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PART C

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IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff,	§	
vs.	§	
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC.; (8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC., Defendants.	§	STATE OF OKLAHOMA } CLEVELAND COUNTY } S.S. FILED In The Office of the Court Clerk OCT 02 2018 In the office of the Court Clerk MARILYN WILLIAMS Case No. CJ-2017-816 JURY TRIAL DEMANDED

Continuation of

NOTICE OF AUTHORITY REGARDING STATE OF TEXAS V. THE AMERICAN TOBACCO COMPANY, ET AL.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS, Plaintiff,	§	CIVIL NO.: 5:96-CV-0091
VS.	§	JUDGE: DAVID FOLSOM
THE AMERICAN TOBACCO COMPANY, ET AL, Defendants.	§	MAGISTRATE JUDGE: WENDELL C. RADFORD

THE STATE OF TEXAS' RESPONSE TO DEFENDANTS' "MOTION TO COMPEL DISCOVERY OF ALL INDIVIDUALS FORMING THE BASIS OF PLAINTIFF'S CLAIMS"

TO THE HONORABLE COURT:

The State of Texas files this response to certain Defendants' "Motion to Compel Discovery of All Individuals Forming the Basis of Plaintiff's Claims." The State will show that the Motion should be denied for several independent reasons, procedural and substantive.

I. Introduction.

Defendants' Motion is fatally flawed procedurally and substantively. The procedural flaw in Defendants' request to take the "depositions of all individual Public Assistance Recipients in Texas whose health costs form a basis, in whole or in part, for Plaintiff's alleged damages" (Defendants' Motion at 15) is that it is simply comes too late. Defendants' request cannot be accomplished within the discovery deadlines set by this Court and Defendants know it.

The fact that this case has been on file for more than one year and Defendants just now ask this Court to order the depositions of all the Medicaid recipients with

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smoking related diseases perfectly illustrates an 11th hour plea for the impossible. Defendants' Motion can, and should, be denied for this reason alone.

Turning to the "substance" of Defendants' Motion, even if Defendants' Motion were timely filed and the relief requested were possible, none of Defendants' substantive arguments have any legal merit as will be discussed fully below. In summary, however, Defendants' proposal raises profound issues of privacy and confidentiality that are particularly troubling in light of the irrelevance of the evidence sought through the depositions.

What Defendants really seek is to deny the State the opportunity to prove certain elements of causation and damages through the use of a scientifically valid, computer generated, statistical model. Defendants contend that if the State is allowed to make this proof, Defendants will somehow be deprived of due process.

In advancing this argument, Defendants ignore a long line of cases and statutes that support the use of statistical methods of proof. Defendants also repeatedly mischaracterize this suit as a "class action." First, relevant statistical evidence has always been admissible. Statistical evidence is particularly appropriate in the State's case because the injury to the State is itself an aggregate one: the sum total of its Medicaid and other health care expenditures attributable to smoking related disease.

Because of the very nature of the injury, and because the State's cause of action is logically and legally unconnected to the affirmative defenses that might be asserted against smokers in individual smoker lawsuits, there simply is no reason to require the State (or allow the Defendants) to proceed on a smoker-by-smoker basis.

In sum, Defendants' proposed tactic of intrusive and unnecessary depositions of individual citizens, not parties to this litigation, is intentionally calculated to deprive the State of its right to a fair and efficient procedure for the adjudication of its claim and their Motion should be denied. *See, e.g.*, Fed. R. Civ. Proc. 1.

II. Individual discovery is neither relevant nor necessary.

Defendants' arguments throughout their motion rest on the false presumption that this action is one of subrogation. They shamelessly mischaracterize the State's pleadings stating, "Plaintiff reasons that, since it is proceeding under common law theories of recovery, not under any Medicaid-related or similar statute, it is not required to 'step into the shoes' of the individual Medicaid recipients" (Defendants' Brief at 4).

Defendants' arguments are patently false and ignore, apparently intentionally, the State's repeated citation to TEX. HUM. RES. CODE ANN § 32.033(d). Section 32.033(d) created a direct right of action in favor of the State to recover Medicaid funds. By the statute's own wording, the State's action is not "*dependent upon*" or "*ancillary to*" any other person's action.[1] As discussed in more detail in section IV, the State has a direct and independent statutory cause of action that is not exclusively one of subrogation.

Defendants next argue that they must be allowed discovery of individual Medicaid recipients because the State cannot prove that Texas Medicaid recipients either used their products, or prove that the Medicaid claims for cigarette illnesses were not

[1] The State has made this argument consistently in its briefing. See Plaintiff's reply to Defendants' response to Plaintiff's Motion for Partial Summary Judgment, or Ruling in Limine, at P. 6; Plaintiff's Post-Submission brief in support of its Opposition to Defendants' Motions to Dismiss at P. 3.

the result of Medicaid fraud. These arguments neglect the obvious answer that the Defendants are free (as they in fact have) to conduct discovery on Medicaid fraud in Texas. They have designated experts on the subject and can offer any evidence they might possess that a particular percentage of Medicaid claims are fraudulent and should offset the amount asked for by the State, just as the State demonstrates statistically that some percentage of the State's Medicaid expenditures were caused by the Defendants' products.

Defendants will not lose the opportunity to show that they did not cause the particular injuries at issue. Rather, they will enjoy the opportunity to make such a showing on an aggregate rather than individualistic basis. Nor can Defendants reasonably ask for anything more.

In this case, aggregation is not used as a surrogate or approximation of the harm suffered by the State. The State's injury is itself an aggregate one. Interrogating individual Medicaid recipients to discover the possibility of Medicaid fraud or cigarette use is unnecessary. Statistical evidence can prove the requisite facts with a high degree of reliability that will ensure fairness and "due process" to Defendants.

III. Aggregate statistical evidence is the best evidence to prove injury to the State's treasury.

The State should be permitted to meet its burden of proving causation and damages through the use of statistical evidence. In fact, when the State proceeds on the basis of aggregate harm to a group of Medicaid recipients, statistical evidence is the sine qua non of such a cause of action. Since the State is not a successor to thousands of in-

dividual claims, there is no impropriety to using statistical evidence to show damages -- there is only one plaintiff, the State of Texas.

The options available to the Defendants establish that there is no unfairness in allowing the State to rely on statistical evidence in its case. Defendants' reliance on *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), is wholly misplaced. *Fibreboard* involved a consolidation of 3,031 asbestos cases for trial. The Fifth Circuit stated that the harm there was not aggregate or collective and that the claims could not be certified as a Rule 23 class. 893 F.2d at 712.

The present case is not a consolidation of thousands of plaintiffs or a class action -- it is a case brought by one plaintiff, the State of Texas, to bring an independent action to recover for the loss to it directly caused by Defendants. As a result, *Fibreboard* is so factually distinguished on the most basic and essential facts that it is simply irrelevant to the issue in this case, namely, whether one plaintiff, the State, can prove its damages through statistical means.

Moreover, Defendants pointedly fail to even cite the Fifth Circuit's more recent decision in *In re Chevron U.S.A. Inc.*, 109 F3d 1016 (5th Cr. 1997). *Chevron* strongly endorses the use of statistical evidence. In fact, statistical evidence similar to the State's has been widely accepted by Courts as proof of both liability and damages.

The judicial view of statistical evidence is best expressed by *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977). The Supreme Court there commented that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted." *Id.*

Determining the value and validity of statistical evidence is within the discretion of the district court. *Pullman-Standard v. Swint,* 456 U.S. 273, 287-90 (1982).[2] The admissibility of statistical evidence should be liberally construed because the other side will have an opportunity to rebut. *Penk v. Oregon State Board of Higher Education,* 816 F.2d 458, 464 (9th Cir.), cert. *denied* 484 U.S. 853 (1987).

Rebuttal can be achieved by: (1) showing that the statistics are flawed; (2) a demonstration that the disparities generated by the statistics are not statistically significant or actionable; or (3) presentation by one party of statistical evidence contradicting that of the plaintiffs. *Id. Penk* emphasizes that conclusion as to whether various qualitative factors should have been included in the model was at the discretion of the district court. Defendants are presumed to be fully prepared to make this showing and individual discovery is again proven unnecessary, especially at this late hour.

Further, the right to recover damages is not precluded by the mere fact of some possible uncertainty regarding the exact amount of damages. The law has long recognized a different level of proof between the *fact* and *extent* of damage. The evidence need only lay a foundation upon which the trier of fact can form a fair and reasonable assessment of the amount of damages. *Ham Marine, Inc. v. Dresser Indus.,* 72 F.3d 454, 462 (5th Cir. 1995) (interpreting Mississippi law identical to Texas law); *L.C.L. Theaters, Inc. v. Columbia Pictures Indus.,* 421 F. Supp. 1090, 1102 (N.D. Tex. 1976), *aff'd* 619 F.2d 455 (5th Cir. 1980). In *L.C.L. Theaters,* the court stated:

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[2] For a thorough discussion of the use of statistics in the courtroom, see *Cimino v. Raymark Industries,* 751 F. Supp 649, 658-64 (E.D. Tex. 1990).

> There are several related and, at times, overlapping doctrines which together state the controlling standard for measuring the sufficiency of the damage proof. Professor McCormick (FN8) stated them in clear, black-letter form:
>
> (a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference.
>
> (b) Where the defendant's wrong has caused the difficulty of proof of damage, he cannot complain of the resulting uncertainty.
>
> (c) Mere difficulty in ascertaining the amount of damage is not fatal.
>
> (d) Mathematical precision in fixing the exact amount is not required.
>
> (e) If the best evidence of the damage of which the situation admits is furnished, this is sufficient.

421 F. Supp. at 1102 (emphasis added).

Statistical sampling evidence is sufficient to make a prima facie case. It is determinative if not challenged or rebutted. *E.E.O.C. v. Steamship Clerks Union, Local 1066,* 48 F-3d 594 (lst Cir.), *cert. denied* 116 S. Ct. 65 (1995) (a challenger must do more than trumpet conclusory averments concerning the validity of the plaintiffs statistical foundation); *Imperial Veal & Lamb Co. v. Caravan Refrigerated Cargo, Inc.,* 554 F. Supp. 499, 501 (S.D.N.Y. 1982) (plaintiff prevailed by using a statistical sample to show an entire shipment of meat had spoiled, the Defendant presented no evidence to the contrary).

The case law clearly establishes that statistical evidence is usually admissible and the trier of fact will make the ultimate decision regarding its validity. Defendants are entitled to no more.

Additionally, the use of statistical methods is a widely accepted practice to calculate the particular type of damages in this case. Some of the common uses include the

calculation of future wage losses or overpayments by governmental agencies. *Eg. Randolph v. Laeisz,* 896 F.2d 964, 968 (5th Cir. 1990) (damages based on life or worklife expectancy should be based on the statistical average in the absence of evidence to the contrary); *Johnston v. Harris County Flood Control Dist.,* 869 F.2d 1565, 1580-81 (5th Cir. 1989), *cert. denied* 493 U.S. 1019 (1990) (Defendant presented no facts that would make application of statistical averages inappropriate); *Mile High Therapy Ctrs. v. Bowen,* 735 F. Supp. 984 (D. Col. 1988) (court held that HHS use of statistical sampling did not violate Medicare Act).

Statistical evidence or sampling is also used extensively in Medicare and Medicaid reimbursement cases. See, *e.g., Ratanasen v. California Department of Health Services, 11* F.3d 1467 (9th Cir. 1993) (projection of the nature of a large population through review of a relatively small number of its components has been recognized as a valuable audit technique); *Georgia v. Califano,* 446 F. Supp. 404 (N.D. Ga. 1977).

If the government properly uses statistical sampling to determine the amount of Medicaid and Medicare overpayments, it is proper to allow the States to use statistical sampling to estimate the amount of payments due to tobacco related diseases. Statistical sampling is also used to determine financial compliance with other government programs. *See, e.g., Rosado v. Wyman,* 322 F. Supp. 1173 (E.D.N.Y.), aff'd 402 U.S. 991 (1970) (sampling has long been considered an acceptable method of determining the characteristics of a large universe).

