IN THE CIRCUIT COURT FOR BALTIMORE CITY

STATE OF MARYLAND,
Plaintiff,

v.

PHILLIP MORRIS INC., et al.
Defendants.

Case No. 96122017/CL211487

May 21, 1997

OPINION AND ORDER OF COURT

BROWN, J.

Facts

On May 1, 1996, the State of Maryland filed suit against Philip Morris Incorporated, Philip Morris Companies, Inc.,; R.J. Reynolds Tobacco Company; R J R Nabisco, Inc.; Brown and Williamson Tobacco Corporation; British American Tobacco Company, LTD.; Batus Holdings, Inc.; B.A.T. Industries, P.L.C.; Lorillard Tobacco Company; Lorillard Corporation; Loews Corporation; The American Tobacco Company; American Brands, Inc., Liggett Group, Inc.; Liggett & Meyers, Inc.; The Brooke Group, Ltd.; Hill & Knowlton, Inc.; the Council for Tobacco Research - USA, Inc.; and the Tobacco Institute, Inc.

Several Defendants filed a Motion to Dismiss for lack of personal jurisdiction, and as a result of discussions between the Plaintiffs and certain Defendants, the action of the Plaintiffs was dismissed against Philip Morris Companies, Inc.; R.J.R. Nabisco, Inc.; Batus Holdings, Inc.; B.A.T. Industries, P.L.C.; Loews Corporation; and American Brands, Inc.

The remaining Defendants then filed a Motion to Dismiss pursuant to Maryland Rule 2-322(b) alleging, *inter alia*, that all of the common law, statutory, and equitable claims in the complaint fail to properly state a claim upon which relief may be granted. The Defendants allege that the common law tort claims contained in counts 6 through 13 of the Plaintiffs' complaint cannot be maintained in the name of the State of Maryland because the Plaintiffs are limited to the statutorily imposed remedy of subrogation contained in § 15 - 120 of the Maryland Health-General Code Annotated. The Defendants further allege that each of the common law counts of the complaint are deficient and should be dismissed on independent grounds because most of the claims there asserted are barred by "the economic loss rule" in that the State has failed to show that Defendants owned any legally cognizable tort duty to the State.

As to count 5, the Defendants allege that said count is deficient as an equitable claim because the State has an adequate remedy at law, and because the State has failed to allege essential elements for a claim of restitution based upon unjust enrichment. Finally, the Defendants argue that the Plaintiffs' statutory claims, as pled in counts 1 through 4 of the complaint and based upon the Maryland Consumer Protection Act, found in Title 13 of the Maryland Commercial Law Code Annotated, and the Maryland Antitrust Act, found in Title 11 of the Maryland Commercial Code Annotated, fail to state a claim upon which relief can be granted because the State has no standing to assert either of these statutory claims.

The parties having supplied memoranda of law in support of their respective positions, the mater was set for hearing on the Defendants' Motion to Dismiss and such hearing was conducted on January 29, 1997 during four (4) hours of argument.

Purpose of the Motion to Dismiss

In deciding the issues raised by Defendants in their Motion to Dismiss, the Court must first briefly examine the purpose and function of the Motion to Dismiss under the Maryland Rules.

Maryland Rule 2-322, titled "Preliminary Motions" provides in section (b) that: "The following defenses may be made by motion to dismiss before the answer, if an answer is required…. (2) failure to state a claim upon which relief can be granted." The Rule further provides in subsection (c) that:

> A motion under sections (a) and (b) of this Rule shall be determined before trial, except that a court may defer the determination of the defense of failure to state a claim upon which relief can be granted until trial. In disposing of the motion, the court may dismiss the action or grant such lesser or different relief as may be appropriate. If the court orders dismissal, and amended complaint may be filed only if the court expressly grants leave to amend. *Id.*

When moving to dismiss, a defendant is asserting that, even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter

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of law. *Lubore v. RPM Assocs*., 109 Md.App. 312, 674 A.2d 547 (1996). Thus, the question which must be addressed by this court is whether or not Plaintiff, assuming the truth of all relevant and well-pleaded facts, has properly asserted claims in its complaint for which relief can be granted.

Brief Statement of the Case

The State of Maryland, as Plaintiff, brings the present action *in its own right* to recover money expended by the State through its medicaid program to treat its citizens who have suffered smoking related illnesses. The State submits its action in a thirteen (13) count complaint alleging *inter alia*, various causes of action under the common law, as well as under the Maryland Consumer Protection Act (hereinafter referred to as the CPA) and the Maryland Antitrust Act (hereinafter referred to as the MATA). It is the State's position that it can maintain its action by virtue of the common law, where relevant, and under the CPA and the MATA. The State further argues that it is not restricted to bringing an action in subrogation, but can choose to bring the action either by means of statutory subrogation or pursuant to the common law, and that it has selected a viable alternative in choosing to bring the action pursuant to the common law and under the CPA and MATA.

In claiming that it has selected a viable alternative to statutory subrogation, the State contends that it has the right under the common law of Maryland, as adopted from the common law of England pursuant to Article 5 of the Maryland Declaration of Rights, to pursue claims against Defendants *in its own name*, for harm Defendants allegedly caused to individual third-party smokers in Maryland. Thus the State's claim that it is entitled to pursue an alternative remedy to statutory subrogation rests squarely upon the premise that the common law of Maryland does, in fact, provide the alternative remedy that the State is seeking.

