

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

KELLEY *ex rel.* MICHIGAN
Plaintiff,

v.

PHILIP MORRIS INCORPORATED, *et al.*
Defendants.

**PLAINTIFF'S REPLY BRIEF TO DEFENDANTS'
BRIEF IN RESPONSE TO PLAINTIFF'S MOTION
TO DISMISS AFFIRMATIVE DEFENSES BASED ON
A PURPORTED LACK OF AUTHORITY OR
STANDING ON THE PART OF THE ATTORNEY
GENERAL TO BRING THIS SUIT**

I Introduction

The Defendants' Brief in Response to Plaintiff's Motion to Dismiss the Affirmative Defenses Based on a Purported Lack of Authority or Standing is based largely upon a single premise: that the Court must treat this action in its entirety as an action for reimbursement under the State's Medicaid subrogation statute. Treated as such, Defendants argue, the Attorney General lacks authority to bring a Medicaid subrogation action unless invited to do so by the Director of the Michigan Department of Community Health, lacks standing to bring a Medicaid subrogation action and is not the real party in interest to a Medicaid subrogation action.

For the reasons stated below, Plaintiff contends that the Court should reject the false premise of the Defendants' response, and grant the Plaintiff's Motion.

II ARGUMENT

A.

1. The Court Should Decline Defendants' Invitation To Treat This Case As A Medicaid Subrogation Action.

The Defendants' response brief is an extension of some of the arguments contained in their Brief Opposing Plaintiff's Motion for Summary Disposition of Defendants Claims that Assignment and/or Subrogation are the State's Exclusive Remedies and Defendants' Cross Motion for Summary Disposition. Here, the Defendants ask the Court not

only to accept the notion that the Attorney General's action is not what it says it is, but to apply the statutes pertaining to a Medicaid subrogation action to find that the Attorney General lacks authority or standing to bring a Medicaid subrogation action.

Defendants' belief that Medicaid subrogation is the Plaintiff's only available remedy is entirely unfounded. Without repeating all of the arguments expressed elsewhere in the motions now pending before this Court, it is sufficient to quote a portion of the recent opinion of the United States District Court for the Northern District of California when recently confronted with such an argument in similar circumstances¹:

"Defendants also argue that Cal. Govt Code @ 23004.1 and 2004.3 provide the counties with their only remedies under the circumstances. Those Government Code sections provide counties with a right of action in subrogation to recover medical costs from tortfeasors who injure their residents, Defendants contend that these sections evidence a legislative choice not to allow derivative suits like the present one. However, *the Court finds that it is not clear under California law that these sections operate to supplant common law fraud*

¹ Cal. Govt Code @ 23004.1 reads, in part, as follows:

23004.1 County's recovery from tortfeasor for care and treatment furnished injured or diseased victim; Procedure

(a)...in any case in which the county is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment, including prostheses and medical appliances, to a person who is injured or suffers a disease, under circumstances creating a tort liability upon some third person to pay damages therefore, the county shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished, or shall, as to this right, be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished.

(b)The county may, to enforce such rights, institute and prosecute legal proceedings against the third person who is liable for the injury or disease in the appropriate court, either in its own name or in the name of the injured person, his guardian, personal representative, estate, or survivors.

and negligence claims, rather than to provide a mere alternative to such claims. Therefore, the Court rejects defendants' argument that Cal. Govt Code @ 23004.1 and 23004.3 preclude this suit." (emphasis added.)

City of San Francisco v. Philip Morris, (opinion of the United States District Court for the Northern District of California, decided February 26, 1997. (Docket No. C-96-2090 DLJ). Pages 19 and 20 are attached as Exhibit 1.

The Defendants' contentions are reduced to absurdity upon the Court's recognition that Medicaid subrogation is not the Attorney General's exclusive remedy. It cannot reasonably be argued that the Attorney General must seek the authorization of the Director of the Michigan Department of Community Health before filing an action under MCL 445.771 *et seq.*; MSA 28.70(1) *et seq.* (the "Michigan Antitrust Reform Act"), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.* (the "Michigan Consumer Protection Act" or under the Attorney General's other constitutional, statutory and common law powers.

In deciding this motion, the Court should decline the Defendants' invitation, as has the United States District Court for the Northern District of California, to that the Medicaid subrogation provisions operate to supplant all other claims, rather than providing a mere alternative to such claims.

2. The Action Is Within The Scope Of Powers Granted The Attorney General By Constitution, Statutes And Common Law, And Is Not "Clearly Inimical To The Public Interest."

As stated in greater detail in the plaintiff's underlying Motion, Attorney General Frank J. Kelley is the elected Attorney General of the State of Michigan and holds this office under the provisions of Const 1963, art 5, §§ 3 & 21, and by mandate of the electorate of the State of Michigan. The Attorney General is the head of the Department of Attorney General created by the Executive Organization Act of 1965, 1965 PA 380, ch 3, MCL 16.150; MSA 3.29(50). The Michigan Attorney General is granted expansive authority under MCL 14.28; MSA 3.181 which provides, in part, that the attorney general shall "...when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this

state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested." The Michigan Attorney General, "...has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed." *Michigan State Chiropractic Ass'n v. Kelley*, 79 Mich. App. 789; 262 N.W.2d 676, 677 (1977). *Attorney General v. Grand Rapids*, 175 Mich. 503; 141 N.W. 890 (1913). The Attorney General has broad discretion "in determining what matters may, or may not, be of interest to the people generally." *Mundy v. McDonald*, 216 Mich. 444,450; 185 N.W. 877 (1921).

The Court should only prohibit the Attorney General from intervening or bringing an action when to do so "is clearly inimical to the public interest." *In re Intervention of Att. Gen.*, 326 Mich. 213; 40 N.W.2d 124, 126 (1949).

The Attorney General contends that this action is well within his powers granted under Michigan law and is by no means inimical to the public interest.

3. The Attorney General Is The "Real Party In Interest" In This Action.

In their final plea to treat this action as a Medicaid subrogation claim, Defendants would have the Court determine that the Attorney General is not the real party in interest for purposes of MCL 600.2041; MSA 27A.2041 because a judgment obtained against them by the Attorney General would not necessarily operate "as a bar to any actions by the Michigan Medicaid recipients (or by the DCH as subrogee) for medical injuries allegedly caused by the use of tobacco."

The Defendants' argument is pure conjecture and provides no justifiable legal basis for finding that the Attorney General is not the real party in interest. Michigan statutes and court rules provide numerous procedural tools to prevent double recoveries, and there is no reason to believe that the Defendants would fail to bring this to the attention of the subsequent courts when and if the need arose, or that the subsequent courts would not do justice.

More appropriately, the Court should look to the statutes in determining whether the Attorney General is the real party in interest. MCL 600.2041 provides the attorney general discretion to sue in his own name without joining with him the party for whose

benefit the action was brought.² A "real party in interest" is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Stephenson v. Golden*, 279 Mich. 710, 766; 276 N.W.2d 849 (1937). *Weston v. Dowty*, 163 Mich. App. 238; 414 N.W.2d 165 (1987).

III. Relief Requested

Plaintiff prays that this Court, pursuant to the provisions of MCR 2.116(9), grant its motion and dismiss the affirmative defenses listed therein, for the reason that the Defendants have failed to state a valid defense to the claim asserted against them.

Respectfully submitted,

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² MCL 600.2041 states in part:

Sec. 2041 Every action shall be prosecuted in the name of the real party in interest...but a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action was brought...