Support for the use of statistical evidence in suits by a state also comes in a longstanding statute authorizing its use. Congress expressly sanctions the use of

statistical evidence by states suing in anti-trust actions in a 1976 federal statute. 15 U.S.C. § 15(c) expressly permits a state to use statistical evidence as aggregate proof in lawsuits brought on behalf of the state's citizens. Defendants' argument, if true, would apparently require that this statutory provision be held unconstitutional.

In many cases Courts have determined that statistical methods are the only reasonable methods for determining an accurate number given large numbers of claims or situations involved. A frequent reason for utilizing or even preferring statistical sampling methods is that they are justified when claims or incidents are voluminous and a case-by-case review is not administratively feasible. *Eg., Jones v. Rath Packing* Co., 430 U.S. 519 (1977) (holding Dept. of Agriculture use of statistical sampling technique permissible, stating that "it is difficult to imagine any other practical technique for policing net-weight labeling requirements in a country where over 200 billion packages are produced every year."); *Chaves County Home Health Service, Inc. v. Sullivan,* 931 F.2d 914 (D.C. Cir. 1991), *cert. denied* 502 U.S. 1091 (1992) (approving use of statistical sampling primarily as a logistical imperative and also upon the hypothesis that any arbitrariness evens out in the long run); *Mile High Therapy Ctrs., Inc. v. Bowen,* 735 F. Supp. 984 (D. Col. 1988) (statistical method "reasonable means" when claims are voluminous and a case- by-case review is not administratively feasible).

Several courts have gone a step further. They have or proposed to permit awards of damages to individuals based on statistical samples in class action cases. *Cimino,* 751 F. Supp. 649 (contains an extensive review of the use of statistics in the courtroom); *In re Estate of Marcos Human Rights Litigation,* 910 F. Supp. 1460 (D. Ha-

waii 1995) (aggregation of compensatory claims does not violate due process). Statistical evidence is not barred in considering punitive damages. *Watson v. Shell Oil Company,* 979 F-2d 1014, 1018-19 (5th Cir. 1992), *vacated for rehearing en banc* 990 F.2d 806, *appeal dismissed* 53 F.3d 663 (5th Cir. 1994) (distinguishable from *Fibreboard* because used to determine punitive damages in a mass disaster case versus compensatory damages in products liability litigation). This case does not involve the use of statistical evidence in a class action context to estimate individual damages. Hence, this Court need not even approach what other courts have found to be well within the limits of the law.

The Defendants have insisted publicly for decades that there is no scientific proof that their products cause disease. In so doing they completely reject the mainstream scientific view of what proof is required to establish disease causation to a reasonable certainty.

Cigarettes have been proven to cause numerous diseases through large, rigorous, peer review, scientifically valid epidemiological studies. This is the most useful and conclusive evidence available. Requiring discovery of individual Medicaid recipients would deprive the State of its due process rights by making this action impossible to prosecute. Such a ruling would effectively end this litigation by making it too costly and onerous to continue, exactly the result Defendants are on record as wanting. The Defendants have successfully convinced several other courts to allow limited discovery of Medicaid recipients. Taking a small sample of Medicaid recipients introduces the irrelevant minutia of these individuals' lives without providing <u>any</u> evidence relevant to the epidemiological study that is the basis of the Plaintiff's proof.

The opinion evidence which the Defendants desire to present is similar to that rejected by the Fifth Circuit in *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194 (5th Cir. 1996). In *Allen*, the Plaintiff had evidence from several animal studies that associated disease with exposure to a specific chemical compound. In upholding the exclusion of this evidence the court held that the Plaintiff's evidence should be excluded because, "numerous reputable epidemiological studies covering thousands of workers indicate there is not a correlation between EtO exposure and cancer of the human brain." *Id.* at 197. Court further stated: "**Undoubtedly, the most useful and conclusive type of evidence in a case such as this is epidemiological studies.**" *Id.* at 97, quoting *Brock v. Merrill-Dow Pharmaceuticals, Inc.* 784 F.2d 307, 311 (5th Cir. 1989), modified by 884 F.2d 166 (5th Cir.1989), cert denied, 494 U.S. 1046 [110 S.Ct. 1511, 108 L.Ed.2d 646] (1990) (emphasis added).

Thus, while the Fifth Circuit recently endorsed the use of statistical evidence in *In re Chevron U.S.A. Inc.*, 109 F3d 1016, 1020 (5th Cir. 1997) (inferential statistical evidence "produces an acceptable due process solution to the troublesome area of mass tort litigation.") (internal quotation omitted), Court of Appeals warned that valid procedures must be employed to ensure that the statistics are reliable. Here, Defendants would have this Court forgo the most reliable and accurate evidence—aggregate epidemiological and statistical evidence—in favor of Defendants' ill-conceived diversionary proposal to examine individual public assistance recipients.

Taking discovery from a small number of Medicaid recipients adds nothing to the vast body of scientific knowledge on the relationship between smoking and disease.

Nor can that discovery be used to improve, adjust, qualify or otherwise modify the calculation of State's cigarette attributable health care costs in any scientifically valid manner.

If the Defendants win this concession they will immediately seek to have the trial limited to the damages of those individuals whose depositions were taken, as they have done in other cases. Defendants are less concerned with due process than the delay and denial of their responsibility for the damage their products have caused the State's treasury.

IV. The State Has A Direct and Independent Cause of Action Against The Defendants.

Depositions of individual Medicaid recipients are unnecessary in part because there is only one Plaintiff in this suit. This is not a class action, nor a subrogation action. The State of Texas has a statutorily created independent action to recover Medicaid expenditures. It states:

> A separate and distinct cause of action in favor of the state is hereby created, and the department may, without written consent, take direct civil action in any court of competent jurisdiction. A suit brought under this section need not be ancillary to or dependent upon any other action.

TEX. HUM. RES. CODE ANN § 32.033(d)(emphasis added).

By the plain wording of the statute, the State's action to recover Medicaid funds is not "dependent upon" or "ancillary to" any other person's action. It is "direct." The "other action" referred to in this section could only be Medicaid recipients' causes of action. Defendants' argument, that the State's cause of action is dependent on and ancil-

lary to the recipients' claims, could not be more directly opposed to the plain wording of the statute.

Defendants' entire reasoning for their contention that the State has no direct, independent cause of action is the heading of TEX. HUM. RES. CODE ANN § 32.033(d). The heading of this section of the statute reads simply, "subrogation." However, a heading in Texas statutes cannot limit the sections below it, according to a Texas law. The Texas Code Construction Act, TEX. GOV'T. CODE ANN. § 311.024, provides:

> **"The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute."**

Id. (emphasis added).

Defendants' motion does not address this statute or even allude to its existence. In the past Defendants have urged a reading of this section in a manner completely opposite to its' plain meaning. They claim that the State has no independent right of action, and that the State must assert its' claim "ancillary" to the claims of Medicaid recipients. Defendants' claim that this statute requires subrogation is without support. Defendants' arguments throughout this motion rest on the false presumption that this action is in subrogation. This presumption is clearly false.

V. Defendants' due process rights are protected under the discovery that has already been ordered.

The discovery that has already taken place provides a fair and reasonable opportunity for the Defendants to rebut the State's claims. *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 464 (9th Cir.), cert. *denied* 484 U.S. 853 (1987). Defendants may rebut the State's claims by attempting to show: (1) showing that the statistics

are flawed; (2) the disparities generated by the statistics are not statistically significant or actionable; or (3) statistical evidence contradicting that of the plaintiffs. *Id.*

The State has been producing the eligibility and claims files *for each and every Medicaid recipient in Texas* -- files which include health histories and disease identifications. These files have been produced on computer tapes in encrypted format to protect the privacy rights of individual recipients. However, the tapes provide information that allows an individual recipient's care to be tracked over the entire relevant time period. With these files in hand, the tobacco companies cannot justify taking depositions of individual Medicaid recipients on issues relating to medical conditions. The State respectfully submits that Defendants have fallen far short of demonstrating the need for intruding into the personal lives of individual Medicaid recipients who are not parties to this case.

VI. Discovery Of Individual Recipients Would Violate Their Privacy Rights And Laws Prohibiting Disclosure.

The personal medical information of the Medicaid recipients and the State employees whose smoking attributable medical expenses are sought in this suit should not be disclosed. These persons are not parties to this action. The relevant records of their medical care have already been disclosed to Defendants, and further disclosure of their records would unnecessarily intrude on the privacy rights of those individuals.

When issues concerning disclosure of Medicaid information are brought before the Court, the State is required by law to inform the Court of the applicable statutory provisions and regulations that potentially restrict any disclosure of such information.

See 42 C.F.R. § 431.306(f). Both federal and state laws concerning the disclosure of Medicaid information reveal a tremendous reverence towards confidentiality.

Specifically, federal law requires states participating in the Medicaid program to provide rigorous safeguards that restrict the use or disclosure of information concerning Medicaid recipients. 42 U.S.C. § 1369 (a)(7). In order to qualify for Medicaid funds the State is required to "provide safeguards, which restrict the use or disclosure of information Concerning applicants and recipients to purposes directly connected with the administration of the plan."[3] These "safeguards" are not a mere formality.

The State is required to promulgate and enforce a "statute that imposes legal sanctions... that restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan."[4] Disclosure of confidential Medicaid information, other than for "purposes directly connected with the administration of the program" is a criminal offense under TEX. HUM. RES. CODE ANN. § 12.003.

"Purposes directly connected with the administration of the program" include (1) establishing eligibility, (2) determining the amount of medical assistance, (3) providing services to recipients, and (4) investigations or criminal or civil proceedings concerning the above items. *See* 40 T.A.C. §71.4; 42 C.F.R. §431.302. These statutes reflect the policy decisions made at the federal level, that the confidentiality of this

[3] 42 U.S.C.§ 1396a(a)(7).
[4] 42 CFR § 431.301.

information should be compromised only when absolutely necessary to ensure the continued orderly administration of the Medicaid system.

The fact that an inappropriate disclosure of Medicaid recipient information is a criminal offense highlights the seriousness of any decision by Plaintiff or this Court to reveal Medicaid recipient information. *See* TEX. HUM. RES. CODE ANN. § 12.003. As such, the State is under a duty to maintain the confidentiality of these records prior to this Court's ruling on these confidentiality issues.

Some of the information on these data tapes is of particular concern, and has been treated by federal regulations and court decisions with special deference. Minimum standards have been promulgated which indicate that certain information contained on these tapes deserve special protection from unauthorized disclosure.

42 C.F.R. § 431.305 Types of information to be safeguarded.

(a) The agency must have criteria that govern the types of information about applicants and recipients that are safeguarded.

(b) This information must include at least-

(1) Names and addresses;

(2) Medical services provided;

(3) Social and economic conditions or circumstances;

(4) Agency evaluation of personal information;

(5) Medical data, including diagnosis and past history of disease or disability; and

(6) Any information received for verifying income eligibility and amount of medical assistance payments (see § 435.940ff.). Income information received from SSA or the Internal Revenue Service must be safeguarded according to the requirements of the agency that furnished the data.

(7) Any information received in connection with the Identification of legally liable third party resources under § 433.138 of this chapter.

42 C.F.R. § 431.305.

This Court has been very careful heretofore in not disclosing Medicaid recipient information in deference to these statutes and the underlying policy against disclosure. The State urges the Court continue to protect the privacy of these individuals and deny the completely unnecessary discovery requested by the Defendants.

VII. Conclusion.

The discovery requested would prevent the trial of this case in this century. The Defendants' request for this discovery should be denied in its entirety as irrelevant and obscenely violative of the privacy rights of the individuals.

