to Washington consumers of tobacco products and causing economic damages to the State. Permitting the State to challenge defendants' actions and recover its actual damages under the CPA, especially where the violations are alleged to be continuing, would presumably "foster fair and honest competition" among defendants and promote the public interest by encouraging defendants to offer all available tobacco products.

The legislative history cited by defendants does not alter this conclusion. It appears that in 1991, and again in 1993, the legislature considered amending the CPA to provide that both direct and indirect injuries would be compensable. The supporters of the amendment, including the Attorney General's office, argued that such an amendment would limit whatever precedential effect *Illinois Brick*, *supra*, might have in the state courts.

However, no legislative history has been presented regarding the intent of the legislature in enacting the second paragraph of RCW 19.86.090. The fact that two proposals to amend the CPA were not enacted does not establish that the legislature originally intended to exclude indirect injuries from coverage. The most that can be said is that, in failing to act in 1991 and 1993, the legislature contemplated no departure from any prior interpretation of the CPA. *See State v. Bostrum*, 127 Wn.2d 580, 587-88 (1995). As noted above, however, Washington courts have not yet had an opportunity to apply RCW 19.86.090 to a damage claim by the State, so such prior interpretation is not available.

Determining the intent of the legislature is

³ These damage actions are in addition to claims for injunctive relief authorized under RCW 19.86.080.

difficult enough when the legislature has affirmatively acted. Attempting to draw clear conclusions from the legislature's refusal to act would be pure speculation. The 1991 and 1993 bills may have been rejected for any number of reasons, including: (1) the legislature may have believed that only those persons who purchase directly from a CPA violator should have a claim and may have assumed that Washington courts would find *Illinois Brick* applicable to actions brought by the State; (2) the legislature may have decided to await judicial construction of the CPA before considering an amendment to the statute; (3) the legislature as a whole may never have considered the proposals on their merits; or (4) the legislature may have believed that indirect and direct injuries to the State were already covered by the unmodified use of the word "injured." The Court will not speculate regarding the motivation of the legislature in declining in 1991 and 1993 to add "direct and indirect" to RCW 19.86.090.

Finally, the inclusion of the phrase "directly or indirectly" in RCW 19.86.010(2), while not compelling, suggests that the legislature intended that indirect injuries be remedied by the CPA. RCW 19.86.010(2) defines "trade" and "commerce" to "include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." Where the only impact of antitrust activity in Washington is indirect (*e.g.*, where all sales of widgets in Washington are transacted through an out-of-state distributor who is forced to buy from out-of-state manufacturers engaged in a monopolistic conspiracy), the CPA defines such activity as a violation of the Act, as defendants acknowledge. *See Reply Brief*, pp. 10-11.

If both individual consumers and the State are precluded from bringing actions for indirect injuries, the statute specifically defines a harm for which it provides no remedy. It is more reasonable to assume that the legislature intended to define indirect injuries as a violation of the CPA and then authorized the State, but not private parties, to bring a damage action whenever it was indirectly injured. At the very least, the reference to indirect injuries in RCW 19.86.010(2), even if there is no relationship between violations defined and remedies granted, suggests that the legislature was aware that some antitrust injuries are more direct than others, and yet decided not to restrict the type of injuries for which the State could recover.

4. Policy Considerations of *Illinois Brick*

Even assuming that, despite the language of RCW 19.86.090, paragraph 2, the court were prepared to dismiss all claims that contravene the policies set forth in *Illinois Brick*, the State's claim would be permitted to

go forward. In *Illinois Brick*, the Supreme Court expressed two primary concerns: (1) whether permitting the claim would make allocation of damages too complex and unwieldy, thereby increasing the risk of duplicative recoveries; and (2) whether permitting the claim would dilute the economic incentive for other, more directly injured, plaintiffs to bring their own claims.

