STATE OF MICHIGAN
IN THE COURT OF APPEALS

OPERATING ENGINEERS LOCAL 324 HEALTH CARE FUND; MICHIGAN STATE AFL-CIO PUBLIC EMPLOYEES HEALTH AND WELFARE TRUST FUND AND ITS BOARD OF TRUSTEES; and SHEET METAL WORKERS LOCAL NO. 292 WELFARE FUND, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

PHILIP MORRIS INCORPORATED; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES P.L.C.; THE AMERICAN TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; LIGGETT & MYERS, INC.; UNITED STATES TOBACCO COMPANY; S. ABRAHAM & SONS, INC.; A. C. COURVILLE & COMPANY, INC.; MARTIN & SNYDER PRODUCT SALES CO.; THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR TOBACCO RESEARCH – U.S.A., INC.; SMOKELESS TOBACCO COUNCIL, INC.; HILL & KNOWLTON, INC.

Defendants-Appellees.

Court of Appeals
No. 218363

Wayne County Circuit Court
No. 97-741291-CZ

APPELLANTS' BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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APPELLANTS BRIEF ON APPEAL

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STATEMENT OF JURISDICTION

This is an appeal as of right under MCR 7.203(A)(1) from a final order of the Wayne County Circuit Court (Judge Robert J. Colombo, Jr.) entered on February 26, 1999, which dismissed the First Amended Complaint herein for the reasons stated in the court's bench opinion delivered at a hearing on February 12, 1999.

STATEMENT OF QUESTIONS PRESENTED

The First Amended Complaint alleges that the defendant tobacco companies, their joint public relations and so-called "research" organizations, and their distributors engaged in unfair business practices and a scheme to defraud concerning cigarette safety, and anticompetative suppression of safer nicotine products, in violation of the Michigan Antitrust Reform Act (MARA), the Michigan Consumer Protection Act (MCPA), the Michigan Pricing and Advertising Act (MPAA); and common law prohibitions against fraud (both misrepresentation and concealment), breach of special duty, conspiracy, and unjust enrichment. The plaintiffs are multiemployer health trust funds (the "Funds"), which pay for health benefits to union members, retirees, and their families using funds collected and contributed pursuant to collective bargaining agreements. Defendants' misconduct injured the Funds -- intentionally and foreseeably -- by impairing the Funds' ability to take steps to reduce their costs of treating smoking-related diseases through smoking-cessation programs and other measures, and by increasing the incidence of smoking among those whose health care is paid for by the Funds. The trial court entered summary disposition dismissing all claims as a matter of law. Under those circumstances:

I. Should the Funds' claims (under MARA, MCPA, MPAA, and the common law) be dismissed on the ground of lack of proximate cause?

The Trial Court answered, Yes.

Plaintiff-Appellant Funds answer, No.

II. Should the Funds MPAA claim be dismissed on proximate causation grounds, even though common law causation principles are inapposite because the statute is remedial and must be liberally construed?

The Trial Court answered, Yes.

Plaintiff-Appellant Funds answer, No.

III. Should the Funds' claims under MARA be dismissed on the ground of lack of antitrust injury or lack of the Funds' status as consumers or competitors in the market?

The Trial Court answered: Yes.

Plaintiff-Appellant Funds answer, No.

IV. Should the Funds' claims under MPAA be dismissed for lack of alleged reliance even though no such element is found in the statutory text?

The Trial Court answered, Yes.

Plaintiff-Appellant Funds answer, No.

V. Does Michigan recognize a claim for intentional breach of a special duty?

The Trial Court answered, No.

Plaintiff-Appellant Funds answer, Yes.

INTRODUCTION -- NATURE OF THE CASE

The three plaintiff Funds sue on behalf of health care funds located in Michigan that play an essential role in our voluntary, employment-based health care system. (Similar funds have brought similar suits in many other states.) Nationwide, more than 30 million Americans depend on "Taft-Hartley" health care funds to pay for their hospital, doctor and other medical bills. These and similar multiemployer health funds are typically established in unionized industries, such as construction, where workers move frequently from employer to employer, making single-employer health benefit plans impracticable. See, e.g., House Rept No 96-869(I) (Comm. on Education and Labor), April 3, 1980, p. 54, P.L. 96-364, reprinted at 1980 US Code, Cong. and Admin. News, 2918, 2921. Without such funds, these employees often would be unable to obtain health care. The Funds are "affected with a national public interest" because "the continued well-being and security of millions of employees, retirees and their dependents are directly affected" by them. 29 USC §1001a.

Smoking-related disease accounts for between seven and ten percent of all health care costs incurred in the United States, and claims over 400,000 American lives annually (¶44). Taft-Hartley and similar funds, whose participants are mostly blue-collar workers, bear a disproportionately high burden because the rate of smoking among such workers is now about twice the national average. (¶¶253-256) Therefore, it is of immense importance, both as a matter of public policy and to the Funds, that those costs ultimately be allocated to the wrongdoing parties that should bear them according to our system of laws. This litigation seeks that goal.

The tobacco companies acknowledge that damage claims can be asserted against them for smoking-related injuries, but insist that only smokers (or parties suing "in the shoes" of smokers via subrogation rights) may bring those claims -- no matter what the legal theory, no matter who

actually paid the treatment costs, and no matter who is the "best" plaintiff according to an analysis of policy factors. Accordingly, whenever health care payors have sued to recover the cost of treating smoking-related diseases, the tobacco companies' first defense has been that only persons suffering actual bodily injury (smokers) have legal standing to sue, and payors are barred on proximate causation (also called "standing") grounds of "remoteness" or "indirectness." In particular, tobacco companies insist that payors, such as the Funds -- the entities that actually pay smoking-related health care costs -- may sue only in subrogation, and are legally barred from suing on their own behalf for the economic injuries they have suffered, *even if the payors plead that the tobacco companies' misconduct intentionally, directly, and immediately affected the activities of the payors themselves*, such as by impairing their implementation of smoking cessation programs.

As a practical matter, it makes no sense to conclude, as did the trial court, that there is some large "remoteness" gap between Defendants' misconduct (for example, their interference with the Funds' ability to counteract smoking addiction among Fund participants) and the Funds' injuries (payment of medical costs to treat smoking-related disease). Nor is it fair or appropriate for Defendants to contend that redress for these injuries can be sought *only* through *personal injury or product liability* cases brought by or on behalf of smokers, subject to the various affirmative defenses (like assumption of risk) that tobacco companies have routinely interposed to obtain dismissal of such cases. When the claims asserted by payors, like the Funds' claims here, satisfy the elements of other theories of recovery -- consumer protection, antitrust, or fraud, for example -- then those claims should be evaluated on their own merits, and not rejected out of hand because they are not personal injury or product liability claims asserted by smokers themselves.

The Funds are the appropriate plaintiffs for the claims they have asserted, and in important respects *the Funds are the only plaintiffs possessing the legal ability to assert these claims – first, because the Funds have paid the costs of treating the smoking-related disease of their participants, and second, under the antitrust laws, because only the Funds have suffered "economic" injury, as distinct from bodily injury, that can be recovered under antitrust laws*. Accordingly, the Funds are suing to recover the *economic* costs that *they* incurred; they are not asserting claims on behalf of smokers for personal injuries, pain and suffering, lost wages, or any medical costs borne by the smokers themselves. Indeed, history shows that smoker lawsuits have always foundered on the immense problems of providing proof of causation, damages, and defenses on a smoker-by-smoker basis. The Funds seek to avoid those problems by bringing different claims based on different theories of Defendants' misconduct, and by seeking recovery only for the aggregate economic depletion of Fund assets (which means that any recovery does not need to be apportioned on a smoker-by-smoker basis).

This case does not arise in a vacuum. Its most important precedents are the cases filed by over 40 states, including Michigan, for recovery of tobacco-related health care costs they had incurred as health care payors (through both Medicaid and State employee health plans) as a result of industry misconduct. The cases brought by the states involved claims and theories of liability and damages virtually identical to the Funds' case here, and the tobacco companies consistently raised the same remoteness defense. The vast majority of courts (mostly state courts), including Michigan, permitted some or all of the plaintiff states' claims to proceed, rejecting defendants' remoteness argument, with several courts carefully noting that plaintiffs would have standing even if they did not enjoy sovereign status. As has been widely reported, the first four state cases that neared or started trial were settled by the industry for over $40 billion, and a global settlement

benefitting all remaining states followed in 1998 for some $206 billion. There is no honestly defensible way to square those outcomes with Defendants' remoteness argument, and the trial court's dismissal on that ground, here.

This Court should conclude that the Funds are appropriate plaintiffs for the claims they assert, reverse the trial court's dismissal, and remand the case so it can proceed in the trial court.

STATEMENT OF FACTS

A. Description Of The Plaintiff Health Funds[1]

Plaintiffs are two multiemployer health care funds covering union workers in private industry in Michigan, organized under §302(c)(5) of the Labor-Management Relations ("Taft-Hartley") Act (LMRA), 29 USC §186(c)(5), and governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC §§1001 et seq.; and one similar multiemployer health care fund covering Michigan public employees, organized under state law. The Funds are administered by boards of trustees (¶¶13-15) generally composed of equal numbers of representatives of the covered workers (typically elected union officers) and representatives of contributing employers. See 29 USC §186(c)(5)(B); NLRB v Amax Coal Co, 453 US 322 (1981). The complaint seeks class treatment for all similar health funds located in Michigan.

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[1] The facts stated in this section are taken from the First Amended Complaint, cited by paragraph. As the trial court recognized (Tr. 49):

> A motion for summary disposition under MCR 2.116(C)(8) is tested on the pleadings alone. Simko v Blake, 448 Mich 648, 654 (1995). All well-pleaded allegations are accepted as true, and construed most favorably to the non-moving party. Wade v Dept. of Corrections, 439 Mich 158, 162-63 (1992). A court may only grant summary disposition pursuant to MCR 2.116(C)(8) where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Simko v Blake, supra, 654; Wade v Dept. of Corrections, supra, 163.