Respectfully submitted:

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BY: _____
GRANT KAISER, by permission of
Walter Umphrey, Attorney-in-Charge

CERTIFICATE OF SERVICE

I hereby certify compliance with Fed. R. Civ. P. 5 and Case Management Order of November 5, 1996, that a true a correct copy of the foregoing document has been sent by facsimile and by overnight delivery service (with diskette) on June 26, 1997, to the following:

ADMINISTRATIVE LIAISON COUNSEL FOR ALL DEFENDANTS:

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Respectfully submitted,

_____
Grant Kaiser

E 12/4/97

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS	§	
	§	
	§	**No. 5-96CV-91**
VS.	§	
	§	
THE AMERICAN TOBACCO COMPANY, ET AL.	§	
	§	

ORDER AFFIRMING MAGISTRATE JUDGE RADFORD'S ORDER DENYING DISCOVERY OF INDIVIDUALS FORMING BASIS OF PLAINTIFF'S CLAIMS

CAME ON TO BE CONSIDERED this day Defendants' Objections to and Appeal of Magistrate Judge's Order Denying Discovery of Individuals Forming the Basis of Plaintiff's Claims. The Court, having reviewed the objections and appeal and the State's response, overrules Defendants' objections and affirms Magistrate Judge Radford's Order of June 27, 1997 denying Defendants' Motion to Compel Discovery of All Individuals Forming the Basis of Plaintiff's Claims. The Court finds that the Order of June 27, 1997 is not clearly erroneous or contrary to law. It is therefore

ORDERED that Defendants' Objections to and Appeal of Magistrate Judge's Order Denying Discovery of Individuals Forming the Basis of Plaintiff's Claims are OVERRULED and Magistrate Judge Radford's Order is AFFIRMED.

Signed this 9th day of December, 1997.

DAVID FOLSOM
UNITED STATES DISTRICT JUDGE

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December 9, 1997

Re: 5:96-cv-00091

Notice sent to:

David Grant Kaiser
Hiram Howard Waldrop

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

STATE OF TEXAS,	)	
	)	CIVIL NO. 5-96CV91
Plaintiff,	)	
	)	
v.	)	JUDGE: DAVID FOLSOM
	)	
THE AMERICAN TOBACCO COMPANY, et al.,	)	MAGISTRATE: WENDELL C. RADFORD
	)	
Defendants.	)	JURY

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON *FIBREBOARD*

Defendants[1] move the Court to enter partial summary judgment on the State's claims for reimbursement of medical care payments allegedly due to smoking because the State's effort to establish causation using aggregate statistical proof fails as a matter of law.

I. Plaintiff Attempts to Prove Causation Using Aggregate Statistical Evidence Despite Fatal Fifth Circuit Precedent

Plaintiff states that it will attempt to "meet its burden of proving *causation* and damages through the use of statistical evidence." The State of Texas' Response to Defendants' Motion to Compel Discovery of All Individuals Forming the Basis of Plaintiff's Claims, filed June 26, 1997 ("Plaintiff's Recipient Discovery Response") at 4 (emphasis added). More specifically, Plaintiff seeks to prove that Defendants' alleged wrongful conduct *caused* injury to the State by offering a complex statistical model that purportedly

[1] This motion is brought by all Defendants except Liggett Group, Inc. and B.A.T. Industries, P.L.C.

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shows that the State was injured because it has incurred higher medical care costs for smokers than non-smokers in the Texas Medicaid, charity care, and State employee populations (hereinafter "Public Assistance Recipients"). *See, e.g.*, V. Miller, *A Preliminary Estimate of Cigarette Smoking - Attributable Medical Care Costs Incurred by the State of Texas 1969-2007* (June 14, 1997).[2]

While some authority exists for the limited use of statistical evidence to prove *damages*,[3] it is well established that an aggregate statistical approach to the "proof" of causation, like that proposed by Plaintiff here, is inadequate and improper as a matter of law. *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990). Plaintiff's attempts to avoid *Fibreboard* by labeling its lawsuit a "direct" cause of action fail because it cannot escape the fact that individual Public Assistance Recipients are an indispensable link in the causation chain between Defendants' alleged wrongful conduct and Plaintiff's alleged damages. If individualized proof demonstrated, for example, that the health care provided to individual recipients by the State was not caused by smoking or by Defendants' alleged wrongdoing, or was unnecessary or fraudulent, Defendants cannot be held legally liable for them, regardless of how the State may wish to style its claim.

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[2] This Motion is brought under well-established Fifth Circuit law prohibiting the use of aggregate proof of causation. A separate and serious issue exists with respect to the scientific validity and reliability of Plaintiff's statistical models, which appear to suffer from numerous statistical and mechanical deficiencies, the details of which are still being discovered and will be presented to the Court, if necessary, on or before September 12, 1997. This Motion deals exclusively with the *purely legal* issue of Plaintiff's impermissible reliance on aggregate statistical proof of causation.

[3] While Plaintiff admits it seeks to meet its causation burden with aggregate statistical "proof," it attempts to blur the distinction between causation and damages when addressing applicable legal precedent. The State's legal authorities and numerous examples of the use of statistical evidence almost entirely relate to the quantification of *damages*. *See* Plaintiff's Recipient Discovery Response. Damages are not at issue in this Motion.

The inescapable fact is that Plaintiff is seeking to recover payments made on behalf of individual Public Assistance Recipients — if Defendants' wrongful conduct caused no harm to those individual recipients, it could have caused no injury to the State. Because individual proof of causation does, in fact, underlie the State's aggregate statistical proof, the State cannot avoid *Fibreboard* and other Fifth Circuit precedent that establishes that the State's proposed method of proving causation — through generalized statistics, aggregate proof, or its damages model — is fatally defective.

II. Plaintiff Cannot Use Aggregate Statistical "Proof" to Establish Causation

A. *In re Fibreboard Corporation*

A basic tenet of tort law is that injury and causation are uniquely individual issues that cannot be proved in the aggregate. *See, e.g., In re Fibreboard Corp*, 893 F.2d 706, 712 (5th Cir. 1990). The justification for this rule is embedded in traditional concepts of causation, as the court in *Fibreboard* explained: "[s]uch traditional ways of proceeding reflect far more than habit. They reflect the very culture of the jury trial and the case and controversy requirement of Article III." *Fibreboard*, 893 F.2d at 711.

In *Fibreboard*, the plaintiff, a class of 3,000 asbestos members, asserted the same theory of liability presented by the State here. Stressing that they were seeking only a "lump sum" verdict, plaintiff urged that "so long as their mode of proof enables the jury to decide the total liability of Defendants with reasonable accuracy, the loss of one-to-one engagement infringes no right of Defendants." *Id.* at 709. Just like here, where the State attempts to "group" claims to recover on behalf of the state, the contention of plaintiff in *Fibreboard*, that only the bottom line mattered. This tactic was expressly rejected.

The Fifth Circuit struck down the proposed aggregation, citing two basic concerns. First, it did not accept the underlying assumption that statistical measures of "general causation" (as opposed to individualized proof of causation) is ever acceptable under Texas law. *Id.* at 711-12. This concern was "particularly strong in this case where there are such disparities among class members." *Id.* The Court pointed out that the individual claimants "suffer from different diseases, some of which are more likely to have been caused by asbestos than others." *Id.* The Plaintiff also was "exposed to asbestos in various manners and to varying degrees." *Id.* The Plaintiffs' "lifestyles differed in material respects." The Court concluded that:

> A contemplated "trial" of the 2,990 class members without discreet focus can be no more than the testimony of experts regarding their claims, as a group, compared to the claims actually tried to the jury . . .. This type of procedure does not allow proof that a particular Defendants asbestos really caused a particular Plaintiffs disease; the only fact that can be proved is that in most cases the Defendants asbestos would have been the cause.

Fibreboard, 893 F.2d at 711.

The *Fibreboard* Court's indictment of the contemplated "trial" included a firm rejection of inevitably generalized proof of causation necessitated by this procedure. In brief, *Fibreboard* held that (1) state law has always demanded that a plaintiff prove that his or her exposure to a defendant's product caused his or her injury, *i.e.*, specific causation must be proved; (2) the fact-finder cannot speculate as to causation — a standard that cannot be met purely by statistical evidence of generic causation; and (3) defendants are entitled to assert contributory negligence or assumption of risk thereby absolving or mitigating their

culpability for the States' claimed injuries. Purely statistical proof of causation satisfies none of these basic requirements. *Id.*[4]

The *Fibreboard* Court's second concern, on a broader policy level, was that the procedure of one-to-one adjudication "reflects the very culture of the jury trial and the case and controversy requirement of Article III." *Fibreboard*, 893 F.2d at 710-711. In other words, something would be lost that transcends statistics:

> The judicial branch can offer the trial of lawsuits. It has no power oR competence to do more. We are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not.

Id. at 712.

The Fifth Circuit's focus with respect to both points was the law of Texas. Texas has not departed from "the requirement that a Plaintiff prove both causation and damages." *Id.* at 711; *see also Watson v. Shell Oil*, 979 F.2d 1014, 1018 (5th Cir. 1992). Plaintiff simply cannot escape the clear directive of the Fifth Circuit prohibiting aggregate causation.

B. Plaintiff's Aggregate Statistical Proof

If the statistical analysis in *Fibreboard* did not meet the traditional requirements of causation and liability, then Plaintiff's aggregate statistical proof of causation here cannot possibly succeed. In *Fibreboard*, the trial plan called for (1) a full trial of injury, causation and damages for eleven individuals; (2) such evidence as the parties wished to offer from

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[4] Plaintiff cites numerous cases in support of the use of epidemiological evidence. *See* Plaintiff's Response Regarding Medicaid Recipient Discovery. These citations are misleading: epidemiological evidence is used to prove that a certain substance causes a certain disease, to enable proof of wrongful conduct. Here, the wrongful conduct alleged is not a causal connection between smoking and disease, but rather, reliance of smokers on alleged misrepresentations. Epidemiological evidence is irrelevant to the issue of causation in this action.

thirty other illustrative plaintiffs; and (3) expert calculations regarding total damages suffered by the entire class, based on the 41 individual claimants *plus* questionnaires and oral depositions "in which defendants were allowed to interrogate each class member." *Id.* at 708.

Here, there will be no sample trials, no evidence from a representative sample of the Texas Medicaid, charity care, and State employee populations, and no depositions of the whole claimant group. *See* June 27, 1997 Order Denying Defendants' Motion for Individual Medicaid Recipient Discovery.[5] In this case, Plaintiff's aggregate proof consists of nothing more than a complex statistical model, the very foundation of which is not *Texas* Public Assistance Recipients, but a sample of the national population — a sample that has not and cannot be deposed or tested against, *inter alia*, the populations relevant to the State's claims. Only a small portion of this National Sample are from Texas and only a small portion are Medicaid recipients from any state, let alone Texas.[6] This difference alone is dispositive.

Moreover, the number of individual claimants here and the "disparities" among them are enormously broader than the disparities among claimants in *Fibreboard*. Plaintiff's aggregate model cannot possibly account for this diversity. Indeed, there are a multitude of

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[5] *See also* Defendants' Motion for Summary Judgment on Causation.

[6] Plaintiff's model attempts to analyze how certain personal characteristics of the subjects in the national sample relate to their medical expenditures in a given year. The results (expressed in the form of mathematical equations that predict medical expenditures for each risk factor, *e.g.*, obesity) are then applied to a purported "representative" profile of the Texas Public Assistance population. Even in developing this profile of the Texas Public Assistance populations, however, data regarding Public Assistance Recipients is not used. Plaintiff then estimates the percentage of the medical expenditures of all Public Assistance Recipients that are purportedly "attributable" to smoking, and then multiplies that percentage times its total Public Assistance expenditures for each of the last 28 years and for each of 10 future years to arrive at its damages number — $8.6 billion.

relevant health and life style factors which are totally ignored in Plaintiff's model, including alcohol use, diet, and exercise. The model is based on a handful of demographics (age, gender, race, income, education, population density, insurance coverage, marital status); behavioral factors (seat belt use, risk taking propensity); and two health factors (weight and level of physical activity). Importantly, there is no information on the medical history for the individuals surveyed (*e.g.*, childhood diabetes or leukemia); no medical history for their families (*e.g.*, three generations of heart attacks); no information on other health related behaviors or exposures (*e.g.*, diet, drug use, mental illness, depression, stress, alcohol use, occupation, exposure to air pollution or other established toxins such as asbestos or radon) and no information on countless other factors that can and do effect particular individuals (*e.g.*, proximity to a waste dump or nuclear plant, service in the Desert Storm campaign). These omitted factors are unique to individuals and many are unique to the Texas Public Assistance populations. Although criticism of the State's model is not necessary to the resolution of this motion (and in fact will likely be the subject of a later motion), these variables underscore the validity of the *Fibreboard* court's concerns.