Although the damage issues promise to be quite difficult, allowing the State to seek recovery of costs incurred as a result of defendants' alleged conspiracy would not raise the specter of complex allocation or duplicative recoveries. The calculations required to avoid double recovery by the State and by individual tobacco consumers do not appear to be, in principle, substantially more complex here than in many tort cases. If a tobacco consumer were, in a separate case, to seek recovery of medical costs that had been recovered by the State in the present case, an appropriate jury instruction would avoid a double recovery. As was the case in *Hairston*, 893 F. Supp. At 1492, separating the damages the State is seeking from those of consumers "would not be difficult" and cannot justify abrogating a cause of action that is otherwise permissible under the statute. Further, it is not clear that any other potential plaintiff would be able to seek the damages claimed by the State in the present case.

Similarly, the State's claim would not dilute the economic incentives supporting direct consumer antitrust suits. First, no reasonable prospect exists that tobacco product distributors, who may theoretically have suffered direct antitrust injury, will pursue antitrust claims against their suppliers. Second, even if the distributors brought such a suit, there is nothing to suggest that the State's claim for the health-related costs it has incurred as a result of the alleged conspiracy would dilute whatever economic relief the distributors might claim. Dismissing the State's claim would create the prospect of an antitrust wrong without a remedy.

Where, as here, the policies underlying the Supreme Court's decision in *Illinois Brick* would not be hindered by allowing the State's claim to proceed, there is no justification for dismissing a cause of action that falls squarely within the terms of the authorizing statute.

B. Injunctive Relief Under RCW 19.86.080

RCW 19.86.080 states:

The attorney general may bring an action in the name of the state against any

person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

Defendants argue that the State must "show that some Washington resident on whose behalf the equitable remedy is sought suffered damages cognizable under the CPA" before a suit may be brought under RCW 19.86.080. Reply Brief, p.17. However, the language of the injunctive relief provision is preventative and allows the State to seek to restrain acts prohibited by the CPA, without regard to injury to any particular individual. (Compare RCW 19.86.080, which allows preventative actions by the State, with the provisions authorizing private actions to enjoin "further" violations in RCW 19.86.090).

The Attorney General's responsibility in bringing [injunctive actions] is to protect the public from the kinds of business practices which are prohibited by the statute; it is not to seek redress for private individuals. Where relief is provided for private individuals by way of restitution, it is only incidental to and in aid of the relief asked on behalf of the public.

Seaboard Surety Company v. Ralph Williams' North West Chrysler Plymouth, Inc., 81 Wn.2d 740, 746 (1973). The ability to seek restitution for its citizens is merely an "additional remedy" and not a prerequisite to the State's action for injunctive relief under RCW 19.86.080. *Ralph Williams'*, 82 Wn.2d at 276. See *Reader's Digest, supra* (Attorney General sought injunction of competitive practice which deprived consumers of time, not business or property).

Implementing the plain language of RCW 19.86.080 is also supported by policy considerations. Where a person is engaged in unfair competition or in a conspiracy to restrain trade or commerce, the State should not be required to wait until its citizens suffer injury before seeking injunctive relief.

C. Conclusion

Defendants' Joint Motion to Dismiss the State's Third Cause of Action is denied. Neither the language of the statute nor the policy considerations of *Illinois Brick* require dismissal of these claims.

II.

ANTITRUST CLAIM (SIXTH CAUSE OF ACTION)

Defendants seek dismissal of the State's claim regarding a combination in restraint of trade in violation of Article XII, § 22 of the Washington Constitution. However, defendants' briefs do not discuss this issue. Defendants' motion is denied.

III.

DAMAGES FOR VIOLATIONS OF RCW 19.86.020 (FIRST AND SECOND CAUSES OF ACTION)

Despite some confusion in the briefs and during oral argument, the State does not appear to seek damages under RCW 19.86.090 for the unfair competitive practices alleged in Counts I and II of the Complaint.⁴ Rather, the State seeks restitution, injunctive relief, attorney fees, and costs under RCW 19.86.080, as well as civil penalties under RCW 19.86.140.