The Funds pay comprehensive health care and related benefits for members covered by the Funds pursuant to various collective bargaining agreements, for their families and for retirees (collectively "participants"). (¶¶13-15, 37) The Funds are required to hold their assets in trust for the exclusive purpose of providing benefits to their participants. ERISA §§403(a), 403(c)(1) and 404(a)(1)(A), 29 USC §§1103(a), 1103(c)(1) and 1104(a)(1)(A); LMRA §302(c)(5)(A), 29 USC §186(c)(5)(A); NLRB v Amax Coal Co, 453 US 322, 328-336 (1982); In re Culhane's Estate, 269 Mich 68, 74-75 (1934); In re Green Charitable Trust, 172 Mich App 298, 313-14 (1998). By law, employers or unions may not claim fund property and have no right or ability to sue for damage to fund assets. Id.; see also 29 USC §§1102-09. The participants' medical bills are typically paid directly by the Funds to the health care providers, rather than by the participants with Fund reimbursement to them. (¶¶41, 266, 304, 305, 311, 328, 329)

The Funds are funded by contributions made by participating employers, collectively bargained as part of a total compensation package. (¶¶263-264) The Funds are non-profit; unlike most insurance companies, there are no shareholders who participate in profits or losses.[2] The employers' contributions to the Funds are not "premiums" that can be adjusted to reflect claims experience. Rather, their contributions -- and therefore Fund assets -- are typically fixed by the negotiated contribution rates for the duration of collective bargaining agreements, so increases in medical costs paid by a Fund directly diminishes the monies available to pay for other treatment or preventive care, for smokers and non-smokers alike. (¶264) This case thus exemplifies the principle that a trust fund's trustees, as fiduciaries, may seek to recover trust assets that have been depleted due to third persons' misconduct.

[2] Indeed, ERISA expressly provides that Taft-Hartley funds are not insurance companies and may not be regulated as such by the states. 29 USC §1144(b)(2)(B); see FMCS Corp v Holliday, 498 US 52 (1990).

B. Tobacco Industry Misconduct

In the early 1950's, scientific studies linking smoking to health risks surfaced in public discourse. (¶¶85, 96a-b, 98) The Funds allege that Defendants concluded that such public awareness could bring on regulation, products liability, and threats to tobacco company profitability, or could even imperil the industry itself. (¶¶62, 68, 228, 352) In other industries (such as automobile manufacturing), concerns about product safety have led to scientific studies, governmental hearings and regulations, litigation if reasonable standards were not met, and competitive efforts to make and advertise safer products -- ultimately resulting in reduced risks for the public. The Funds assert, however, that the tobacco industry was different. Industry members, although mounting a massive public relations campaign starting in 1953 to persuade the public that the industry would honestly research risks from tobacco and make candid disclosure of the results, entered into a conspiracy to do just the opposite. They embarked upon a course of conduct, which continues to this day, of deceiving the American public -- including teenagers who comprise 82% of starting smokers (¶230), and health care providers and agencies that deal with the health problems caused by tobacco use -- about crucial issues of tobacco, nicotine, and health. (E.g., ¶¶64-65, 86-88, 96-99, 108, 116-20, 225-27, 230, 244-45, 268, 279) Industry members also made a pact not to compete to develop safer products that would cause less illness or reduce addictive behavior, and agreed not to advertise differences in product safety or reveal other product safety information. (¶¶116-20, 143-63, 284-97)

As a result of the conspiracy, programs for smoking cessation -- in marked contrast to programs to treat drug addiction and alcoholism -- were not developed on a scientifically validated basis that would permit such programs' widespread acceptance for coverage by health care and insurance plans. (¶¶228, 300, 303, 313, 318-19, 329-30) (For example, clinical guidelines were

issued only in 1996, see Agency for Health Care Policy & Research, Clinical Guidelines No. 18: Smoking Cessation, Rockville, MD: ACPHR Pub. No. 96-0692 (April 1996).) Millions of American continue to become addicted smokers, almost always as teenagers (¶¶230, 252); a high proportion of those people suffer serious illnesses that they otherwise would have avoided, and for which their health care providers otherwise would not have had to pay. (¶¶44-53, 263, 264) In addition, tobacco products are no safer today than they were 40 years ago, and there is no competition among cigarette manufacturers to sell truly safer products. (¶¶284-98)

Starting in the 1970's, when smoking rates began to decline among white-collar workers, tobacco company advertising focused increasingly on blue-collar families (¶¶253-57). As a result, while overall national smoking rates have been declining, blue-collar smoking rates have remained fairly steady or even increased in recent years. (Id.) Among blue-collar workers the prevalence of smoking is now approximately twice the national average. (¶¶253-54)

Defendants' conspiracy took many forms. Defendants falsely discredited adverse scientific research results, and the companies promised among themselves not to perform research on smoking and health other than through their joint organization. (¶¶101-04, 117-20) Extensive efforts were made to avoid public dissemination of accurate and complete information about the addictive nature of nicotine. (¶¶166-75, 184, 189-91) Defendants also undertook disinformation campaigns against health care plans. This included suppressing or challenging evidence that smoking causes disease and is addictive (¶¶63-142); undertaking covert actions against insurance companies' efforts to implement premium discounts for non-smokers); impairing development and implementation of smoking cessation programs, which would reduce the number of smokers but imperil tobacco company profits (¶¶228, 300, 303, 313, 318-19, 329-30); boycotting suppliers that promoted smoking cessation products; and maintaining the powerful lie that the link between

smoking and disease was an "open controversy". (E.g., ¶¶64, 98-106) Defendants hired former union lobbyists to oppose union efforts to curtail smoking in the workplace, without revealing that these lobbyists were being paid by the tobacco industry. As recently as 1994, tobacco company chief executives testified under oath to Congress that nicotine is not addictive, despite their knowledge to the contrary. (¶¶54-56, 271-77) To this day, tobacco companies have not accepted any responsibility for the death and disease caused by their products. (¶¶54-57)

Some tobacco companies did in fact develop safer cigarettes, but as part of their antitrust conspiracy refrained from producing and marketing them or even acknowledging their existence. ¶¶155-59, 162, 288-91, 296) A main reason was to preserve "the tobacco industry's joint [litigation] defense efforts" and preserve "[t]he industry position . . . that there is no alternative [safer] design for a cigarette," according to an industry lawyer. (¶163) Instead, cigarette makers kept these less hazardous cigarettes off the market, holding them in reserve to retaliate in case other manufacturers breached the conspiracy by competing on product safety. (¶291) Likewise, Defendants that did develop product information on cigarette safety that would have helped them market safer brands withheld such information, honoring their agreement to refrain from advertising differences in product safety. (¶¶149-50, 151-56, 284-97)

Because many of the issues and risks concerning tobacco and nicotine focused on health, Defendants targeted much of their misconduct at the Funds and other health care payors in order to fraudulently shield themselves from having to pay the health care costs of tobacco-related diseases and to shift those costs to others, including the Funds. (¶¶253, 257, 263-70, 300-01, 322)

The industry's wrongdoing injured the Funds through two distinct causal chains:

First, Defendants' manipulation of information and suppression of safer products

immediately affected the Funds, which would have used accurate information and safer products in the operation of their business to reduce smoking rates, thereby reducing smoking-related disease and lowering Fund expenditures. (¶¶228, 284-331) Had Defendants not undertaken their deceptive, fraudulent and anti-competitive activity, the Funds could have earlier taken counter-measures against smoking and smoking-related diseases and would have commenced legal efforts much sooner and more effectively to impose the costs resulting from tobacco use on the tobacco companies. (¶¶228, 312-22) Similarly, had Defendants not suppressed the manufacture and sale of safer tobacco/nicotine products, the Funds could have adopted programs and rules encouraging or even requiring participants who smoked to use safer, less addictive cigarettes and/or participate in smoking addiction-treatment programs. (¶¶303, 319, 330)

Second, Defendants' misconduct also immediately impacted smokers, causing them to begin smoking, smoke more cigarettes, choose less safe products to smoke, and suffer tobacco-related diseases, thereby increasing the medical costs paid by the Funds for treating such disease. (E.g., ¶¶229-62, 265-66, 302-05, 377)

As entities that would have undertaken stronger anti-smoking measures if not deprived of relevant information and products, and as the entities that paid the bills, the Funds have borne the brunt of smoking-related health care costs. The Funds seek to replenish their trust assets by recovering damages from Defendants to compensate for their economic injuries caused by Defendants' misconduct.

C. Proceedings In The Trial Court

The Funds filed their original complaint on December 30, 1997. Defendants removed the case to federal district court pursuant to 28 USC §1446(b) on February 8, 1998. The federal court granted the Funds' remand motion on August 19, 1998, and, after denying Defendants' motion to reconsider, remanded the case on September 22, 1998. The Funds filed their First Amended Complaint (the pleading now at issue) on November 3, 1998.

Defendants moved to dismiss the First Amended Complaint pursuant to MCR 2.116(C)(8) on December 18, 1998. On February 12, 1999, in a bench opinion following oral argument, the Honorable Robert J. Colombo, Jr. granted Defendants' motion on the grounds described above. Judge Colombo nevertheless observed (Tr: 60):

> Now, I am not so confident that my rulings will be sustained on appeal.

A final order dismissing the case was entered on February 26, 1999. The Funds filed their Notice of Appeal from that order on March 17, 1999.