Of course, Plaintiff steadfastly opposes any effort to obtain discovery of the relevant populations, including individual specific information, and the Magistrate has denied Defendants' motion seeking this discovery, impairing Defendants' ability to defend against Plaintiff's amorphous aggregate of assumed causation. *See* Magistrate's Order dated June 27, 1997; Certain Defendants' Objections to and Appeal of Magistrate Order Denying Discovery of Individuals Forming the Basis of Plaintiff's Claims, filed July 14, 1997. Plaintiff thus both wants to assert impermissible aggregate theories and avoid providing the most basic necessary information to evaluate the accuracy of its aggregate conclusions. The

injustice of prohibiting discovery of the relevant individual recipients to demonstrate the obvious failings of Plaintiff's statistical model is apparent. For example, one issue in this lawsuit is whether Defendants' false advertising caused individual recipients to smoke or to continue to smoke which, in turn, caused heart disease. But, under Plaintiff's plan for determining causation, Defendants never see the individual or his medical records to determine if he really did have heart disease or whether his treatment was proper. Defendants also never find out whether Plaintiff's family has a long history of heart disease or whether Plaintiff had rheumatic fever as a child or exercises as an adult or uses illegal drugs or alcohol or even whether he is HIV positive. Nor do Defendants ever find out whether Plaintiff ever saw defendant's advertising or cared one way or another about what Defendants said. The model contains no information about "real" people, let alone real Texas Medicaid recipients.

The Plaintiff's damages model also is flawed in its assumption that smoking causes increases in all medical care costs, including the costs of broken arms and the common cold. It also assumes that all reported health care services and costs are accurate and reliable. The model also assumes that each recipient's condition was properly diagnosed (*e.g.*, they really had heart disease); that their treatment was appropriate (*e.g.*, open heart surgery rather than cheaper drug therapy); and that the entire event was not biased by "Medicaid fraud."

Finally, in *Fibreboard*, the claimants were involuntarily exposed to asbestos at the workplace. There was no choice issue at all. Here there is a fundamental question, simply assumed by Plaintiff's aggregate proof, relating to whether Defendants' conduct (the alleged misrepresentations or concealment) had anything to do with anything. *See Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir.), *cert. denied*, 117 S. Ct. 300 (1996); *see also*

Defendants' Motion for Summary Judgment on Causation. This simply cannot be the "fair process" required by *Fibreboard*.[7]

C. **Related Fifth Circuit Precedent**

It is significant that the Fifth Circuit recently revisited the aggregation issue in *In re Chevron*, 109 F.3d 1016, (5th Cir. 1996), although the question presented there was considerably narrower. The aggregation plan provided for 30 sample trials that would be used as "bellweather" for settlement purposes for the remaining claimants. Even for this limited purpose, the Fifth Circuit rejected the plan because the trial judge had failed to assure that the cases were a statistically significant representative sample of the whole group.

Here, Plaintiff has made no attempt to sample the relevant Public Assistance populations, but merely assumes that any sample taken, even of the general national population, is somehow representative. Moreover, the model here is not offered as a marker for settlement as in *Chevron*, but as proof of injury, causation, and damages. Finally, the defendant in *Chevron agreed* to the bellweather methodology. No such agreement is in place here.

Interestingly, Plaintiff attempts to use the *Chevron* decision to support its argument that the Fifth Circuit has approved the use of aggregate statistics in proving causation. *See* Plaintiff's Response Regarding Medicaid Recipient Discovery. Plaintiff's reading of *Chevron* is misguided. First of all, as the court pointed out, the "causation" finding of the sample plaintiffs was not extrapolated to bind the remaining plaintiffs: "[T]he trial plan . . . does

[7] It is relevant to note that the Florida legislature, apparently believing that legislative action was necessary to allow aggregate causation proof, enacted a specific statute authorizing this type of proof. Ch 94-251 § 4, Laws of Fla. (1994).

not identify any common issues or explain how the verdicts in the thirty (30) selected cases are supposed to resolve liability for the remaining 2970 plaintiffs." *Chevron*, 109 F.3d at 1019. Secondly, while the court in dicta hypothesizes that "in appropriate cases common issues *impacting upon* general liability or causation may be tried standing alone," the court provides no guidance for what such an appropriate case may be. *Id.* *Chevron* does not in any way dilute the clear procedural directive of *Fibreboard*.[8]

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[8] All of the cases Plaintiff cites allegedly supporting its argument that aggregate statistics may be used relate to the use of statistics as evidence of liability or damages; none establish that statistical evidence can be used to prove causation. *See* Plaintiff's Recipient Discovery Response. Plaintiff's cases can be broadly grouped into categories clearly distinguishable from the instant case. Plaintiff points to discrimination cases where statistics are used to prove a pattern or practice of discrimination. *See, e.g. Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Castaneda, Sheriff v. Partida*, 430 U.S. 482 (1977); *E.E.O.C. v. Steamship Clerks Union, Local 1066*, 48 F.3d 594 (1st Cir. 1995); *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989); *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458 (9th Cir. 1987); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647 (5th Cir. 1983); However, these statistics are *not used to show causation*, but wrongful conduct, *e.g.* to show that, objectively, the number of minority hires, promotions, etc. are smaller than the number of non-minority hires, promotions, etc. Similarly, Plaintiff also cites trademark cases, where statistics are not used to show causation, but are used to demonstrate the level of consumer identification with a particular mark. *See, e.g. Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 682 F.2d 500 (5th Cir. 1980). Plaintiff cites numerous cases where statistics are used to quantify *damages* — not causation — in the context of Medicaid and Medicare overypayments; *e.g. Chavez County Home Health Service v. Sullivan*, 931 F.2d 914 (D.C. Cir. 1991); *Mile High Therapy Centers, Inc. v. Bowen*, 735 F. Supp. (984 (D. Colo. 1988); *State of Ga. Dept. of Human Resources v. Califano*, 446 F. Supp. 404 (N.D. Ga. 1977); life expectancy and lost revenue; *e.g. Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990); *G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526 (11th Cir. 1985); *Ageloff v. Delta Airlines*, 880 F.2d 379 (11th Cir. 1988) and to demonstrate the adequacy of inspections of large quantities of goods, *e.g. Jones v. Rath Packing Co.*, 430 U.S. 519 (1976); *Imperial Veal & Lamb Co. v. Caravan Refrig. Cargo*, 554 F. Supp. 499 (S.D. N.Y. 1982); *United States v. 449 Cases, Etc.*, 212 F.2d 567 (2nd Cir. 1954). Finally, while Plaintiff does cite to a few cases where statistical proof is used in mass tort cases, a careful reading of the opinions reveals that the use of statistics is limited by the context of the case, i.e., the defendant has stipulated to causation and injury, *e.g. Cimino v. Raymark*, 751 F. Supp. 469 (E.D. Tex. 1990); or that the statistical proof is used in the context of damages only, *e.g., Cimino*, 751 F. Supp. 649 (E.D. Tex. 1990); *Watson v. Shell Oil*, 979 F.2d 1014, 1018 (5th Cir. 1992).

Two other courts have applied the holding of *Fibreboard*. In one case, *Cimino v. Raymark Corp.* (essentially *Fibreboard* on remand following the Fifth Circuit's grant of mandamus), the court proceeded with the resolution of 3,000 cases based upon the mass adjudication of a random sample of 160 cases. However, in *Cimino*, the Defendant *agreed* to forego individualized requirements of proof.[9] In a second case, *Watson v. Shell Oil*, 979 F.2d 1014, 1019 (5th Cir. 1992), a class action involving over 20,000 members following an industrial accident, the district court found that proof of causation and damages must proceed on an individual basis, although not with "full blown" trials.

In short, *Fibreboard* applies and Plaintiff cannot avoid it. Because the use of aggregate statistical evidence to prove causation is not permitted, Defendants' motion for summary judgment should be granted.

III. The State's Method of Proving "Causation," if Permitted, Would Contravene Separation of Powers Principles.

The Fifth Circuit in *Fibreboard* also concluded that the trial court exceeded its authority in formulating a sampling approach to resolve the asbestos cases pending before it: "The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more. We are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial but it is not." *Fibreboard*, 893 F.2d at 712. Thus, in ordering the procedures contemplated in *Fibreboard*, the Fifth Circuit found that the district court had infringed the constitutionally mandated separation of power between the judicial and legislative branches of government. The Fifth Circuit expressly rejected plaintiffs' claim that such a procedure was the only "realistic" way of

[9] *Cimino* was appealed to the Fifth Circuit, but settled before it was resolved.

trying these cases. While noting that this argument was compelling, the Fifth Circuit observed that it should be addressed to the state and federal legislatures, not the courts. *Id.*

The court is presented with precisely the same request: to abrogate decades of legislatively mandated procedural guidelines. But it is particularly inappropriate for the Court to make sweeping changes in Texas law where, as here, the product at issue is extensively regulated by both the federal government and the State. *See Brown Forman Corp. v. Burns*, 893 S.W.2d 640, 647 (Tex. App. — Corpus Christi 1994, writ denied). In fact, the Texas legislature has prohibited tort recoveries under virtually *any* theory of liability arising from personal injuries caused by a tobacco product (except breach of express warranty and manufacturing flaws). TEX. CIV. PRAC. & REM. CODE ANN. §§ 82.001 - 82.006 (West 1997) (the Texas Products Liability Act of 1993).[10] Moreover, it is not the proper function of the federal courts, when applying state law, to adopt untested legal theories "represent[ing] radical departures from [the] traditional theories of tort liability [of the State]." *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 583 (5th Cir.) *cert. denied*, 465 U.S. 1102 (1984). In Florida, the state passed legislation changing Florida common law in an effort to target tobacco companies in litigation. Ch. 94-251 § 4, Laws of Fla. (1994). This Court should decline the invitation to step into the shoes of the Texas legislature and make public policy.

[10] Moreover, during debate regarding the Act, the sponsor of the bill, Representative Seidlits, stated that it was "a policy decision that we can handle tobacco . . . through this legislative body, rather than through lawsuits." *House Floor Debate on Tex. S.B. 4*, 73rd Leg., R.S. (Feb. 22, 1993).

IV. Conclusion

Plaintiff's aggregate statistical "proof" of causation is inadequate under well-established Fifth Circuit precedent. The Court in *City and County of San Francisco v. Philip Morris, Inc.*, a similar case, explained:

> [I]t would be extremely difficult for the Court to ascertain the amount of damages attributable to defendants' conduct, as there are many other factors that could affect plaintiffs' smoking-related damages. For instance, in a direct suit by a smoker to recover his or her smoking-related medical expenses, the Court could inquire into any other health problems which may have exacerbated the costs of health care for that smoker. Likewise, the Court could ascertain from an individual smoker the amount of information he had regarding the risks associated with smoking. In the present suit, on the other hand, because of the lack of directness, it will be difficult, if not impossible, to explore these and other relevant issues.

City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1137 (N.D. Cal. 1997). For all of the foregoing reasons, Defendants respectfully request that the Court grant its Motion for Partial Summary Judgment based on *Fibreboard*.

Respectfully submitted this ____ day of July, 1997.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Defendants' Motion for Partial Summary Judgment Based on *Fibreboard***, has been properly forwarded to Plaintiff's Administrative Liasion Counsel, Grant Kaiser, 2901 Turtle Creek Drive, Suite 201, Bank One Building, Port Arthur, Texas, 77642, by facsimile at 409-727-7671, and overnight delivery and to all defense counsel by overnight/regular mail on this 23th day of July, 1997.