Defendants have not challenged the State's claim for penalties, but they maintain that the State may not seek restitution of its own money or property under RCW 19.86.080. The court agrees. Restitution is authorized for any "person," a term defined by the Act as "natural persons, corporations, trusts, unincorporated associations and partnerships." RCW 19.86.010(1). The State and its political subdivisions are not included in this provision. "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* -- specific inclusions exclude implication." *Washington Natural Gas Co. v. Public Utility District No. 1*, 77 Wn.2d 94, 98 (1969) (municipal corporations are exempt from operation of the CPA).

⁴ As noted by defendants, RCW 19.86.090 does not specifically authorize damage actions by the State for violations of RCW 19.86.020. Even if an action could be brought under the first paragraph of RCW 19.86.090, the claim would be subject to the "business or property" language contained therein, a course which the State has declined to take.

Defendants' motion is granted. The State may not seek damages for a violation of RCW 19.86.020 under the second paragraph of RCW 19.86.090 and may not seek restitution for its own losses under RCW 19.86.080.

IV.

SPECIAL DUTY CLAIM (FOURTH CAUSE OF ACTION)

The State alleges that defendants, through their public statements, assumed special duties to render direct services for the protection of public health and to assist others, including the State, who protect public health. The State further alleges that, as a proximate result of defendants' breach of these duties, more of its citizens smoked and the State bore, and continues to bear, increased public health costs. In response, defendants have argued that the 1954 "Frank Statement to Cigarette Smokers," on which the State's claim relies, did not create a duty, that the State's alleged damages are not recoverable because they are not physical, and that, if a duty did exist, its breach was not the proximate cause of the State's alleged damages.

Generally, whether a duty exists is a matter of law. *Hanson v. Friend*, 118 Wn.2d 476, 479 (1992). For purposes of this ruling, the court will assume, without deciding, that the "Frank Statement's" acknowledgment of responsibility for public health and its assurance that specific activities would be undertaken in that regard created a special duty to the State. The court will further assume, without deciding, that such duty was breached by defendants.

The Restatement (Second) of Torts § 323 provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Cited with approval in *Herskovits v. Group Health*

Cooperative of Puget Sound, 99 Wn.2d 609, 615 (1983) and *Panitz v. Orange*, 10 Wn.App 317, 320 (1973).

Restatement (Second) of Torts § 324A provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Sections 323 and 324A are limited by their terms to liability for "physical harm" caused by the breach of a special duty. Although § 324A is not the law of Washington (see *Webstad v. Stortini*, ___Wn.App. ___, 924 P.2d 940 (1996)) and the status of the physical harm requirement of § 323 in Washington is unclear, no Washington case has found liability for violation of a special duty in the absence of physical harm. See *Herskovits*, 99 Wn.2d 609 (personal injury caused by cancer); *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293 (1975) (loss of life and property in avalanche); *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn.App. 126 (1982) (physical injury caused by IUD); *Panitz I*, 10 Wn.App. 317 (physical injury caused by car accident); *Estes v. Hammerstad, Inc.*, 8 Wn.App. 22 (1972) (fire loss to home). On balance, the Washington appellate courts are likely to require physical harm, and this court so rules.

Even assuming physical harm were not required, no proximate cause exists between the duties alleged and the damages claimed by the State. The State has alleged two distinct duties based on the "Frank Statement," the first of which runs to the citizens of Washington (a duty to conduct research to protect their health) and the second of which runs to the State (a duty to cooperate with those who protect the public health). The State seeks damages in the

form increased public health costs. For purposes of this ruling, the court will assume that defendants breached both duties and that the State suffered a compensable injury. Plaintiff's special duty claim fails, however, because there are no allegations that would support the conclusion that the State's damages were proximately caused by a breach of one or both of the asserted duties. See *Hartley v. State*, 103 Wn.2d 768, 777 (1985) ("Negligence, of course, requires duty is substantial factor in bringing about the harm, proximate cause is established.")