ARGUMENT

STANDARD OF REVIEW

Appellate review of a motion for summary disposition is *de novo*. Spiek v Michigan Dep't of Transportation, 456 Mich 331, 572 NW2d 201 (1988). The standard of review by this Court regarding a circuit court's grant of summary disposition pursuant to MCR 2.116(C)(8) is well settled:

> The motion is to be tested on the pleadings alone. The motion tests the legal basis of the complaint, not whether it can be factually supported. The factual allegations of the complaint are taken as true, along with any inferences or conclusions which may fairly be drawn from the facts alleged. Unless the claim is so clearly unenforceable as a matter of law that no factual development can

possibly justify a right to recovery, the motion under this subrule should be denied.

Wodogaza v H&R Terminals, Inc, 161 Mich App 746, 750, 411 NW2d 848 (1987).

I. THE FUNDS' CLAIMS SATISFY APPLICABLE PROXIMATE CAUSATION REQUIREMENTS.

A. Proximate Causation Is An Issue Of Public Policy.

Proximate cause is a cause of which the law will take notice. Hagerman v Gencorp Automotive, 457 Mich 720, 728, 579 NW2d 347, 351 (1998). It is not determined by application of some rule-of-thumb. 457 Mich at 734. Rather, "[t]he line of demarcation between causes which will be recognized as proximate and those which will be disregarded as remote is really a flexible line." 457 Mich at 735.

"Thus the limit of proximate cause is a question of public policy, and its boundaries depend on the type of case in which the Court is asked to determine those boundaries. 457 Mich at 735-36. See also Palsgraf v Long Island R Co, 248 NY 339, 352, 162 NE 99 (1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"). Cases under federal laws that utilize proximate causation analysis are to the same effect. See Associated General Contractors of California, Inc v California State Council of Carpenters, 45 US 519, 536-37 (1983) ("[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case."); Holmes v SIPC, 503 US 258, 272 n20 (1992) ("our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text"). Accordingly, a leading treatise summarizes:

> "Proximate cause" -- in itself an unfortunate term -- is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct . . . . Some boundaries must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.
>
> This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to a greater extent, however, the legal limitation on the scope of liability is associated with policy -- with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.

W. Keeton, *et al.*, Prosser and Keeton on Law of Torts, §41, at 264 (5th ed 1984).

Accordingly, this Court's analysis of proximate causation, concerning the relationship between Defendants' alleged misconduct and the Funds' injuries, must not be based on any pre-defined rule, but rather must rest on policy considerations, including "notions of fairness and justice." Hagerman, supra, at 735.

B. All Relevant Factors Show That The Funds Satisfy Proximate Causation Requirements.

Judge Colombo did not engage in any explicit policy analysis. He stated that the Funds' claims are indirect under a rule that "a plaintiff, who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts, was generally said to stand at too remote a distance to recover," quoting Holmes, 503 US at 268-69 (Tr: 49-50) He further opined that determining the Funds' damages would be almost impossible unless particular injured participants were identified; that a proposed pending class action of smokers in Michigan raised a problem of overlapping recovery of medical expenses; and that smokers should vindicate their

own claims or the Funds should pursue subrogation claims.[3] (Tr: 50-51) The trial court also rejected the Funds' assertions that Defendants' misconduct directly affected the Funds, and instead characterized the Funds' injuries as derivative of smokers' injuries and hence indirect. Finally, the trial court rejected the Funds' contention that governing trust law establishes that the trust funds, not trust beneficiaries (smokers), have standing to sue for injury to trust assets; and also rejected the Funds' contention that proximate causation extends further in cases of intentional harm. (Tr: 51-53) The Funds respectfully submit that each of those conclusions is incorrect.

1. **The Funds' allegation that Defendants *intended* to cause foreseeable injury *directly to the Funds* defeats any general rule of remoteness.**

It is well established that the boundary of the chain of proximate cause extends further in cases involving intentional conduct than in those alleging less-deliberate action. In Hagerman v Gencorp Automotive, supra, the Supreme Court discussed the limits of proximate cause and concluded, "Legal causation reaches further in some types of cases than it does in others. It reaches further in tort actions based upon intentional harm than in those resulting from negligence. . . ." 457 Mich at 735 (quotation omitted). See also Blue Cross and Blue Shield of New Jersey v Philip Morris, 1999 WL 177501 (ED NY, March 30, 1999) (App Ex E) ("[t]hose who have acted intentionally or with reckless disregard for the health and safety of others have difficulty convincing the law that it is unjust or unwise for society to hold them responsible for the damages which foreseeably follow from their deliberate actions. The law has a strong interest in deterring such intentional efforts to harm others."); Iron Workers Local Union No. 17 Ins Fund v Philip

[3] In the state of Michigan's case against the tobacco industry, the trial court specifically rejected defendants' assertion that subrogation is an exclusive remedy, either by statute *or contract*. Kelley v Philip Morris, No. 96-84281-CZ (Ingham Co Cir Ct, 1997) (App Ex H), slip op at 3-4.

Morris, 23 F Supp 2d 771, 780-83 (ND Ohio, 1998) (proximate cause is broader with regard to intentional acts than it is for negligent acts); Restatement (Second) of Torts, §435B (intent, degree of moral wrong, seriousness of harm intended are factors in determining whether liability should be imposed).

Liability for intentional acts extends to all intended consequences and to foreseeable consequences even if they are "indirect." See F. Harper, *et al*, The Law of Torts, §6.1 at 270 (2nd ed. 1986) ("if the harm was intentionally caused by the appellee, there is no difficulty about the problem of legal causation, since all intended consequences are legal or proximate"); Restatement (Second) of Torts, §8A, comment b ("intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result); W. Keeton, *et al*, Prosser and Keeton on Law of Torts, §42, at 273 (5th ed. 1984) ("[T]he scope of liability should ordinarily extend to but not beyond all 'direct' (or 'directly traceable') consequences and those *indirect consequences* that are *foreseeable*") (emphasis added).

The trial court declined to ascribe any significance to the Funds' allegation that Defendants intended to cause injury to the Funds. (Tr: 52-53)[4] The court relied on three cases which merely found proximate cause lacking even though intentional *misconduct* (but not *intent to injure the plaintiff*) was alleged: the two U.S. Supreme Court cases, Associated General Contractors ("AGC") and Holmes; the mid-19th-century Massachusetts case cited in AGC and Holmes, Anthony v Slaid, 52 Mass 290 (1846). But each of these precedents is clearly distinguishable, and

[4] The trial judge recognized that Hagerman is authority "for the proposition that the line for proximate cause is a flexible line and reaches further . . . in tort actions based upon intentional harm" (Tr: 53). But he failed to apply Hagerman's principles here, apparently merely because intentional conduct is not *always* a proximate cause of harm to a plaintiff.

in fact *confirms* the fundamental importance of extending proximate cause in cases of *intended* injury that directly affects *plaintiff* (as well as, or instead of, a non-party).

In AGC, the Court explained: "In torts . . . where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote . . . *unless the wrongful act is willful for that purpose.*" 459 US at 532 n25 (emphasis added, quoting 1 J. Sutherland, A Treatise on the Law of Damages at 55-56 (1882)). A later version of the Sutherland treatise illustrated the quoted exception with a case in which the defendant (a wharf owner competing with the plaintiff) deceived a ship captain, who thought defendant was a harbor master, into moving his ship from plaintiff's wharf to defendant's wharf, which resulted in lost rent to the plaintiff. 1 J. Sutherland, A Treatise on the Law of Damages at 128 (1916). Although the injury to the plaintiff was an "indirect" effect of the deceit practiced on an intervening non-party (the ship captain), the court found that the plaintiff could sue, noting that "the cases are numerous where injuries have been holden actionable although not directly committed upon the plaintiff . . . if they were intended to affect and did injuriously affect him." Gregory v Brooks, 35 Conn 437, 446 (1868).

In Anthony v Slaid, plaintiff contracted with a town to financially support the poor. The defendant's wife assaulted an indigent and plaintiff complained of being "put to increased expense for his care and support" of the assaulted. The court held that plaintiff could not recover his increased expenses because the damage was too "remote and indirect." 52 Mass at 291. But in that case there was no allegation whatever that defendant sought to injure the plaintiff. Confirming the importance of that distinction, the same Massachusetts court later explicitly recognized that proximate cause extends further for intentional conduct that causes foreseeable harm by directly affecting the plaintiff:

> [I]t is not alleged that there was any knowledge on the part of the defendant of the contract between Hoffman and the plaintiff or that the negligence of the defendant had any relation to such knowledge. There is no allegation of malice on the part of the defendant toward the plaintiff or toward anybody. There is no allegation of deliberate design by the defendant to accomplish a definite end regardless of consequences to others. If elements of that nature were present a quite different question would be presented.

Chelsea Moving & Trucking v Ross Towboat Co, 280 Mass 282, 283, 182 NW 477, 478-79 (1932).

Thus, a key question is whether the defendant *intended* to cause injury to *the plaintiff*. In Anthony, no such intent was alleged, and proximate causation was found lacking; but in Gregory and Chelsea Moving such intent was present and the plaintiff was allowed to sue even though his injury could be termed "indirect." This is also the point of Hagerman, which holds that proximate cause "reaches further . . . in tort actions based on intentional harm," as recognized by Judge Colombo (Tr: 53) -- even though he utterly failed to apply or analyze Hagerman's principles in the context of the facts alleged here. Id. *But the Funds allege that the tobacco companies did engage in intentional misconduct aimed at harming the Funds (as well as smokers)* -- for the simple reason that the Funds and other health care payors could otherwise have implemented effective smoking cessation programs, cutting into the tobacco companies' profits, and that the companies wanted to shift the costs of smoking onto the Funds (e.g., ¶¶253, 257, 263-66, 300-01, 315, 320-22). *The Funds' assertion that Defendants' misconduct directly affected the Funds' activities and was intended to injure the Funds removes this case from the ambit of any of the precedents advanced by Defendants or relied upon by the trial court.*

2. **The policy factors identified in Holmes and AGC also demonstrate that the Funds' claims satisfy proximate causation standards.**

The trial court relied on the articulation of proximate causation factors in Holmes, a federal RICO case, in rejecting proximate causation here. (Tr: 50-51) Of course, the Funds' claims do not arise under federal law, so considerations of intended and foreseeable injury to plaintiffs (Parts IA and IB1 above) and liberal interpretation of remedial statutes (like the MCPA, see Part II below) should have primary significance in the proximate causation analysis. Nevertheless, a review of the three Holmes factors[5] also shows that proximate causation is satisfied for the Funds' claims.