Howard Waldrop

Howard Waldrop

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 5-96CV91
vs.	§	
	§	
THE AMERICAN TOBACCO CO., et al.,	§	
	§	
	§	
Defendants.	§	

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON THE STATE'S INABILITY TO ESTABLISH CAUSATION

Come now Defendants Philip Morris Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation (Individually and As Successor to The American Tobacco Company), Lorillard Tobacco Company, United States Tobacco Company, Hill & Knowlton, Inc., The Council for Tobacco Research--U.S.A., Inc., and The Tobacco Institute, Inc., and respectfully move this Court for an order granting summary judgment in favor of Defendants, and against Plaintiff the State of Texas (the "State"), on each and every one of the State's claims for damages in the Second Amended Complaint. This motion is based upon Fed. R. Civ. P. 56, and the State's inability to establish causation, an essential element of each of the State's

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EXHIBIT
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claims for damages, as is demonstrated in the accompanying Defendants' Memorandum of Law in Support of Their Motion for Partial Summary Judgment Based on the State's Inability to Establish Causation. This motion is also based upon the accompanying Declaration of Counsel and exhibits, the records and files in this proceeding, such facts of which this Court may take judicial notice, and the laws of the State of Texas and of the United States.

Dated: July 23, 1997

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 5-96CV91
vs.	§	
	§	
THE AMERICAN TOBACCO CO., et al.,	§	
	§	
	§	
Defendants.	§	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON THE STATE'S INABILITY TO ESTABLISH CAUSATION

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 5-96CV91
vs.	§	
	§	
THE AMERICAN TOBACCO CO., et al.,	§	
	§	
	§	
Defendants.	§	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON THE STATE'S INABILITY TO ESTABLISH CAUSATION

Defendants[1] submit this memorandum in support of their motion for partial summary judgment dismissing the damage claims in the Second Amended Complaint (the "Complaint"). This motion is based on the State's inability to establish that its alleged damages were caused by the Defendants' alleged wrongdoing.

Basis for the Motion

The State of Texas alleges that Defendants have engaged in a broad variety of wrongdoing over the past 45 years. See Complaint ¶¶ 47-146. The State also alleges that smoking cigarettes has caused thousands of Texans to suffer from

1. Liggett Group, Inc., and B.A.T. Industries, P.L.C., do not join this motion.

diseases, the treatment of which has caused the State to expend additional money for health care. Id. ¶¶ 147-52.

Two points about the State's allegations are critical:

First, the State does not allege that it was unlawful for Defendants to make and sell cigarettes. For the most part, the unlawful conduct alleged by the State involves Defendants' misrepresentation and concealment of material facts about the adverse effects of smoking on health.

Second, the State alleges that it is entitled to damages because the Defendants' unlawful conduct (consisting mainly of misrepresenting and concealing facts about the health effects of smoking) caused the State to pay many millions of dollars in increased medical costs for thousands of Texans who have become ill from smoking cigarettes.[2]

This motion is based on a fundamental defect in each of the State's damage claims: the State cannot prove a causal connection between the alleged unlawful conduct of Defendants and the State's purported damages. It is not enough for the State to prove that smoking cigarettes caused diseases that increased the State's health care costs. The State must prove a causal connection between the Defendants'

2. Complaint ¶¶ 176 (Count I), 191 (Count II), 202 (Count III), 215-16, 229, (Count IV), 240-41, 248, 254 (Count V), 259 (Count VI), 274 (Count VII), 280 (Count VIII), 286 (Count IX), 296 (Count X), 303 (Count XI), 323-24 (Count XII), 327 (Count XIII), 331 (Count XIV), 354 (Count XV), 355, 357 (Count XVI), 359-62 (Count XVII), and at 122-24 (prayer).

alleged unlawful conduct and the State's increased health care costs. The State cannot establish that causal connection because it cannot prove how much, if any, smoking of cigarettes by Medicaid recipients who became ill was caused by Defendants' alleged unlawful conduct.[3]

This motion accepts as true the State's allegations of wrongdoing by Defendants. This motion also accepts as true the State's allegations that smoking cigarettes caused illnesses that increased the State's health care costs. This motion relies on two basic propositions: (1) the law requires that the State prove that the alleged misconduct caused the damages that it is seeking, and (2) the State cannot establish such causation. Because of the State's inability to prove causation, summary judgment must be granted on all of the State's claims for damages.

This fatal defect in the State's case is separate from and in addition to the State's inability to prove causation as set forth in Defendants' Motion for Partial Summary Judgment Based on Fibreboard, which focuses on the defects in the State's case in light of In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990), and the defects in the State's individual claims (as set forth in the other motions for summary

3. As used in this brief, the term "Medicaid recipients" includes all categories of smokers whose health care costs the State claims it has had to pay -- including patients treated by state-funded charity hospitals and pursuant to insurance programs administered for state employees and retirees, as well as recipients of medical services pursuant to the Medicaid program, 42 U.S.C. §§ 1396 et seq..

judgment, as well as Defendants' pending motions to dismiss pursuant to Fed. R. Civ. P. 12).

Summary Judgment Standard

To withstand a motion for summary judgment, a nonmoving party that bears the burden of proof upon an issue at trial must submit "'significant probative evidence tending to support the complaint.'" Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "It will not do to 'presume' the missing facts because without them the affidavits would not establish [causal connection to] the injury that they generally allege." Lujan, 497 U.S. at 889. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (emphasis added). "[I]f the factual context renders respondents' claim implausible" the nonmovant "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). See Hart v. United States, 945 F. Supp. 1009, 1010-11 (E.D. Tex. 1996) (Folsom, J.) (discussing Rule 56 case law).

The State bears the burden of proving that Defendants' unlawful conduct caused the State's alleged injury. Under Lujan, to defeat this motion the State must come forward with "significant probative evidence" of such causation. And it must do

so in light of the "overwhelming and competing inference"[4] of lack of causation that arises from the recognition by both the Fifth Circuit and the Texas Supreme Court that the dangers of smoking have been known to the community for decades. Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168 (5th Cir.), cert. denied, 117 S. Ct. 300 (1996); American Tobacco Co. v. Grinnell, No. 94-1227, 1997 WL 336358 (Tex. June 20, 1997). Because the State cannot meet this burden, this motion must be granted.[5]

Summary of Argument

1. To prevail on its damage claims, the State must prove that Defendants' alleged misconduct caused the State to incur increased health care costs.

2. The State cannot present significant probative evidence that Defendants' alleged misconduct caused the State to incur increased health care costs. In fact, the recent decisions by the Fifth Circuit in Allgood and by the Texas Supreme Court in Grinnell render the State's causation claims untenable.

3. None of the States' theories of causation has factual support that will permit the State's damage claims to survive this motion for summary judgment, and the State's damage models do not supply proof of the requisite causation.

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4. Braxton v. Zapata Offshore Co., 684 F. Supp. 921, 925 (E.D. Tex. 1988) (citing Matsushita).

5. See, e.g., In re Norplant Contraceptive Products Liability Litigation, 955 F. Supp. 700 (E.D. Tex. 1997) (granting summary judgment based on lack of evidence that lack of warnings accompanying oral contraceptives were "producing cause" of injury within meaning of Texas law).

Argument

I. Causation Is a Required Element of Each of the State's Claims for Damages.

The State can recover damages only if it proves that Defendants' misconduct was the "legal cause" of its injuries. A plaintiff must "prove, with certainty, both the existence of damages and the causal connection between the wrong and the injury." Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 532 n.26 (1983) (citing F. Bohlen, Cases on the Law of Torts 292-312 (2d ed. 1925)). "Legal cause" requires, at a minimum, proof that the defendant's alleged unlawful conduct was the "but-for cause" of the plaintiff's injury.

The United States Supreme Court has defined but-for cause as follows:

> In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.

Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (pl. op.). But-for cause is also referred to as "cause-in-fact." Union Pump Co. v. Allbritton, 898 S.W.2d 773 (Tex. 1995). "Cause-in-fact cannot be established by mere conjecture, guess, or speculation." Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex. 1995).[6]

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6. Accord, Purina Mills, Inc. v. Odell, 1997 WL 336293, *6 (Tex. App. -- Texarkana June 20, 1997, no writ). See also Segura v. United States, 468 U.S. (continued...)

Many of the State's claims require that it establish proximate cause in addition to but-for cause. To prove proximate cause, "[t]he evidence must go further, . . . [and] justify the conclusion that such injury was the natural and probable result" of the wrongful act. Carey v. Pure Distributing Corp., 124 S.W.2d 847, 849 (Tex. 1939). Proximate cause is present only if "an act sets in motion a natural and unbroken chain of events [leading] directly and proximately to a reasonably foreseeable result." Hart v. Van Zandt, 399 S.W.2d 791, 793 (Tex. 1965) (emphasis added). Proximate cause requires "some direct relation between the injury asserted and the injurious conduct alleged," and the concept of "proximate cause" bars a plaintiff from "complain-[ing] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts"; the State cannot recover simply because others "cannot pay their bills." Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 271 (1992).

Each of the State's damage claims requires the State to prove causation:

6. (...continued)
796, 816 (1984) ("pure speculation" insufficient to show "but-for" cause); Union Pump, 898 S.W.2d at 776 (cause-in-fact cannot be established merely by proving that that defendant's conduct "create[d] the condition that made [the plaintiff's] injuries possible."); Prudential Ins. Co. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 161 (Tex. 1995) (The plaintiff must prove that the "defendant's [unlawful] act or omission was a substantial factor in bringing about injury which would not have occurred otherwise.").

Counts I through III, brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962 et seq., require proof of both but-for cause and proximate cause. Holmes, 503 U.S. at 269.

Count IV, brought under the Sherman Act, 15 U.S.C. § 1, also requires proof of but-for cause and proximate cause. Holmes, 503 U.S. at 267 n.13; Associated General Contractors , 459 U.S. at 533-34 & n.29.

Count V, brought under *Texas' antitrust* laws, also requires the State to prove that the alleged conspiracy was the proximate cause of its damages. Tex. Bus. & Com. Code Ann. § 15.21(a) (Vernon 1990); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 686 (Tex. 1990), cert. denied, 498 U.S. 1048 (1991).

Count VI, alleging *Defendants'* negligence in failing "to use reasonable care in the design, manufacture and marketing" of cigarettes (Complaint ¶ 257), requires proof that Defendants' alleged unlawful conduct -- i.e., either a failure to market "safer cigarettes" or to provide "better" warnings[7] -- was the proximate cause of the *State's damages*. See Union Pump, 898 S.W.2d at 775 .

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7. Although the State alleges Defendants' failure to market a "*safer cigarette*" was negligent, the Texas Supreme Court recently sustained summary judgment in favor of American Tobacco Co. on the ground that "American conclusively proved that no reasonably safer alternative design exists for [present-day] cigarettes," American Tobacco Co. v. Grinnell, 1997 WL 336358, *16 (Tex. June 20, 1997). If no claim for failure to market a "safer cigarette" exists, the only possible basis for the State's negligence claim is a failure to warn. Id.

Count VII, alleging strict products liability, alleges that Defendants' products were defective and unreasonably dangerous; it requires proof that Defendants' failure to design and sell "safer cigarettes" or provide "better" warnings was the "producing cause" of alleged injuries; "producing cause" means cause-in-fact. Nebgen v. Minnesota, Mining and Manufacturing Co., 898 S.W.2d 363, 366 (Tex. App. -- San Antonio 1995, writ denied); Walton v. Harnischfeger, 796 S.W.2d 225, 228 (Tex. App. -- San Antonio 1990, writ denied).

Counts VIII (breach of warranty), XII (fraud), and XIII (negligent misrepresentation) all "share the common element of reliance." Grinnell, 1997 WL at 336358*13. The State must prove that there was justifiable, detrimental, reliance on the alleged misrepresentations that in turn caused the State to incur its alleged damages. Allgood, 80 F.3d at 170-71; Doe, 907 S.W.2d at 481(breach of warranty); DeSantis, 793 S.W.2d at 688 (fraud); Greenstein, Logan & Co. v. Burgess Marketing, Inc., 744 S.W.2d 170, 188 (Tex. App.-- Waco 1987, writ denied) (negligent misrepresentation).