It is possible that a breach of the duty to Washington's citizens may have caused certain individuals to take up or continue smoking, thus increasing the healthcare costs for which the State is responsible, but the State has not made any factual allegations regarding the actions taken or injuries suffered by its individual citizens. Without such allegations, there is no basis for a finding that the defendants' breach of their duty to the public proximately caused the State's damages.

Similarly, while a breach of the duty to cooperate with the State may have lulled it into a false sense of security regarding potential health risks and/or forestalled health-based regulation of the tobacco industry, the State has failed to allege that its course of conduct in this area over the last thirty or forty years was influenced by defendants' research and related disclosures. Without allegations of reliance, any damages attributable to the State's inaction were not proximately caused by defendants' actions or inactions.

Thus, the State's special duty claim fails because it has not suffered physical harm and has not adequately alleged causation. Defendants' motion is granted. The Fourth Cause of Action is dismissed.

V.

UNJUST ENRICHMENT (FIFTH CAUSE OF ACTION)

The State's unjust enrichment claim turns on whether the state's actions have benefited defendants.

A person confers a benefit upon another if he gives to the other possession of or some interest in money, land, chattels, or chooses in action, performs services beneficial to or at the request of the other, satisfies a debt or duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the

property of another, but also where he saves the other from expense or loss. The work "benefit," therefore, denotes any form of advantage.

Chemical Bank v. Washington Public Power Supply Sys., 102 Wn.2d 874, 910 (1984), *cert. denied*, 471 U.S. 1065 (1985) (citing comment b to restatement of restitution § 1 (1937)). The State has not alleged that it gave the defendants possession of or an interest in goods. To the extent that the State alleges that it performed any services for or at the request of the defendants, such as the provision of medical services that allow smokers to continue to purchase defendants' products, the benefits of the healthcare payments were enjoyed by the citizens of Washington and not by the defendants. In such circumstances, the benefits the State alleges that it conferred on defendants are too indirect and speculative to support its unjust enrichment claim under Washington case law. *See Chemical Bank*, 102 Wn.2d at 910-11.

Thus, the claim of unjust enrichment stands or falls on the State's theory that the defendants have an underlying obligation or legal duty to third persons which has been satisfied by the State's efforts. *See Florida Power and Light Co. v. Allis-Chalmers Corp.*, 752 F. Supp. 434, 438 (S.D. Fla. 1990) (benefit may be conferred where plaintiff satisfies an obligation or duty of defendant); Restatement of Restitution, §§ 112-115 (1937). The State cannot recover under this theory without proving that defendants had a duty to individual Washington citizens which was breached, causing damages to such individuals. Because the State makes no allegations regarding defendants' duties and liabilities to individuals, the State's unjust enrichment claim is deficient. Further, if the State is subject to its own statutory duty to make the Medicaid payments at issue here, some of the damages claimed were incurred as a result of the State's independent legal obligations and duties, and not because of defendants' breach of any duty owing to the State. *See Lynch v. Deaconess Medical Center*, 113 Wn.2d 162, 166 (1989) (attorney could not recover fees from ultimate recipient of judgment monies where attorney was obligated to diligently seek the judgment on behalf of his client).

The State also argues that it may base its unjust enrichment claim on defendants' "manifest duty" to pay restitution to the State for the amounts the State has spent for victims of defendants' enterprise. "Manifest duty" is based on the Emergency Assistance Doctrine, restatement of Restitution § 115, a theory of recovery that is not available where the plaintiff is seeking recovery for harms caused by product defects. *Washington Water*

Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 855 (1989) (equitable causes of action under § 115 for harms caused by product defects, which may included the State's unjust enrichment claim, are preempted by the Washington product Liability Act). Assuming § 115 were applicable, the State's unjust enrichment cause of action could not survive because § 115 requires that the State have "performed the duty of another." As was discussed above, the State does not seek to prove defendants' breach of duty to individual Washington citizens. The State's manifest duty argument in favor of unjust enrichment, is therefore, not viable.

Defendants' motion is granted. The Fifth Cause of Action is dismissed.