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[5] The three policy factors identified in Holmes for making assessments of proximate causation are (1) whether allowing suit by the "indirect" party would make causal connection too speculative or difficult to prove; (2) whether suit by that party would require complicated apportionment of damages in order to avoid duplicative recoveries against the defendant; and (3) whether indirectness means that there is a more directly injured party who could bring the same cause of action. 503 US at 269, 273 n. 20.

The Holmes factors derive from the same factors for assessing proximate causation in federal antitrust cases articulated in AGC. See Holmes, 503 US at 270. The federal precedents are also relevant because MARA authorizes Michigan courts to consider interpretations given by federal courts with respect to comparable federal antitrust statutes. MCL 445.784(2).

It is clear that the Holmes/AGC factors do not replace the underlying common law principles of proximate causation discussed in Part IB1 above. For example, AGC states that an intent to harm an antitrust plaintiff "should 'ordinarily be dispositive' in creating standing." 459 US at 537 n35. Foreseeability is also recognized as an important factor in this analysis. See Blue Shield v McCready, 457 US 465, 478-79 (1982).

Furthermore, *no single factor is necessarily dispositive*. For example, as the trial court observed (Tr: 53), the AGC Court denied standing to the plaintiff union notwithstanding an express allegation there of intent to cause injury (459 US at 537). But this was due largely to the fact that a "more direct" plaintiff in the AGC situation (subcontractors) also could bring the same claim. The factors balance differently here, as described in the text.

Finally, the additional standing factor of "antitrust injury," applicable to antitrust claims, is treated separately in Part III below.

a. Damages can be *better* ascertained and "apportioned" in cases brought by the Funds than in smoker cases.

The trial court first asserted that ascertaining the amount of damages is more difficult in cases involving "a less direct injury," and observed that in this case, "[w]ithout identifying particular participants or beneficiaries, determining damages is almost impossible." (Tr: 50)

It was simply improper for the trial court to draw this conclusion on a pleading motion, with no factual record before it. Moreover, the relevant precedents show that the trial court's concern is unfounded. Similar damage models offered by health care payor plaintiffs have been accepted by the courts in other cost-recovery cases.[6] In fact, overall there is far *less* uncertainty in assessing the Funds' damages than there is in individual smoker cases. That is because statistical proof of the link between Defendants' misconduct and increased medical bills at the Fund level, covering thousands of workers, is inherently far more accurate than trying to prove whether a specific worker would have contracted an illness if she had smoked less or had access to safer cigarettes.[7] Individuated (smoker-by-smoker) proof would be extremely cumbersome, inefficient and impractical for the courts, and would also likely be so expensive as to preclude smokers' pursuit of those claims, which obviously is Defendants' purpose.

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[6] See, e.g., Iron Workers Local Fund, 29 FSupp2d at 820 (plaintiffs show evidence of costs paid, sufficient to demonstrate "injury to business or property," based on their damage model); Northwest Laborers-Employers Health Fund v Philip Morris, No. C97-849WD, slip op. (WD Wash, Dec. 23, 1998) (App Ex M) (denying defendants' Daubert motion to exclude damages model); Texas v American Tobacco Co, 14 FSupp2d 956, 968 (ED Tex, 1997) (in considering proximate causation, court considered plaintiffs' damage model and concluded that "at this stage in the litigation, damages are not sufficiently difficult to calculate to warrant dismissal of this action").

[7] Moreover, once the *fact* of damages is established, there is a relaxed standard for proving the *amount* of those damages. Defendants may not profit from uncertainty created by their own violations. See J. Truett Payne v Chrysler Motors, 451 US 557, 566 (1981); Zenith Radio Corp v Hazeltine Research, 395 US 100, 114 n9, 123-25 (1969).

b. **Problems of apportioning damages among plaintiffs do not exist, because the Funds, as trusts, paid the medical costs at issue, which cannot be recovered by smokers.**

The trial court also cited a "substantial likelihood of overlap of medical expense damages" as a reason for denying proximate causation (Tr: 51), "particularly in light of the fact that . . . [a proposed] class action by smokers against the tobacco Defendants is presently pending in this very court." (Tr: 50)

That concern is unfounded for at least two reasons. *First*, a party that has not suffered economic injury cannot sue to recover based on those injuries. See Blue Cross & Blue Shield v Marshfield Clinic, 65 F3d 1406, 1414-15 (7th Cir, 1995), cert denied, 516 US 1184 (1996) (health care payor had standing to assert antitrust claims for overcharges, even though they were incurred based on patients' bodily injuries; patients would not have standing); Steele v Hospital Corp of America, 36 F3d 69, 70 (9th Cir, 1994) (mental care patients denied standing to sue for medical care overcharges; patients' insurers had paid the charges, so patients had not been injured). The rule would prevent recovery in the pending smoker class action and elsewhere of medical costs paid by the Funds.

That conclusion is confirmed by traditional trust law. Under the common law of trusts, trust beneficiaries may not sue for injury to or depletion of trust assets; rather, the trustees are the proper plaintiffs. Appollinari v Johnson, 104 Mich App 673, 305 NW2d 565 (1981).[8] These

[8] Accord IV Scott on Trusts, §294.1 at 98-99 (4th ed, 1989) ("[I]f a third person commits a tort with respect to the trust property, the trustee and not the beneficiary is ordinarily the proper party to bring an action against him."); G. Bogart, Trusts and Trustees, §689 at 112-17, §954 at 675 (rev. 2d ed, 1995) ("The right to sue in the ordinary case vests in the trustee as representative . . . . [I]f the third person without justification causes harm to trust property, normally only the trustee can sue for damages.").

common law principles of standing apply to trusts covered by ERISA.[9] The trial court erroneously distinguished Appollinari on the ground that it "involved wrongs committed directly against the corpus of the trust" (defendant's deceit in obtaining trust funds). (Tr: 52) *But the Funds here do allege that Defendants committed wrongs directly against the Funds*, such as intentionally impairing the Funds' ability to implement smoking cessation programs.

The *second* reason that supposedly overlapping recoveries (by smokers and by the Funds) are not a problem is the single satisfaction rule. That rule -- and the associated defense of payment assertable by Defendants in the unlikely circumstances that overlapping judgments for the same damages were to arise -- applies to all claims assertable by the Funds and/or smokers, thereby preventing multiple recoveries with respect to any claims or injuries. See Restatement (Second) of Torts §885(3) (torts); Zenith Radio Corp, 401 US at 348 (antitrust); Iron Workers Local Fund, 23 FSupp2d at 785 nn24-26 (collecting cases and holding the single satisfaction rule eliminates duplicate damages concern in Taft-Hartley fund case); Rogers v Detroit, 457 Mich 125, 155-157, 579 NW2d 840 (1998). In short, there is no risk of overlapping or duplicative damage recoveries here.

c. Smokers cannot vindicate claims asserted by the Funds in this litigation.

The trial court expressed the third Holmes/AGC factor by stating: "the need to grapple with these [proximate causation and standing] problems is unjustified where directly injured victims could vindicate their own claims." (Tr: 50) The court observed that health care providers

[9] Central States Pension Fund v Central Transport Inc, 472 US 559, 570-71 (1985) (ERISA trusts and trustees are governed by the common law of trusts). ERISA trusts are legal entities able to sue in their own name. ERISA §502(d), 29 USC §1132(d) ("An employee benefit plan [like the Funds] may sue or be sued under this subchapter as an entity").

often file liens to protect their interests in patients' suits to recover medical expenses, and that the Funds could pursue claims by way of subrogation. (Tr: 51)

The trial court's analysis is certainly incorrect with respect to the Funds' claim under MARA. As the trial court observed in another section of its decision, an antitrust violation must involve injury to "business or property" in order to be actionable. (Tr: 55) While the trial court focused on whether the *Funds'* injuries involve "business or property," it is also consistently held that claims for monetary damages flowing from *a person's own* bodily injury are excluded. See Reiter v Sonotone Corp, 442 US 330, 339 (1979); Genty v Resolution Trust Corp, 937 F2d 899, 918 (3rd Cir, 1991); Drake v B.F. Goodrich Co, 782 F2d 638, 641 (6th Cir, 1986). Thus, smokers cannot sue under antitrust laws for their bodily injuries; and even if they had paid the medical bills, they could not assert antitrust claims with respect to those bills. On the other hand, the *Funds can* sue under antitrust for the same medical bills because U.S. Supreme Court authority allows a plaintiff to sue for damage to its business or property flowing from physical injury inflicted on *others*. NOW v Scheidler, 510 US 249 (1994).[10] See also, Steele and Marshfield Clinic.