Count IX (unjust enrichment) and Count X (nuisance) require the State to prove that Defendants' unlawful conduct proximately caused its injury. Hunter v. Fort Worth Capital Corp., 620 S.W.2d 547, 555 (Tex. 1981) (Spears, J., dissenting) (unjust enrichment); Givens v. Terrell, 461 S.W.2d 201, 203 (Tex. App.-- Amarillo 1970, writ denied) (nuisance).

Count XI, alleging that Defendants "voluntarily assumed the duty and responsibility to report honestly and completely on all research regarding cigarette smoking and health," Complaint ¶ 298, requires the State to prove that the alleged failure to fulfill this duty proximately caused its damages. Rudolph v. ABC Pest Control, Inc., 763 S.W.2d 930, 933 (Tex. App. -- San Antonio 1989, writ denied).

Count XIV, brought under the Texas Deceptive Trade Practices and Consumer Protection Act, requires that the State, to recover damages, prove that the alleged "false, misleading or deceptive representations" were the producing cause (i.e., the cause-in-fact) of its injuries. Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995).

Count XV, alleging that Defendants conspired "to conceal the true nature and extent of the dangers of their products, [and] avoid legitimate regulation," Complaint ¶ 344, requires the State to prove that unlawful conduct of a Defendant proximately caused its damages. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983).

Counts XVI and XVII seek to hold Defendants liable for the unlawful conduct of others under theories of aiding and abetting, agency, and respondeat superior. Liability under any of these theories depends on proof of the State's underlying claims, which all require proof of causation. See, e.g., N.S. Sportswear, Inc. v. State

of Texas, 819 S.W.2d 230, 231 (Tex. App. -- Austin 1991, no writ); Permian Petroleum Co. v. Barrow, 484 S.W.2d 631, 634 (Tex. App. -- El Paso 1972, no writ).

II. The State Cannot Prove that Defendants' Alleged Deception and Other Unlawful Conduct Caused the State's Asserted Damages.

There is no genuine issue as to whether the unlawful conduct alleged by the State caused the State's claimed injuries. Because the State cannot prove such causation, the State's damage claims fail as a matter of law. No matter what unlawful conduct the State might prove, if "the element of proximate [or other required level of] cause is not supported by sufficient probative evidence," "the existence or nonexistence of the remaining elements is irrelevant." Campos v. Ysleta General Hospital, Inc., 836 S.W.2d 791, 794 (Tex. App. -- El Paso 1992, writ denied).[8] Because the State cannot prove the required causation, it would flout Rule 56 -- and common sense -- to conduct literally months of trial when the State cannot prove an essential element of its claims.

The gist of the unlawful conduct alleged by the State relates to information about smoking: the State alleges in 100 paragraphs that Defendants misrepresented or concealed material facts about the alleged health hazards of smoking cigarettes.

8. See also Green v. GS Roofing Products Co., Inc., 928 S.W.2d 265, 268 n.1 (Tex. App. -- Houston [14th Dist.] 1996, no writ) (If a party's misconduct is not proximate cause of injuries suffered, that misconduct, "if any, is irrelevant."); Warren v. Illinois Central Gulf Railroad Co., 768 F.2d 709, 711 (5th Cir. 1985) (per curiam) (If alleged misconduct "failed to constitute a proximate cause" of the injuries alleged, everything else the plaintiff might seek to prove "would be irrelevant.").

Complaint ¶¶ 47-146. Thus, the State alleges that Defendants conspired to "suppress, distort and obfuscate scientific and medical information relating to the use of tobacco products and the resulting diseases." Id. ¶ 346. *Indeed, the gravamen* of this lawsuit is the State's assertion that there have been "years of deception on the part of the *[tobacco] industry.*" State's Opposition to Motion to Dismiss (Jan. 27, 1997) at 1. The Complaint repeatedly alleges that this unlawful conduct caused the State to incur increased health care costs. See footnote 2. Now, at the summary judgment stage, the State must supply evidence that will enable it to prove causation. See Lujan, 497 U.S. at 888-89. This the State cannot do.

The State cannot establish that this deception caused the smoking by Medicaid recipients that is the source of the State's alleged injury.[9] Recent case law

9. Insofar as the State alleges that Defendants' wrongful conduct involves anticompetitive conduct (under Counts IV and V) or a failure to design and sell "safer" cigarettes (under Counts VI and VII), the arguments presented here apply fully.

With regard to the antitrust claims, the State cannot establish, by anything other than the rankest speculation, what (if any) smoking by Medicaid recipients was caused by Defendants' alleged anticompetitive conduct, or how the State's health care costs would have been affected if Defendants had competed more vigorously to manufacture and distribute "safer" cigarettes. In fact, there is no evidence that it is even possible to quantify the market share that some unspecified level of more vigorous marketing of "safer" cigarettes would obtain, or the impact on disease rates, or State health care costs, that would result from such marketing.

Likewise, under Counts VI and VII, if it is assumed that Defendants (continued...)

establishes the difficulty, if not the impossibility, of proving under Texas law that deception by tobacco companies was the legal cause of anyone smoking and consequently suffering from a smoking-related disease. Both the Fifth Circuit in Allgood and the Texas Supreme Court in Grinnell confirmed that, as a matter of Texas law, the general health dangers of smoking have been commonly known for decades. As a result, both courts recognized that proving that tobacco companies have engaged in fraud and that smoking caused a smoker to become ill is insufficient to establish liability.

In Allgood, the Fifth Circuit affirmed a summary judgment against representatives of a deceased smoker who sued four of the Defendants in this case on claims of negligence, conspiracy, products liability, breach of warranty, and fraudulent misrepresentation and concealment. 80 F.3d at 170-71. Plaintiffs alleged that "fraudulent concealment or a failure to warn" about the dangers of smoking were responsible for Samuel Allgood's lung cancer, and relied on the 1954 "Frank Statement to Cigarette Smokers" and other advertisements to show that false statements had been

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9. (...continued)
could have marketed a safer cigarette, the State cannot establish by "specific facts" how the marketing of such safer cigarettes would have affected the State's health care costs. To the extent the State's claims under Counts VI and VII rest on an alleged anticompetitive concealment or misrepresentation of facts about smoking and health, the same causation problems that inhere in the State's other claims for damages are present.

made by the cigarette industry.[10] Assuming Mr. Allgood's cancer was caused by smoking, the Court of Appeals held that "[t]he evidence that Allgood relied upon the alleged misrepresentations . . . is insufficient as a matter of law" because "[t]he most plaintiffs' affidavits and depositions have been able to show is that Allgood read news periodicals during the time period the alleged misrepresentations were made." 80 F.3d at 171. Plaintiffs' evidence was not enough to avoid summary judgment because it failed to show that Mr. Allgood "read the misrepresentations" and "falls far short of proving he actually relied on them." Id. The Fifth Circuit also held that Mr. Allgood's claims were barred because "the dangers of cigarette smoking have long been known to the community" and "defendants had no duty to warn Allgood of the dangers of smoking." Id. at 172.

Last month, the Texas Supreme Court in Grinnell held that almost all of a smoker's claims against a tobacco company were barred as a matter of law on a summary judgment record. No. 94-1227, 1997 WL 336358 (Tex. June 20, 1997) (not released for publication). The Supreme Court observed that "the general health risks associated with smoking" have been known for nearly 100 years. Id. at *4. The Court noted that, as early as 1900, the United States Supreme Court had stated that "'a belief

10. For a more complete description of the advertisements allegedly relied upon by Mr. Allgood, see Allgood v. American Tobacco Co., Civ. No. H-91-0158, 1994 U.S. Dist. LEXIS 20932 *2, *24 (S.D. Tex. Nov. 7, 1994) (Milloy, M.J.).

in [cigarettes'] deleterious effects . . . has become very general.'" Id. (quoting Austin v. Tennessee, 179 U.S. 343 (1900)). Citing a wealth of judicially noticed facts, the Texas Supreme Court concluded "that the general health dangers attributable to cigarettes were commonly known as a matter of law by the community when Grinnell began smoking" in 1952. Id. at *6 (emphasis added). The Texas Supreme Court also held that, even under Texas' stringent standards for summary judgment, the defendant had "prove[d] that Grinnell did not rely on any of [the defendant's] advertisements" and that plaintiff's proof of reliance was at best "speculation." Id. *15.

Judge Jacks recently held that Allgood compelled dismissal at the pleadings stage of a smoker's claims for breach of warranty and related wrongdoing because "[t]his Court is bound by Allgood." Perez v. Brown & Williamson Tobacco Corp., 1997 WL 358018 (S.D. Tex. June 4, 1997). Under Texas law, "cigarettes are inherently unsafe and are known to be unsafe by ordinary consumers with the ordinary knowledge common to the community." Id. at *3. See Marks v. R.J. Reynolds Tobacco Co., 1997 WL 242126, *4 (W.D. La. Feb. 4, 1997) (following Allgood; applying Louisiana law). Of course, this Court is likewise bound by Allgood.[11]

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11. Since Perez, Grinnell has confirmed the relevant aspects of Allgood. Insofar as Grinnell did not direct the entry of summary judgment, its reasoning nonetheless supports summary judgment in favor of the Defendants. The Texas Supreme Court held that the defendant had failed to establish as a matter of law that "the specific danger of nicotine addiction was common knowledge when Grinnell began smoking" in 1952, 1997 WL 336358 *6, and it denied summary

(continued...)

The Allgood and Grinnell courts both rejected the notion that the plaintiffs could establish that deceptive conduct by tobacco companies caused people to smoke and, as a result of these holdings, the plaintiffs could not hold tobacco companies liable even though it was alleged (and assumed for purposes of motions for summary judgment) that smoking caused injuries to the specific smokers involved. Because of the common knowledge of the health dangers of smoking, the plaintiffs in those cases were unable to establish a causal link between defendants' alleged deception and smokers' injuries.[12] For the same reason, the State's claims of a grand conspiracy

11. (...continued)
judgment on such claims. In essence, Grinnell recognized that there may be some people who can establish that they relied on some statement that did not warn of the possibility of becoming "addicted" to cigarettes, even though Texas law presumes conclusively that they were aware of the "general health risks" of smoking. Under Texas summary judgment procedure, which does not follow Celotex Corp. v. Catrett, 477 U.S. 317 (1986), that possibility, together with Mr. Grinnell's testimony that he would not have started smoking if he had been more fully informed of the "addictive" aspects of cigarettes, defeated summary judgment. See Grinnell, 1997 WL 336358, *9; see also Casso v. Brand, 776 S.W.2d 551, 555-56 (Tex. 1989) ("Summary judgments in federal courts are based on different assumptions, with different purposes, than summary judgments in Texas. . . . We respectfully disagree with those [state court] jurisdictions that have applied [federal summary judgment standards].").

Here, by contrast, there is no testimony of causation analogous to that of Mr. Grinnell, and under federal summary judgment practice, it is not the Defendants' burden to factually negate the plaintiff's claims. Celotex, 477 U.S. at 323. Accordingly, Grinnell fully supports this motion.

12. These Texas decisions echo rulings of other courts recognizing that "the essential intervening link of the injured individual smokers" and their individual (continued...)

by Defendants to defraud the public about those dangers cannot succeed under Texas law. Under federal summary judgment standards, the State cannot create a genuine issue of fact over whether Defendants' alleged unlawful conduct was a legal cause of the damages claimed by the State.

III. The State Cannot Establish That Defendants' Alleged Misconduct Caused Its Damages.

The State has attempted to articulate two theories by which it may seek to prove that Defendants' alleged unlawful conduct caused the State's injury. In describing these theories below, we will refer to them as the "Smoker Deception Theory" and the "State Deception Theory." Under both theories, the State lacks sufficient evidence to establish that Defendants' alleged unlawful conduct was even the cause-in-fact, let alone the proximate cause, of its alleged injury in the form of increased Medicaid payments. The State's statistical models cannot establish a causal link between the Defendants' alleged unlawful conduct and the State's injuries.