This conclusion weighs heavily in demonstrating proximate causation for the Funds' MARA claim. The smokers cannot assert that claim. If the Funds are denied antitrust standing, Defendants' violations of MARA would be unfairly sheltered in a safe harbor and effectively immunized from any private redress. Thus, proximate causation is not found lacking if that would

[10] In Scheidler, defendants were alleged to have committed and threatened physical violence against a clinic's employees and patients. From that physical injury suffered by the employees and patients flowed an alleged economic harm to the clinic's business or property, namely lost business. the clinic owner was held to have standing based on injury to its "business and/or property interests." Scheidler, 510 US at 253-56.

be "likely to leave a significant antitrust violation undetected or unremedied." AGC, 459 US at 542; see also California v ARC America Corp, 490 US 93, 102 n6 (1989) (important that "at least some party have sufficient incentive to bring suit.") The point is not to restrict claims -- it is to aid enforcement by allowing suit by the plaintiff that will face the fewest problems with causal proof.

Moreover, with respect to the Funds' other claims, as discussed at Part IB2b above, smokers cannot remedy any claimed violations when Defendants' misconduct directly affected the activities of the Funds themselves. For example, the smokers cannot claim that Defendants' *practices that interfered with implementing smoking cessation programs by the Funds* constituted MCPA, MPAA, or common law violations. Here, too, either the Funds' claims satisfy proximate causation, or no claims at all are permitted and Defendants escape liability for their misconduct. The latter outcome, adopted by the trial court, would contravene the entire policy-based purpose behind proximate causation analysis.

3. The fact that smokers' illnesses underlie the Funds' injuries does not detract from proximate causation.

Much of the trial court's proximate causation analysis was influenced by the erroneous idea that the Funds' injuries are "derived" from illnesses suffered by smokers, thereby supposedly making the smokers more appropriate plaintiffs. With respect to the Funds' claim that Defendants' wrongful action prevented the Funds from obtaining and using better treatment products, for example, the trial court summarily stated: "this claim is merely derivative of the personal injury claims of the participants and beneficiaries." (Tr: 57) The court also characterized the Funds' assertion that they could have saved money if they had not been deceived by Defendants as implicating only "indirect injuries to the funds as a result of the direct injuries"

to the smoker participants. (Tr: 52)

The fact that the measure of the Funds' economic injuries derive from the costs of treating their participants' bodily injuries arises only due to the happenstance that the Funds' business is devoted to paying their participants' medical costs. Disqualifying the Funds from asserting claims to recover those costs on ("derivative") proximate causation grounds simply because the Funds' business is to pay for treatment for such *bodily injury* would be arbitrary and is not supported by any principled reason or case precedent. It would unjustifiably set up health care as a uniquely disfavored industry in utilizing remedial statutes to obtain legal redress.

Indeed, prior to these tobacco cases, "derivative" injury, as a factor standing alone, has never been accepted as a reason for rejecting proximate causation. One example is claims for loss of consortium. A Michigan court, considering the "derivative" character of such a claim, has explained:

> The alleged damages are separate and distinct from any damages to the physically injured spouse, yet they are dependent both legally and causally on the latter. Our Supreme Court has recognized that a claim for loss of consortium is derivative "but only in the sense that it does not arise at all unless the other, impaired spouse has sustained some legally cognizable harm or injury," and treats such a claim not as an item of damages, but as a separate cause of action. Eide v Kelsey-Hayes Co, 431 Mich 26, 29, 427 NW2d 488 (1988).

Burchett v RX Optical, 232 Mich App 174, 183, ___ NW2d ___ (1998) (Neff, P.J., concurring in part and dissenting in part). See also Endykiewicz v State Hwy Comm'n, 414 Mich 377, 387, 324 NW2d 755 (1982) (recognizing separate claim for loss of companionship even though "those damages arise as a direct consequence of the bodily injury" of decedent). In fact, most economic injuries "derive" from events that are not immediately associated with the injured party, such as increased costs imposed by a supplier, or decreased income derived from a customer -- yet those

situations do not disqualify on proximate causation grounds the claims of a plaintiff seeking damages from a wrongdoer.

Courts regularly accept claims that are labeled as derivative and that flow "merely from the misfortunes visited upon a third person by the defendant's acts." The common law allows so-called "indirect" plaintiffs to recover in numerous circumstances.[11]

The trial court's summary rejection of the Funds' claims as supposedly "derivative" or "indirect" is plainly erroneous.

4. **Numerous courts have sustained health care payors' claims against the tobacco companies in the face of the tobacco companies' proximate causation defenses.**

Courts, both federal and state, that have addressed proximate cause issues in similar tobacco health recovery cases have made varying policy decisions.[12] This Court must decide

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[11] See e.g., H. Rosenblum Inc v Adler, 461 A2d 138 (NJ S Ct, 1983) (independent auditor liable to third party for preparing inaccurate public financial statement); Rozny v Marnul, 250 NE2d 656 (Ill S Ct, 1969) (surveyor liable for inaccurate boundary survey to third party purchaser of land); Immerman v Ostertag, 199 A2d 869 (NJ Super Ct ,1964) (notary public attesting signature of wrong person); Hardy v Charmichael, 24 Cal Rptr 475 (Ct App, 1962) (inspector liable for negligent inspection of termites to third party who subsequently purchased home); Lucas v Hamm, 364 P2d 685 (Cal S Ct, 1961) (attorney liable for negligent drafting of will to third party who otherwise would have received profits); Biakanja v Irving, 320 P2d 16 (Cal S Ct, 1958) (en banc) (notary public liable for negligent drafting of will to third party who would otherwise have received profits); United States v Rogers & Rogers, 161 F Supp 132 (SD Cal, 1958) (architect held liable to third party for failing to supervise for conformity with specifications); Western Union Tel Co v Mathis, 110 So 399 (Ala S Ct, 1926) (telegraph company liable for negligent delay in transmission to third party who lost contract as result); Glanzer v Shepard, 135 NE 275 (NY Ct App, 1922) (public weigher liable to third party).

[12] Cases holding proximate causation requirements satisfied by payors' claims include: Arkansas Blue Cross and Blue Shield v Philip Morris, 1999 US Dist LEXIS 4573 (ND Ill, April 6, 1999) (App Ex D); Blue Cross and Blue Shield of New Jersey v Philip Morris, 1999 WL 177501 (ED NY, March 30, 1999) (App Ex E); Iron Workers Local Union No. 17 Ins Fund v Philip Morris, 23 F Supp 2d 771 (ND Oh, 1988); Kentucky Laborers District Council Health & Welfare Trust Fund v Hill & Knowlton, Inc, 24 F Supp 2d 755 (WD Ky, 1998); National Asbestos Workers Med Fund v Philip Morris, 1998 WL 732911 (ED NY, Oct. 19, 1998) (App (continued...)

whether the boundary of proximate cause embraces the claims of these Michigan non-profit Fund plaintiffs, or whether, on some policy basis, the tobacco industry Defendants' intentional misconduct involving foreseeable and intended harm to these Funds is immune from redress. Based on the considerations previously described, the Funds' claims should be allowed to proceed.

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[12](...continued)
Ex J); New Jersey Carpenters Health Fund v Philip Morris, 17 F Supp 2d 324 (D NJ 1998), case dismissed (May 12, 1999); Northwest Laborers v Philip Morris, No. C97-849WD (WD Wash, Dec. 23, 1998) (App Ex L); Operating Engineers Local 12 Health & Welfare Trust Fund v American Tobacco Co, No. BC 177968, slip op (Cal Super Ct, July 9, 1998) (App Ex N); Screen Actors Guild-Producers Health Plan v Philip Morris, No. BC 181603, slip op (Cal Super Ct, June 22, 1998) (App Ex P); Stationary Engineers Local 39 Health & Welfare Trust Fund v Philip Morris, 1998 WL 476265 (ND Cal, April 30, 1998) (App Ex U); Steamfitters Local Union No. 614 Health & Welfare Fund v Philip Morris, No. 92260-2 (Tenn Cir Ct, Jan. 29, 1999) (App Ex W); Utah Laborers' Health & Welfare Trust Fund v Philip Morris, No. 2:98-CV-403 B (CD Utah, March 31, 1999) (App Ex X); West Virginia Laborers Pension Trust Fund v Philip Morris, No. 3:97-0708 (SD WV, August 12, 1998) (App Ex Y); West Virginia-Ohio Valley Area IBEW Fund v American Tobacco Co, No. 2:97-0978 (SD WV, Aug. 11, 1998) (App Ex Z). And see, e.g., Ohio v Philip Morris, No. 97CVH05-5114 (Franklin Co Common Pleas Ct, Aug. 28, 1998) (App Ex S); Wisconsin v Philip Morris, No. 97-CV-328 (Dane Co Cir Ct, March 17, 1998) (App Ex T).

Courts declining to extend proximate cause to Funds and granting the tobacco companies' motions to dismiss include: Laborers Local 17 Health & Benefit Fund v Philip Morris, 1999 US App LEXIS 6336 (2d Cir, April 8, 1999) (App Ex I) (reversing the district court's partial denial of motion to dismiss, F Supp 2d 277 (SD NY, 1998), on proximate cause grounds); Steamfitters Local Union No. 420 Welfare Fund v Philip Morris, 1999 US App LEXIS 5624 (3rd Cir, March 29, 1999) (affirming district courts' dismissal of all claims, 1998 WL 212846 (ED Pa, April 22, 1998), and criticizing the New Jersey Carpenters decision) (App Ex V); Hawaii Health & Welfare Trust Fund v Philip Morris, No. 97-00833 (D Haw, Jan. 25, 1999) (App Ex F); Intl Brotherhood of Teamsters Local 734 Health & Welfare Trust Fund v Philip Morris, 1998 US Dist LEXIS 8114 (ND Ill, Dec. 1, 1998) (App Ex G); Laborers & Operating Engineers Health & Welfare Trust Fund v Philip Morris, No. Civ-97-1406, slip op (D Ariz, Feb. 10, 1999); New Mexico & West Texas Multi-Craft Health & Welfare Trust Fund v Philip Morris, No. CV-97-09118, slip op (D NM, Dec. 24, 1998) (App Ex K); Oregon Laborers-Employers Health & Welfare Trust Fund v Philip Morris, 17 F Supp 2d 1170 (D Or 1998); Seafarers Welfare Plan v Philip Morris, 27 F Supp 2d 623 (D Md 1998); Southeast Florida Laborers District Health Fund v Philip Morris, 1998 US Dist LEXIS 5440 (SD Fl, April 13, 1998) (App Ex Q); Texas Carpenters Health Benefit Fund v Philip Morris, 21 F Supp 2d 664 (ED Tex, 1998); Regence Blue Shield v Philip Morris, 1990 LEXIS 1820 (WD Wash, Jan. 6, 1999) (App Ex O); Williams & Drake Co v American Tobacco Co, No. 98-553, slip op (WD Pa, Dec. 21, 1998) (App Ex AA).

II. IN PARTICULAR, THE FUNDS' CLAIM UNDER THE MICHIGAN CONSUMER PROTECTION ACT SATISFIES APPLICABLE PROXIMATE CAUSATION REQUIREMENTS.

Count II of the Funds' complaint claims that Defendants' conduct violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, MSA 19.418(1) *et seq.*, including MCPA §3(1)(s), MCL 445.903(1)(s), which provides:

> (1) Unfair, unconscionable or deceptive methods, acts or practices in the conduct of trade or commerce . . . are unlawful and are defined as follows: . . . .
>
> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not be reasonably known by the consumer.

In the decision below, Judge Colombo applied the same proximate causation standards to the MCPA claim as to all other claims in dismissing it (although he did reject Defendants' assertion that only consumers can sue under the statute):

> Defendants move for summary disposition under MCR 2.116(C)(8) of Plaintiffs' claims under the Michigan Consumer Protection Act (hereinafter MCPA), MCL 445.901 et seq., arguing that the Plaintiffs are not a consumer and have no standing.
>
> Plaintiffs have cited case law demonstrating that the MCPA has been applied to competitors and persons testing products where they are -- where there are claims of [deceptive] advertising.
>
> In reply, Defendants assert these cases dealt with direct injuries and not remote injuries alleged here.
>
> The reply filed by the Defendants, in effect, raises *the same remoteness argument on which this Court has already granted summary disposition.* With respect to the claim that the MCPA limits Plaintiffs to being consumers, it is clear to this Court there is no such limitation. And to the extent that Defendants are claiming that there was no standing for that reason, the motion for summary disposition under MCR 2.116(C)(8) is denied.

(Tr: 60-61, emphasis added)

The trial court erred in applying the same proximate causation and remoteness standard to the MCPA claim as to the Funds' common law claims.[13] "Because the MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce, it must be liberally construed to achieve its intended totals." Smith v Globe Life Insurance Co, 223 Mich App. 264, 286, 565 NW2d 877, 886-87 (1997); Price v Long Realty, Inc, 199 Mich App 461, 471, 502 NW2d 337, 341 (1993).[14]

As shown in Part I above, proximate causation -- the basis on which Judge Colombo dismissed the MCPA claim -- is a doctrine expressly based in public policy. This means that in areas in which the Legislature has enacted remedial statutes, including MCPA, there is a strong policy in favor of liberal statutory interpretation. Dismissal of MCPA claims on the proximate causation ground of remoteness, a doctrine based on common law where no such special remedial purpose is inferred, is inconsistent with the mandated liberal statutory interpretation. See e.g., Leach v Detroit Health Corp, 156 Mich App 441, 448, 402 NW2d 38, 41 (1986) (administrative

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[13] The trial court's erroneous dismissal of the Funds' MCPA claim is particularly important because the tobacco companies' defenses against the state of Michigan's MCPA claim in its cost-recovery suit were rejected by Judge Glazer, who held that the statutory pre-filing notice was not required. Kelley v Philip Morris, No. 96-84281-CD, bench op (Ingham Co Cir Ct, 1997 (App Ex H)). As in many other states, in Michigan the consumer protection act claim was a principal ground for the state's assertion that the tobacco companies were legally responsible for reimbursing smoking-related health care costs the state had incurred.

The Funds occupy a similarly important role in providing health care in Michigan as does the state, and their claims deserve similar recognition. Accordingly, at a bare minimum on this appeal, the Funds' MCPA claim should be dismissed and remanded for further proceedings.

[14] Accord, Dix v American Bankers Life Assur Co, 429 Mich 410, 417, 415 NW2d 206, 208 (1987); Rodriguez v Berrybrook Farms, Inc, 672 F Supp 1009, 1021 (WD Mich 1987); Mayhall v A H Pond Co, Inc, 129 Mich App 178, 341 NW2d 268 (1983) (broadly construing "loss" under the MCPA to include not only monetary loss but also the frustration of a plaintiff's expectation created by defendant's actions). The MCPA's intended purpose is to "prohibit certain practices in trade or commerce, and to provide for certain remedies." Price, 199 Mich App at 470; McRaild v Shepard Lincoln Mercury, 141 Mich App 406, 409, 367 NW2d 404, 406 (1985).

decision granting benefits affirmed despite employer's assertion of estoppel and lack of causation; "Because the Workers' Disability Compensation act is remedial in nature, its benefits should not be lightly set aside. Application of standard causation principles in this context would lead to inequitable results.").

Judge Colombo's rejection of Defendants' insistence that the standing provisions of the MCPA be read narrowly (Tr: 60-61) correctly recognized the requirement of liberal interpretation of this remedial statute. He erroneously failed to apply a similar liberal analysis to proximate causation under the statute.

III. THE FUNDS SUFFICIENTLY ALLEGE THAT THEY SUFFERED ANTITRUST INJURY TO THEIR BUSINESS AND PROPERTY.

Count I of the Funds' complaint alleges a violation of the Michigan Antitrust Reform Act (MARA), MCL 445.771 *et seq.*, MSA 28.70(1) *et seq.* The factual basis for the claim is that the tobacco companies conspired to suppress competition among themselves over product quality -- i.e., a safer and less addictive product – and to withhold information regarding absolute and comparative product safety. (E.g., ¶284-97, 117-18, 120, 127, 143-63, 315) This is a classic horizontal anticompetitive conspiracy among competitors, except unlike the typical situation where *prices* are fixed, here it was product *quality* (and information about quality) that was involved.

Such anticompetitive activity has been consistently condemned as violating the antitrust laws. See e.g., Allied Tube & Conduit Corp v Indian Head, Inc, 486 US 492, 500-01 (1988) (conspiracy to prevent safety code approval for competing product); American Soc of Mechanical Engrs, Inc v Hydrolevel Corp, 456 US 556, 577-78 (1982) (conspiracy to suppress new and potentially superior "cut-off" device); FTC v Indiana Fed of Dentists, 476 US 447, 461 (1986) (antitrust law covers defendants' "concerted . . . effort to withhold . . . information" about their

services from the insurers of defendants' customers); National Soc of Professional Engrs v United States, 435 US 679, 697 (1978) (antitrust covers conspiracy interfering with the product quality produced by competitive markets).

The trial court dismissed the Funds' MARA claim both on the general proximate causation grounds previously discussed in Part I above (Tr: 49-54) and for more specific reasons relating to antitrust injury (Tr: 54-59). The court characterized the Funds' injuries as being derived from the Funds' payment of health care costs of treating their participants' smoking-related illnesses and concluded that they did not constitute injury to business or property. (Tr: 54-57) The trial court also believed that the Funds' injury is "unrelated to the anticompetitive claim" and that the Funds "are not consumers or competitors in the market," which the court concluded meant that antitrust injury and standing requirements are not met. (Tr: 57-59)

The Funds' satisfaction of antitrust proximate causation requirements is demonstrated in Part I above. The Funds are the first and only entities that paid for the medical costs at issue, and Defendants' alleged antitrust misconduct was intentional in inflicting those injuries on the Funds. A primary consideration in sustaining the Funds' standing under the AGC factors is that no other persons (including smokers) can bring these antitrust claims against the tobacco companies, so the Funds are the *only parties* that can vindicate the antitrust statute's purposes. See Part I( ) above; AGC, 459 US at 542 (standing is not denied if it would be "likely to leave a significant violation undetected or unremedied").

The Funds also meet the "injury to business or property" requirement of MARA §8(2), MCL 445.778(2). Contrary to the trial court's observations, the case authority clearly allows a plaintiff to sue for damages to its "business or property" flowing from physical injury inflicted *on others*. NOW v Scheidler, 510 US 249 (1994). Other courts considering trust fund cases have

explicitly held that identical fund injuries constituted injury to "business or property." Iron Workers Local Fund, 23 FSupp2d at 792-93; Kentucky Laborers Fund, 24 Fsupp2d at 769; New Jersey Carpenters, 17 F Supp 2d at 338-39, case dismissed on other grounds (May 12, 1999). Further, although Judge Colombo asserted that Judge Glazer rejected the state's MARA claim on "business or property" grounds (Tr: 56), that was *not* a part of Judge Glazer's holding. See Kelley, slip op at 6.

In addition, standing under MARA is particularly relaxed because of the statutory language that – unlike the federal antitrust statute, §4 of the Clayton Act -- allows suit by a person "injured *directly or indirectly*". MCL 445.778(2). Michigan courts consistently treat such deviations from a federal or model statute as significant. See e.g., Lawrence Baking Co v Unemployment Compensation Com'n, 308 Mich 198, 205, 13 NW2d 260 (1944), cert den 323 US 738 (1944); Gibson v Neelis, 227 Mich App 187, 194, 575 NW2d 313 (1997); Haworth, Inc v Wickes Mfg Co, 210 Mich App 222, 227-28, ___ NW2d ___ (1995); In re Childress Trust, 194 Mich App 319, 326, 486 NW2d 141 (1992); SEIU Local 79 v Lapeer County Hosp, 111 Mich App 441, 445, 314 NW2d 648 (1981).