Because the State cannot present evidence to prove the material issue of causation, summary judgment with respect to all of the State's damage claims should be granted.

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12. (...continued)
decisions to smoke and to continue to smoke make it all but impossible to prove claims such as those asserted by the State. City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1137 (N.D. Cal. 1997). See Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988); Paugh v. R.J. Reynolds Tobacco Co., 834 F. Supp. 228, 230-31 (N.D. Ohio 1993).

A. The State Cannot Establish Causation Under The Smoker Deception Theory.

The Complaint delineates causation by asserting that Defendants deceived Medicaid recipients about the health effects of smoking, resulting in increased health care costs to the State. As Defendants showed in their motions to dismiss, the State has no cause of action for such derivative injury because the State's alleged injury is too remote from the alleged unlawful conduct. That conclusion was reached by the courts in City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1137 (N.D. Cal. 1997), and State of Maryland v. Philip Morris Inc., No. 96112017/ CL211487, slip op. at 28 (Md. Cir. Ct. -- Baltimore City May 21, 1997) (Ex. A).

The Smoker Deception Theory relies on the following causal chain: (1) Defendants' alleged misrepresentations and omissions of material facts about smoking and health caused smokers, including those who were (or later became) Texas Medicaid recipients, to begin or continue smoking; (2) because they smoked, some of these Medicaid recipients incurred diseases; and (3) the treatment of these diseases increased the State's health care costs. See Complaint ¶¶ 159.

To establish causation by means of the Smoker Deception Theory, the State would have to prove, as the first link in this chain, that Defendants' alleged unlawful conduct caused Medicaid recipients to begin and continue smoking. But there is no evidence of such causation. Indeed, the State has blocked Defendants' efforts to ascertain the facts as to such causation by refusing to allow Defendants any information

about individual Texas Medicaid recipients on the ground that such discovery is "irrelevant." See State's Response to Defendants' Motion to Compel (June 26, 1997) at 3.[13] The injuries asserted by the State derive, as the State admits, from "the actions taken by individual smokers . . . to purchase and smoke cigarettes." State's Opposition to Motion to Dismiss (Jan. 27, 1997) at 29. Yet the State, by thwarting discovery on this issue, has left the record bare as to why Medicaid recipients smoked -- including whether Defendants' alleged unlawful conduct caused them to smoke.

Because proof of legal causation is the State's burden at trial, the absence of this proof on this issue is the State's problem, not Defendants'.[14] "[T]he plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If there is "a complete failure of proof concerning an essential element of the nonmoving party's case," "[t]he moving party is 'entitled to a judgment

13. The State's refusal to cooperate in such discovery is the subject of objections to this Court, pursuant to 28 U.S.C. § 636 and the Court's Local Rules.

14. Merely permitting the Defendants to conduct discovery pertaining to individual Medicaid recipients would not obviate the State's duty to come forward with evidence on causation in order to meet this motion for summary judgment. This discovery is absolutely necessary to secure Defendants' rights to due process of law, but the fact that Defendants have sought discovery into the histories of individual Medicaid recipients cannot relieve the State of its burden of proof.

as a matter of law' because the nonmoving party has failed to make a sufficient showing . . . with respect to which [it] has the burden of proof." Id. at 323. That is the case here.

Without evidence to establish what, if any, effects Defendants' alleged unlawful conduct had on Medicaid recipients, the State cannot support factually the first link in the causal chain underlying the Smoker Deception Theory. Indeed, to the extent individual Medicaid recipients might be able to show a causal link between Defendants' alleged misconduct and the medical costs the State seeks to recover, summary judgment procedures bar this Court from "presum[ing] the missing facts" into the record. Lujan v. National Wildlife Federation, 497 U.S. at 889. The district court in the City and County of San Francisco case noted this defect when it granted motions to dismiss: "it would be extremely difficult for the Court to ascertain the amount of damages attributable to defendants' conduct, as there are many other factors that could affect plaintiffs' smoking-related damages." 957 F. Supp. at 1138.

The Fifth Circuit's reasoning in Allgood is dispositive on this issue. The Court held that, in the absence of "specific facts" linking the alleged fraud and Mr. Allgood's decision to start and to continue to smoke cigarettes, "the district court properly granted summary judgment." Allgood, 80 F.2d at 170. The Court held that "[t]he evidence that Allgood relied upon the alleged misrepresentations . . . is insufficient as a matter of law" because "[t]he most plaintiffs' affidavits and depositions

have been able to show is that Allgood read news periodicals during the time period the alleged misrepresentations were made." Id. Here, the State has no evidence that a single Medicaid recipient -- let alone the thousands of them whose smoking underlies the State's damage claims -- had any knowledge of Defendants' alleged misstatements. It follows a fortiori that the State lacks specific evidence of what is required: namely, that individual Medicaid recipients "actually relied on" Defendants' alleged misstatements. 80 F.3d at 171. Therefore, summary judgment should be entered with respect to the State's damage claims under the Smoker Deception Theory.

B. The State Cannot Establish Causation Under The State Deception Theory.

In opposing Defendants' motions to dismiss, and in subsequent discovery proceedings, the State has articulated another causation theory, which is based on Defendants' alleged misleading of the Texas Legislature and enforcement officials of the Executive branch. The State Deception Theory relies on the following causal chain: (1) Defendants' alleged misrepresentations and omissions of material facts about caused the Texas legislature or regulators to enact or not to enact legislation and regulations about smoking; (2) because different legislation or regulations were not enacted, persons who became Medicaid recipients in Texas began or continued to smoke; (3) because they smoked, some of these Medicaid recipients incurred diseases; and (4) the treatment of these diseases increased the State's health care costs. The first two links in this chain are fatally flawed, factually and legally.

1. First link: legislative causation

The first link in the causal chain posited by the State is both factually deficient and legally improper. It requires proof of what legislation or regulation would have been enacted, and when, in the absence of Defendants' alleged misstatements and concealment about the health consequences of smoking from the Texas Legislature. The relevant period appears to be 1954 to the present. To put the State's claim in historical context, that period encompasses the administrations of Presidents Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan, Bush and Clinton.

The State cannot possibly come forward with "significant probative evidence" that will establish causation. During the relevant period, the Texas Legislature has been made up of 31 senators and 150 representatives, and its composition has changed every two years. See Tex. Const. art. III, §§ 2-4 (1876). Proving what each of a score of differently constituted legislatures would have done across a 40-year period, if they had been presented with different facts about the health consequences of smoking, would necessitate depositions putting hypothetical questions to hundreds of present and former legislators. Many of the former legislators -- particularly those who served when many of the Medicaid recipients began smoking -- are deceased. Others will find it impossible to give meaningful testimony about how they would have voted decades ago under hypothetical circumstances. Moreover, because the Governor has the power to veto legislation, the State Deception Theory would require taking the

deposition of each of Texas's Governors since 1954. The three Governors who held office in the 1950s and early 1960s (Alan Shivers, Price Daniel, and John Connally) are no longer alive.

The State has not submitted any admissible evidence demonstrating that a majority of the legislators who held office at any given time (and the Governor, or a veto-proof super-majority of legislators), would have passed any particular statute had the "informational matrix" somehow been different. And, in light of Allgood and Grinnell, the State will never be able to do so.[15] Those binding constructions of Texas law hold that the dangers of smoking have been known in the community for decades. The notion that "fraud" was perpetrated on the members of the Legislature, the Governor and regulatory officials -- who are more sophisticated than, and have access to far more information than the general populace -- is meritless. The State Deception Theory cannot survive this summary judgment motion.

15. Similar problems of proof would be raised by claims that Texas' regulatory officials would have put into place a different system of regulations governing smoking if they had not been deceived by Defendants. In addition to having to demonstrate that such officials had the authority at the particular time at issue to adopt the regulations that the State alleges would have been adopted but for Defendants' actions, the State would have to present proof that each official in the chain of command would have exercised that authority in a particular manner, that the regulation would have been enforced in a particular manner, and that the courts would have sustained enforcement in that manner.

2. Second link: effect of hypothetical legislation

The State also cannot provide evidence to establish the second link in the causal chain implied by the State Deception Theory. This theory shifts the place in the causal chain that is occupied by the imponderables as to why thousands of individual Medicaid recipients and recipients-to-be decided to smoke. But it does not remove those imponderables from the causal chain that the State must establish. If the State somehow could prove that different legislation or regulations would have been in place but for the alleged unlawful conduct, it would then have to prove which, if any, Medicaid recipients would not have smoked in a hypothetical world in which these laws were on the books in Texas. There is no way in which the State can prove what effect hypothetical legislation or regulation would have had on smoking by the thousands of Medicaid recipients whose health care costs are at issue.

Once again, any evidence of causation that the State might offer would run directly into the basic fact that drove the decisions in Allgood and Grinnell: Texans have been on notice for decades of the health dangers of cigarette smoking and, despite this knowledge, millions of people still smoke. The notion that hypothetical statutes or rules about smoking in Texas would have prevented Medicaid recipients from smoking is sheer speculation. On these grounds, too, this motion for summary judgment should be granted.

3. Lack of legal cause

Moreover, even if it could somehow be sufficiently supported with evidence, as a matter of law the causal chain on which the State Deception Theory is based is too long and speculative to provide a basis for liability. Both cause-in-fact and, a fortiori, proximate cause analysis prohibit a plaintiff from obtaining a money recovery on the basis of "mere conjecture, guess, or speculation." Doe, 907 S.W.2d at 477. It is legally impermissible to base a damage claim on proof of what hundreds of legislators or other officials would have done over a course of decades under other facts, and how thousands of individuals would have responded to such hypothetical actions. The State's claim would entail an improper review of "'the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (citation omitted).

In Allen v. Wright, 468 U.S. 737, 758 (1984), the Supreme Court reasoned that parents of black children attending public schools in school districts undergoing desegregation had no standing to challenge the government's policies with regard to tax exemptions for private schools that allegedly were practicing race discrimination. The plaintiffs theorized that, if these tax exemptions were denied, the private schools would become more expensive, causing many white parents to decide to send their children to public schools instead. The Supreme Court held that the causal

link between the government's policies regarding private racial discrimination and the integration of public schools rested on "pure speculation" because the "links between the challenged Government conduct and the asserted injury are far too weak . . . involving numerous third parties . . .whose independent decisions may not collectively have a significant effect on the [plaintiffs]." 468 U.S. at 758-59.

Likewise, the State Deception Theory rests on "pure speculation" -- about (a) whether, in the absence of Defendants' alleged unlawful conduct, statutes and regulations different from those that existed over the past 45 years would have existed, and (b) how, if at all, any such differences would have affected Medicaid recipients' decisions to smoke, and would have reduced Texas health care costs. The State has no more standing than the parents in Allen.[16] As in Allen and the cases on which it relies, the independent decisions of absent third parties -- here, thousands of Texas Medicaid recipients -- render "[t]he causal connection" between the hypothetical laws at issue here and the State's injury "sufficiently uncertain to break the chain of causation between the plaintiff's injury and the challenged [defendants'] actions." Id. at 759.[17]

16. See also Zepik v. Tidewater Midwest, Inc., 856 F.2d 936, 942 (7th Cir. 1988) ("The causal connection between a defendant's [failure to provide information to government regulatory agency] and a plaintiff's injury is too remote and speculative to satisfy generally applicable standards of causation in fact or proximate causation.").

17. Just as it is "not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case," Whitmore v. Arkansas, (continued...)

4. Non-justiciability, First Amendment, and Due Process Concerns

In addition, the State Deception Theory is legally flawed because it would plunge this Court into a morass of nonjusticiable "political questions" and independently raise serious issues under the First Amendment and the Due Process Clause of the United States Constitution and their Texas counterparts.