The trial court, relying on Kelley, held that the statute's use of the term "indirectly" did not broaden standing in general -- rather, the court believed that the term referred only to "indirect purchasers" (i.e., purchasers later in a chain of product distribution) as plaintiffs. (Tr: 56) This is contrary to the plain meaning of the statutory language; indeed, the term "purchaser" is not used in the statute at all. Other state courts with similar state antitrust statutory provisions interpret the term "indirectly" to modify the word *injured*; and hold that the use of the term "indirectly" broadens the scope of the statute to extend protection to those indirectly injured in circumstances similar to those here. See, e.g., State of Maryland v Philip Morris, 1997 WL

540913, *20 (Md Cir Ct, May 21, 1997) (App Ex R) (state has standing to sue under state antitrust act regardless of standing under the Clayton Act); Cellular Plus, Inc v US West Cellular, 18 Cal Rptr 2d 308 (Cal Ct App, 1993) (although California law requires "antitrust injury" as in Clayton Act, the state statute, which provides "for lawsuits by injured persons who dealt 'directly or indirectly'" with offenders is broader in scope); Minnesota v Philip Morris Inc, 551 NW2d 490, 495-96 (1996) (antitrust statute providing cause of action for person "injured directly or indirectly" was an "expansive grant of standing"). The language of MARA thus contradicts the trial court's narrow reading.

The trial court also concluded that antitrust injury under MARA was lacking on the basis that the Funds "are not consumers or competitors in the market" (Tr: 59) and that there is "no connection" between the Funds' claims and the claim that competition was suppressed in the market for developing safer nicotine products. (Tr: 58) But the trial court was mistaken in believing that "consumer or competitor" status was required to satisfy antitrust injury, and did not appreciate that the Funds' injuries *are* attributable to an anticompetitive aspect of the tobacco companies' violations of MARA.

"Antitrust injury" is a separate requirement applicable to antitrust claims, defined as injury "attributable to an anticompetitive aspect of the practice under scrutiny." Atlantic Richfield Co v USA Petroleum Co, 495 US 328, 334 (1990). It is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Brunswick Corp v Pueblo Bowl-O-Mat, Inc, 429 US 477, 489 (1977); Zenith Radio Corp, 395 US at 125. The requirement is designed to filter out claims where the alleged injury would be due to *pro*-competitive effects of the defendant's conduct.

Here, the Funds allege that Defendants conspired to suppress safer products and safety information. When those safer products and information were denied, *it followed closely and logically that the costs of such misconduct were realized through increased medical costs.* Defendants' course of misconduct required that vast segments of the health care industry and the people it covered be misled about the dangers of smoking for as long as possible and be deprived of safer products. See Arkansas Blue Cross and Blue Shield v Philip Morris, Inc, No. 98 C 2612, 1999 LEXIS 4573 at *10 (ND Ill, April 6, 1999) (App Ex D) ("defendants would not have been in a position to realize the enormous profits of its industry without the compelled and unknowing subsidization by" health care payors). Therefore, the Funds' injury directly reflects the anticompetitive aspects and effects of Defendants' misconduct; certainly, no "procompetitive" results have been identified.

In assessing antitrust injury, there is no requirement that the injured plaintiff be a "consumer" or market participant. No reason could exist to screen out *any* plaintiffs (assuming they satisfy the other factors) whose injuries flow from anticompetitive aspects of the challenged conduct, just because they are not a consumer of the defendant's products. MARA provides that "any" person may sue. MCL 445.778(2). The U.S. Supreme Court has stated that even the Clayton Act, with its less expansive language, "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Blue Shield of Virginia v McCready, 457 US 465, 472, 73 LEd2d 149, 102 SCt 2540 (1982) (quotation omitted). The Supreme Court has frequently found antitrust injury present

for plaintiffs who are not in the categories of competitor, consumer or direct market participant.[15] In AGC, moreover, the Court rejected the notion that a plaintiff must be in the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." 459 US at 537 n33.[16]

Moreover, the similar language in MCPA §11(2), MCL 445.911(2), permitting suit by "a person" who suffers loss as a result of a violation of the MCPA, has been uniformly interpreted (as the trial judge recognized [Tr: 60-61]) to *not* be limited to consumers or competitors in the market. (See discussion in Part IV below).

Contrary to the trial court's opinion, there is ample authority for finding antitrust injury where the plaintiff is not a consumer of the defendant, if foreseeable injury due to anticompetitive effects is "inextricably intertwined" with injury of others who are affected directly by the lack of choice or by other restraint in the restrained market. Thus, the McCready plaintiff did not purchase insurance policies. Her employer did. It sufficed that plaintiff's injury was foreseeable and inextricably intertwined with injury to those in the restrained market. Such intertwining was present because she (not the employers) *paid the bills* resulting from the conspiracy. McCready, 457 US at 483-84. See also Bodie-Rickett v Mars, 957 F2d 282, 291 (6th Cir, 1992) (accepting

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[15] See, e.g., Illinois Brick Co v Illinois, 431 US 720, 736 (1977) (indirect purchaser with cost-plus contract has antitrust standing although not a consumer or competitor in market in which prices were fixed); California v ARC America Corp, 490 US 93, 102 n6 (1989); AGC, 459 US at 541-42 (unionized subcontractors would have standing although not competitors or consumers of the defendants).

[16] AGC did observe, in finding no antitrust injury for the union plaintiff in that case, that the plaintiff was not a consumer or a competitor in the restrained market. Id. at 539. But the Court nowhere contravened its clear rejection of an area-of-the-economy test. Nor did it overrule or suggest it was overruling McCready. It simply indicated a reason why under the facts of the case it was "not clear whether the [union plaintiff's] interests would be served or disserved by enhanced competition in the market." Id. The Court thus applied the test of whether the injury is due to pro- or anti-competitive aspects of the violation.

"inextricably intertwined" standard); Peck v GMC, 894 F2d 844, 847 (6th Cir, 1990); Fallis v Pendleton Woolen Mills, 866 F2d 209, 210 (6th Cir, 1989); Province v Cleveland Press Pub, 787 F2d 1047, 1051 (6th Cir, 1986).

Here, the Funds' injuries are similarly inextricably intertwined with injuries suffered by market participants (smokers deprived of a choice of safer products) in that the Funds *paid the bills* resulting from the restraint. As the McCready Court put it: "Her psychologist [the direct "target" of the conspiracy] can link no claim of injury to himself [because] . . . he has been fully paid . . . . [I]t is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits." 457 US at 475. Here, it is not the smokers as consumers buying tobacco, but their Funds as health care payors, who are out-of-pocket for medical costs as a result of the failure of the tobacco market to offer the choice of safer products. The Funds "participate" in the restrained market by paying the medical bills resulting from the restraint; this is all the market participation that is required for standing.

Any "consumer" litmus test for antitrust injury would contradict the cases relating to "inextricably intertwined" injury and the U.S. Supreme Court's directive that black-letter rules should not be imposed. Here, the close relationship between the anticompetitive aspects of Defendants' antitrust violations and the Trusts' economic injuries yields the clear conclusion that antitrust injury is present.

IV. THE FUNDS PROPERLY ALLEGE A SUFFICIENT CLAIM UNDER THE MICHIGAN PRICING AND ADVERTISING ACT.

The Funds claim that Defendants executed a fraudulent course of conduct, including placing before the public deceptive and misleading statements, in violation of §6 of the Michigan Pricing and Advertising Act ("MPAA") (referred to by the trial court as the "False Advertising Act," (Tr: 59)), MCL 445.356; MSA 19.853(16), which proximately caused harm to the Funds under MPAA §10(2), MCL 445.360(2). (¶¶377-379) Section 6(1) of the MPAA provides: "[A] person shall not knowingly make, publish, disseminate, circulate, or place before the public an advertisement which contains a statement or representation which is untrue, deceptive, or misleading." MCL 445.356(1). Under MPAA §10(2), MCL 445.360(2), a person who "suffers loss as a result of a violation of this act" may sue for damages. Accordingly, the Funds' complaint, tracking the statutory language verbatim, alleges that "as a direct and proximate result of [Defendants'] wrongful activity, Plaintiff Funds and Class members have suffered and will continue to suffer substantial damages and injuries to their business or property . . ." (¶378)

The trial court held that those allegations fail to state a claim because plaintiffs supposedly did not also allege "reliance". Its entire holding on this point was:

> A claim under MCL 445.356(1) is to be construed with reference to a common law fraud claim. Mayhall v A.H. Pond Co, Inc, 129 Mich App 178, 182 (1983), reliance is an element of fraud. Hi Way Motor Co v Int'l Harvester Co, 398 Mich 330, 336 (1976).
>
> The claim under MCL 445.356(1) asserts no reliance. Consequently, the motion for summary disposition under MCR 2.116(C)(8) is granted as to this claim. (Tr: 59-60).

But neither the MPAA nor the cases construing it require reliance. The statute comprehensively specifies eight elements of an action thereunder for damages. Section 6(1)

prohibits (1) a person (2) from knowingly (3) disseminating or placing before the public (4) an advertisement (5) containing an untrue, deceptive or misleading statement. Section 10(2) authorizes an individual or class action for a violation of §6(1) by (6) a person (7) who suffers loss (8) as a result of a violation of the act. "Reliance" is conspicuously absent from this exhaustive list, clearly indicating that the Legislature did not intend to require it. See, e.g., People v Preuss, 436 Mich 714, 721, 461 NW2d 703 (1990) (omission of element shows legislative intent not to require it; statute should be read literally unless manifestly contradictory to its purpose or if necessary to correct an absurd and unjust result); Michigan Ass'n of Intermediate Special Ed Adm'rs v DSS, 207 Mich App 491, 497 (1994); McCready, 457 US at 472 n9.

Thus, while the statute requires that the false statement *cause* the loss, it clearly does not limit the class of persons who may sue to those who actually relied on the statement. A person may sue for actual damages suffered, whether or not he actually heard and relied on the deceptive statement, so long as his loss results from a violation of §6. Here, for example, the Funds suffered substantial losses to their assets as a result of Defendants' false advertising by, among other things, paying for the health care and related costs of disease and addiction caused by consumption of the tobacco products being advertised. (¶378)

It is entirely proper to use a well-defined term from the common law to interpret the same or similar term actually found in a statute. E.g., Thomas v State Hwy Dept, 398 Mich 1, 9-10, 247 NW2d 530 (1976). But the trial judge used the common law for a very different purpose -- to supply a new element *not* found in the statutory text.

Indeed, the case cited by the trial court, Mayhall v A.H. Pond Co Inc, 129 Mich App 178, 341 NW2d 268 (1983), clearly limits use of the common law for statutory interpretation to terms actually contained in a statute. "*[B]y specifying in §10 of the PAA . . . that* in order to bring suit

a plaintiff must suffer a 'loss' as a result of the statutory violation, the Legislature, we conclude, has incorporated in the act[] the common law requirement of *injury*." 129 Mich App 183 (emphasis added). Thus, it is precisely because the Legislature chose to *include* in the MPAA a term ("loss") similar to a common law fraud concept (injury) that the specific statutory term should be construed with reference to the common law. Accordingly the trial court erred in imposing a reliance requirement when none is specified in the statute.[17]

Rulings as to parallel provisions of §11(2) of the MCPA, MCLA 445.911(2), also make clear that reliance is not required here.[18] Like §10(2) of the MPAA, MCPA §11(2) permits "a person who suffers loss as a result of a violation of this act" to sue. And as with MPAA §10(2), Mayhall held that MCPA §11(2) should also be construed with reference to the common law tort

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[17] Moreover, *no* Michigan case holds that reliance is an element of a claim under the MPAA. Mayhall's reference to the common law was aimed solely at the meaning of "loss" in §10(2) of the statute, MCL 445.360(2) -- not at the elements of a violation of PAA §*6(1)*, MCL 445.356(1), for which the trial judge erroneously cited Mayhall. (Tr: 59) And see Pantelas v Montgomery Ward & Co, 169 Mich App 273 (1988) (aggravation is not a recoverable "loss"), which reiterated that Mayhall was concerned with refining the contours of the *injury* component of a PAA action: "[Mayhall] interpreted the above section and determined that appellant must suffer a loss as a result of the statutory violation before recovery is allowed." Id at 275.

[18] It is well settled that "[u]nless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense. . . . The same rule has been applied even where the language is only substantially similar." 2B Sutherland Statutory Construction, §51.02 (5th ed.)

Similarly, statutes relating to the same general subject matter or having the same purpose or object are considered to be *in pari materia* and are interpreted in light of the comparable provisions of the other. Id at §51.03; Good Roads Fed'n v Board of Canvassers, 333 Mich 352, 361, 53 NW2d 481 (1952).

The legislative intent to interpret similar phrases similarly is even stronger where the statutes are enacted in the same legislative session, as were the MCPA (PA 1976, No. 331) and the MPAA (PA 1976, No. 449). 2B Sutherland Statutory Construction, supra at §51.03; Reed v Secretary of State, 327 Mich 108, 113, 41 NW2d 491 (1950); Good Roads Fed'n v Board of Canvassers, supra, 333 Mich at 361-62.

of fraud. Id at 182-183. But under MCPA §11(2), it is clear that even a *non*-consumer who suffers loss from a false or deceptive advertisement, even if she did not "rely" on it, may sue for damages. Janda v Riley-Meggs Industries, Inc, 764 F Supp 1223 (ED Mich, 1990) (orthopedic surgeon could sue baseball bases manufacturer and distributor who ran advertisement creating a false impression that the surgeon endorsed the product); John Labatt Ltd v Molson Breweries, 853 F Supp 965, 970 (ED Mich, 1994) (a "person" that was a competitor, not a consumer relying on defendant's advertisements, could sue under the MCPA because "nothing in the *text* of the statute suggests an intention on the part of the legislature" to limit to consumers the right of action created under the MCPA" (emphasis added)). Indeed, the plaintiffs in both Janda and John Labatt, as the parties possessing the information about the false or misleading nature of the advertisements in question, clearly did *not* rely on and were *not* misled by the ads.

Similarly, as "persons" that suffered loss as a result of the tobacco industry's violation of the MPAA, the Funds may bring an action under MPAA §10. The trial court's restriction of such actions to persons who "rely" on a defendant's false advertisement -- i.e., consumers -- is found nowhere in the statutory text; is unsupported by a single case; is inconsistent with Mayhall; violates well-settled principles of statutory construction; is contrary to judicial decisions interpreting the parallel provisions of the MCPA; and contravenes the remedial purpose of the MPAA.

Finally, even if "reliance" were required here, the Funds sufficiently allege it. The trial court *rejected* Defendants' contention that the Funds' fraud and misrepresentation common law claims do not sufficiently allege justifiable reliance, holding that ¶349 of the complaint *did* sufficiently allege justifiable reliance. (Tr: 61-62) For example, the Funds "relied" by not sooner implementing smoking cessation programs. Paragraph 375 incorporates ¶349 into Count VII

(violation of MPAA). Therefore, the "justifiable reliance" sufficiently alleged to support the Fund's common law fraud and misrepresentation claims was also alleged by the Funds with respect to the false advertising claim under the MPAA.

V. THE TORT OF INTENTIONAL BREACH OF A SPECIAL DUTY SHOULD BE RECOGNIZED IN MICHIGAN.

Count IV of the complaint alleges that Defendants intentionally failed to perform a special duty, assumed by Defendants through their promises and statements since the early 1950's. (¶¶342-350, 352) The trial court rejected this claim on the ground that it doubted the very existence of such a cause of action (Tr: 62), which is a question of first impression in Michigan.

Michigan law, however, permits recovery for economic losses, despite the lack of any physical harm (or harm to chattel) for the intentional tort of fraud in the inducement. Huron Tool & Engineering Co v Precision Consulting Services, Inc, 209 Mich App 365, 532 NW2d 541 (1994). The Huron court, in reaching its decision to permit economic recovery for fraud, noted that "the emerging trend is clearly toward creating an exception to the economic loss doctrine for a select group of intentional torts." Id at 370. See e.g., San Francisco v Philip Morris, Inc, 957 F Supp 1130, 1142-43 (ND Cal, 1997) (recognizing that the defendants could be held liable for "purely economic loss" based on the plaintiffs' pleading of intentional breach of an assumed duty); Minnesota v Philip Morris, Inc, 551 NW2d 490 (Minn, 1996) (holding that the fact that plaintiffs sought recovery for economic rather than physical harm did not defeat plaintiffs' cause of action for breach of an assumed duty). Northern States Power Co v International Telephone & Telegraph Corp, 550 FSupp 108 (D Minn, 1982) (fraud in the inducement and misrepresentation); Interstate Securities Corp v Hayes Corp, 920 F2d 769, 776 n11 (CA 11, 1991) (defamation); Moorman Mfg Co v Nat'l Tank Co, 91 Ill 2d 69, 435 NE2d 443 (1982) (intentional

misrepresentation); Werblood v Columbia College of Chicago, 180 Ill App 3d 967, 536 NE2d 1134 (1987); Santucci Constr Co v Baxter & Woodman, Inc, 151 Ill App 3d 547, 502 NE2d 1134 (1987) (intentional interference with contractual relations).

The paucity of reported cases or historical context for the tort of intentional breach of special duty is hardly surprising given the unique factual scenario under which such a tort would arise. Here, Defendants undertook a special duty by affirmatively assuring the public, including the Funds, that they would disclose all material facts about tobacco use, health and addiction. (¶¶ 104-107, 120, 122, 256-266, 344-345)

That pledge may have been a fraud and misrepresentation from the outset – the usual case, in which suit on those torts would provide a remedy. Or, alternatively, the pledge may have been a genuine undertaking by Defendants of a special duty which subsequently was intentionally breached. Either way, the Funds were injured as a result of the conduct, and they are entitled to plead relief in the alternative.

The intentional breach of a special duty would indeed be a rare tort, albeit a particularly egregious one. Since Michigan law recognizes a negligent breach of a special duty, Smith v Allendale Mutual Ins Co, 410 Mich 685, 711-12, 303 NW2d 702 (1981); Krass v Joliet, Inc, 231 Mich App 661 (February 2, 1999), no principled reason exists for failing to recognize the greater wrong of an intentional breach. Consistent with Huron, economic recovery should be permitted for this wrong.

CONCLUSION

This lawsuit represents an effort by the Funds to recover damages for the costly wrongdoing committed by Defendants during decades of shifting to health care payors the costs inflicted by smoking-related illnesses.

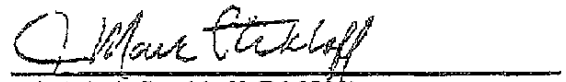
The trial court's dismissal of the case amounts to a finding that the Funds' claims were so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recover. MCR 2.116(C)(8). That was clearly error. Even the trial court expressed doubt whether its ruling was correct. Under the applicable standards, the Funds' claims satisfy proximate causation and all other legal requirements.

RELIEF REQUESTED

For the reasons articulated above, the trial court's dismissal of the Funds' causes of action should be reversed and the Funds' claims should be reinstated.

Respectfully submitted,

SACHS, WALDMAN, O'HARE, HELVESTON, BOGAS & McINTOSH, P.C.

By: 

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