Texas law has long recognized the impropriety of attempting to recreate a hypothetical statutory or regulatory scheme based on allegations that the regime that was in fact enacted or promulgated was procured by fraud. The Texas Supreme Court held more than 80 years ago that a plaintiff claiming to have been injured by a statutory scheme could not sue unless the statute complained of was unconstitutional. Absent a finding of unconstitutionality, "no court in this state has power to right that wrong," and "[t]his conclusion embraces all of the objections which relate to the unfairness,

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17. (...continued)
495 U.S. 149, 160 (1990), it would be an impossible task for this Court to conclude that any particular group of Texas legislators would have enacted particular laws, or that any particular Texas regulator would have issued different rules, on the basis of the information the State alleges that they would have had but for Defendants' asserted misconduct. Just as it is "only speculative" to say that enforcement of a criminal statute against non-payment of child support will lead to the payment of support, see Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973), it is "only speculative", at best, to say that any particular set of laws regarding smoking would cause a reduction in State health care costs. See also Raines v. Byrd, 65 U.S.L.W. 4705 (U.S. June 26, 1997) (executive and legislative officers have no standing to challenge "institutional" injuries caused by laws that limit their authority, regardless of validity of limitations).

injustice, and wrong to the complainants, whether they occurred through fraud, inadvertence, or want of information; all of these matters were settled by enacting the law." Glass v. Pool, 106 Tex. 266, 271, 166 S.W. 375, 377 (1914).

A closely analogous rule was recognized in Massachusetts Indemnity and Life Insurance Company v. Texas Board of Insurance, 685 S.W.2d 104, 111-12 (Tex. App. -- Austin 1985, no writ): " a 'litigant may not procure invalidation of the legislation merely' by tendering evidence in court that the legislature was mistaken . . . [because] almost all legislation is procured through the efforts of some interested persons. . . ." The State Deception Theory violates these principles, in that it would effectively require this Court to retroactively create an entire regulatory regime and hold Defendants responsible under this hypothetical set of laws.[18]

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18. The impropriety of permitting the State to pursue a claim based on "fraud" upon federal legislators or regulators clearly would constitute inappropriate interference with legislative and regulatory decisions. As the Eleventh Circuit recently held in Lewis v. Brunswick, Corp., 107 F.3d 1494, 1505 (11th Cir. 1997):

> Permitting such claims would allow juries to second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process. If that were permitted, federal regulatory decisions that Congress intended to be dispositive would merely be the first round of decision making, with later more important rounds to be played out in state courts. Virtually any federal agency decision that stood in the way of a lawsuit could be challenged indirectly by a claim that the industry involved had misrepresented the relevant data or had otherwise managed to skew the regulatory result.

As the Supreme Court of Alaska noted in a recent decision holding that questions concerning legislative inaction were nonjusticiable "political questions":

> Our constitution commits to the legislature the duty to enact laws. . . . Imputing a motive to the legislature for failing to act risks expressing a lack of respect for that branch of government. Further, there are no "judicially manageable standards" which might be used to resolve the question as to why the legislature failed to take a particular action.

State Dep't of Natural Resources v. Tongass Conservation Society, 931 P.2d 1016, 1019 (Alaska 1997). See also, e.g., Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (agency inaction is "general[ly] unsuitable" for judicial review; it is akin to the decision "not to indict"); Klingler v. Yamaha Motor Corp., 738 F. Supp. 898, 909 (E.D. Pa. 1990) ("[A]ny suit in which legislative inaction by a deliberative or electoral body could be germane would . . . be unsuited to resolution as a matter of law.").

The State Deception Theory also raises significant First Amendment problems. As the United States Supreme Court noted more than 35 years ago, lobbying the legislative or executive branch cannot be a basis for liability, even when that activity involves "deception of the public, manufacture of bogus sources of reference, and distortion of public sources of information." Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). Noerr immunity has long been extended beyond the antitrust arena. See Video International Production, Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075 (5th Cir. 1988).

Finally, the State Deception Theory presents significant Due Process problems. Even if some Texas legislators and former legislators were willing to testify about how they would have voted under other circumstances, the task of retroactively assessing what the Legislature would have done since the time of the first Eisenhower administration could never be a fair one. Under Texas law, "public policy dictates that individual legislators be incompetent witnesses regarding a law enacted by the legislature as a body. Legislators' hands must not be bound by a possibility of being haled into court any time a legislative action is questioned." Clear Lake City Water Authority v. Salazar, 781 S.W.2d 347, 350 (Tex. App. -- Houston [14th Dist.] 1989, no writ) (citing Sosa v. City of Corpus Christi, 739 S.W.2d 397, 405 (Tex.App. -- Corpus Christi 1987, no writ)).[19]

The Texas Constitution accordingly grants each legislator absolute testimonial immunity for legislative activities, whether at the State or the local level. Clear Lake, 781 S.W.2d at 349. ("It simply is not consonant with our scheme of government for a court to inquire into the motives of legislators."). Even if the State did produce testimony from some legislators, Defendants cannot compel legislators or

19. Ironically, the State has claimed a broad testimonial privilege as well over its executive branch officials, creating independent violations of Defendants' Due Process rights. Although discovery orders limiting these claims by Texas executive branch officials might render moot part of the Due Process problems, it would not solve any of the numerous problems with the State Deception Theory, including the Due Process problems caused by the immunity of legislators from subpoena.

former legislators to testify in response. It would violate due process and notions of fundamental fairness to allow the State to move forward on the State Deception Theory because discovery necessary to defend against this claim is, under Texas law, unavailable to Defendants. The State Deception Theory thus cannot be a basis for causation.

In sum, the State Deception Theory is fatally flawed on numerous fronts. Accordingly, several courts have rejected the State Deception Theory in lawsuits against tobacco companies, and none has held that this damage theory can proceed to trial. See Order, State of Florida v. American Tobacco Co., et al., No. 95-1466-AH (Fla. 15th Cir. Ct. Palm Beach County July 2, 1997) (granting summary judgment on State Deception Theory) (Ex. B); City and County of San Francisco v. Philip Morris, Inc., 957 F. Supp. at 1138, 1142 (granting motion to dismiss); State of Washington v. American Tobacco Co., No. 96-2-15056-8-SEA, Slip op. at 13 (Wash. Super. Ct. King Cty. Nov. 19, 1996) (granting motion to dismiss) (Ex. C). Like these Courts, this Court should find that the State Deception Theory has no support -- in fact, in logic, or in legal precedent.

For all these reasons, the State cannot withstand this summary judgment motion on its damage claims under the State Deception Theory.

C. The State Cannot Establish Causation by Its Statistical Models.

As the Court is aware, the State plans to establish its damages at trial by presenting complex statistical models that purport to show health care costs that are

attributable to smoking. Although Defendants have not yet received meaningful discovery about these statistical models, one basic fact about them is clear: they do not provide a causal link between Defendants' alleged unlawful conduct and these damages.[20] These aggregate statistical damage models are all designed to answer the same question: What health costs have resulted from cigarette smoking? In that formulation, "cigarette smoking" means "all cigarette smoking." Thus, as the State has stated recently, "[t]he Texas models seek to calculate the State's tobacco-related health care expenditures for the past thirty years[.]" State's Response to Defendants' Second Motion to Enforce Court Orders on Disclosure of Plaintiff's Damage Model (July 11, 1997) at 1 (emphasis added). The Texas models do nothing to identify any portion of "tobacco-related health care expenditures" that was caused by Defendants' unlawful conduct.

Dr. Jeffrey Harris, one of the State of Texas's expert witnesses, has confirmed that the available statistical models seek to determine the total Medicaid cost

20. As demonstrated in this memorandum and in the memorandum in support of Defendants' Motion for Partial Summary Judgment Based on Fibreboard, as a legal matter the State's aggregate statistical models cannot be used to satisfy the State's burden of proof as to causation. Defendants also expect, however, that discovery will illustrate other problems with the State's statistical models that render those models improper for consideration by this Court. The point of the discussion about the State's aggregate statistical models in this memorandum is that, because these statistical models do not even purport to answer the causation questions posed by this case, they cannot create a genuine issue of material fact, and therefore cannot support the denial of this motion.

allegedly attributable to smoking -- not that portion attributable to the Defendants' alleged unlawful conduct. Dr. Harris testified in the State of Florida case:

> Q: Now I'm asking you this: Isn't the only condition under which that would be true with respect to fraud as misconduct is if you assume that every person at that time would not have smoked but for the fraud?
>
> A: *I can only simplify it this way*, by saying that if a product causes a certain amount of injury but it is determined in an independent inquiry that the manufacturer's conduct at issue caused only a fraction of the injury, then what I am doing is totaling the entire injury and not the fraction.

Dep. of Dr. Jeffrey Harris (May 29, 1997) at 119-20 in State of Florida v. American Tobacco Co., No. CL 95-1466AH (Fla. Cir. Ct. Palm Beach County) (Ex. D).

The State's statistical models do not purport to identify what, if any, portion of smoking by Medicaid recipients would have occurred in the absence of Defendants' alleged unlawful conduct, whether that alleged conduct is deemed to consist of misrepresenting the dangers of smoking or failing to market a "safer" cigarette. These statistical models do not distinguish between (1) the effects of smoking that the State can prove was caused by Defendants' unlawful conduct, and (2) the effects of smoking that the State cannot prove was caused by that conduct. Therefore, the models do not purport to examine, or in any way consider, the extent to which there is a causal connection between Defendants' alleged unlawful conduct and smoking. That is the failure of proof on which this motion is based.

The statistical models in this case will be complex and sophisticated. But that complexity and sophistication should not deceive the Court into thinking that the models can prove something that they cannot prove and do not even purport to prove. The State's statistical models cannot satisfy the causation requirement raised by this motion. The State's statistics about the health effects of smoking cannot substitute for the evidence of legal causation that the State must present to prevail on its claims for damages.

Conclusion

For the reasons above, summary judgment should be granted in favor of Defendants on all claims for damages asserted by the State in the Second Amended Complaint.

Dated: July 23, 1997

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Certificate of Service

The undersigned counsel hereby certifies that he has served a true and correct copy of (1) Defendants' Motion for Partial Summary Judgment Based on the State's Inability to Establish Causation and (2) Defendants' Memorandum of Law in Support of Their Motion for Partial Summary Judgment Based on the State's Inability to Establish Causation to the counsel of record of Plaintiff by telecopy and by overnight delivery to Plaintiff's liaison counsel, at the following address and facsimile number, on July 23, 1997:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 5-96CV91
vs.	§	
	§	
THE AMERICAN TOBACCO CO., et al.,	§	
	§	
	§	
Defendants.	§	

DECLARATION OF COUNSEL AND EXHIBITS A-D IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON THE STATE'S INABILITY TO ESTABLISH CAUSATION

STEVEN S. MICHAELS, pursuant to 28 U.S.C. § 1746, declares:

1. I am an associate with the law firm of Debevoise & Plimpton, which is of counsel to defendant The Council for Tobacco Research -- U.S.A., Inc., in this litigation. Attached to this declaration are true and correct copies of judicial decisions and deposition testimony referred to in Defendants' Memorandum of Law in Support of Their Motion for Partial Summary Judgment Based on the State's Inability to Prove Causation.

2. Attached hereto as Exhibit A is a true and correct copy of the decision in Maryland v. Phillip Morris, Co., No 96112017/CL211487, slip op., (Md. Cir. Ct. -- Baltimore City, May 21, 1997).

3. Attached hereto as Exhibit B is a true and correct copy of the Order Granting in Part and Denying in Part Defendants' Motions for Partial Summary Judgment (Proximate Cause Issues) in State of Florida v. America Tobacco Co., et al., No. 95-1466-AH (Fla. 15th Cir. Ct. Palm Beach County July 2, 1997);

4. Attached hereto as Exhibit C is a true and correct copy of the decision in State of Washington v. American Tobacco Co., No. 96-2-15056-8-SEA, slip op., (Wash. Super. Ct. Kings County, November 19, 1996).

5. Attached hereto as Exhibit D are true and correct copies of excerpts of the transcript of the Deposition of Dr. Jeffrey Harris, State of Florida v. American Tobacco Co., No. CL 95-1466 AH (Fla. Cir. Ct., Palm Beach County, May 29, 1997).

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on July 22, 1997 at New York, New York.

Steven S. Michaels