Conversely, Defendants argue that the State of Maryland, as Plaintiff in this action, cannot maintain this suit in its present form because the State is seeking to recover money it expended through the medicaid program, and as such its manner of recovery must be as set forth under the Maryland medicaid statute, contained in Maryland Health-General Code Annotated § 15-120, which statute sets forth the procedure by which recovery of medicaid funds must be recovered, and that is by way of subrogation. The statute provides as follows:

> If a Program recipient has a cause of action against a person, the Department shall be subrogated to that cause of action to the extent of any payments made by the Department on behalf of the Program recipient that result from occurrence that gave rise to the causes of action. *Id.*

Defendants contend that where the State cannot maintain its common law tort claims, in their present form, under the common law of Maryland, because under the common law of England, a plaintiff could not maintain a cause of action against a defendant for injuries that the defendant may have caused to a third party. Thus, Defendants argue that subrogation is the State's exclusive remedy, and to the extent that the State has failed to plead its common law tort claims by means of subrogation as set forth in the medicaid statute, it has failed to state a claim upon which relief can be granted.

Consequently, the issues before this Court are as follows:

> I. Is the remedy of subrogation as set forth in Maryland Health-General Code Annotated § 15-120 the exclusive remedy available to the Plaintiff (the State of Maryland) in this action where the Plaintiff seeks to recover reimbursement for funds expended through the Medical Assistance Program for the smoking related illnesses of program recipients?
>
> II. Does the Plaintiff have a cause of action under the common law of Maryland to recover *in its own name* for injuries alleged to have been caused to individual third party medicaid program recipients by Defendants?
>
> III. Has the Plaintiff properly asserted a claim for restitution based upon unjust enrichment?
>
> IV. Has the Plaintiff properly asserted a cause of action pursuant to the Maryland Consumer Protection Act, found in Title 13 of the Maryland Commercial Law Code Annotated?
>
> V. Does the Plaintiff have standing to seek equitable relief, civil penalties and damages for Defendants alleged antitrust violations under the Maryland Antitrust Act, found in Title 11 of the Maryland Commercial Law Code

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Annotated?

The Court will address these issues accordingly.

Discussion

I. Is the remedy of subrogation as set forth in Maryland Health-General Code Annotated § 15-102 the exclusive remedy available to the Plaintiff (the State of Maryland) in this action where the Plaintiff seeks to recover reimbursement for funds expended through the Medical Assistance Program for the smoking related illnesses of program recipients?

The remedy of subrogation is set forth in Maryland Health-General Code Annotated § 15-120 is the exclusive remedy available to the State of Maryland in seeking to recover reimbursement for funds expended through the Medical Assistance Program for the smoking related illnesses of program recipients. The general rule under principles of statutory construction is that, absent a legislative intent to the contrary, the statutorily created remedy is deemed to be exclusive.

Statutory Remedies Are Generally Deemed to Be Exclusive

Maryland courts have reiterated time and again the fundamental principle that, absent clear legislative intent to the contrary, statutorily created remedies are deemed to be exclusive. One of the earliest cases to clarify and establish the law in this area was *Roselle Park Trust v. Ward Baking Corporation*, 177 Md. 212, 9 A.2d 228 (1939). The case involved a dispute between the litigants as to the fair market value of stock certificates after the merger of two corporations, but the issue on appeal concerned whether or not a statutorily imposed limitation that a dissenting stockholder file a claim within a prescribed period of time was mandatory, or merely directory. Quoting in part from *Sutherland on Statutory Construction*, § 454, the Court of Appeals declared:

> When a statute is passed authorizing a proceeding which was not allowed by the general law before, and directing the mode in which an act shall be done, the mode pointed out must be strictly pursued. It is the condition on which alone a party can entitle himself to the benefit of the statute, that its directions shall be strictly complied with. Otherwise the steps taken will be void. *Roselle Park*, at 220, 231.

There are many other Maryland cases that establish this rule of statutory construction, which is often expressed by the Latin maxim "expressio unius est exclusio alterius" or the enumeration of one thing implies the exclusion of all others. *Office and Professional Employees International Union v. Mass Transit Administration*, 295 Md. 88, 96, 453 A.2d 1191, 1195 (1982); *Makovi v. Sherwin-Williams*, 75 Md. App. 59, 540 A.2d 494 (1987). The rule as set forth applies even in instances where there may be an alternative cause of action recognized under general or common law in Maryland, but it particularly applies in instances where there was no recognized cause of action at common law.

In *White v. Prince George's County*, 282 Md. 641, 387 A.2d 260 (1978), Plaintiffs filed suit to recover an excess of recordation taxes that they had accidentally paid, claiming that they had a right to do so under the common law of Maryland, in addition to the remedy which was provided by statute. In concluding that Plaintiffs' were limited to the statutory remedy for the recovery of such taxes, the Court held:

> Where there exists a special statutory remedy for the resolution of a particular matter, as well as an ordinary action at law or in equity, whether the special statutory remedy is exclusive, and preempts resort to the ordinary civil action, is basically a question of legislative intent . . .. In ascertaining that intent, it is a settled principle of statutory construction that, absent a legislative indication to the contrary, it will usually be deemed that the legislature intended the special statutory remedy to be exclusive. *Id*. at 265, 649.

The Court, in essence re-affirmed its original holding and reasoning in *Roselle Park Trust*, *supra*, where it stated:

> But when the proceeding is permitted by the general law, and an act of the legislature directs a particular form and manner in which it shall be conducted, then it will depend on the terms of the act itself whether it shall be considered merely directory, subjecting the parties to some disability if it be not complied with, or whether it shall render the proceeding void. A statute that directs a thing to be done in a particular manner ordinarily implies that it shall not be done otherwise. *Id*. At 220, 231.

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Thus, even in instances where there may be an alternate remedy at common law, the statutory remedy is presumed to be exclusive.

The State cites *Miles Labs., Inc. v. Doe, et al.*, 315 Md. 704, 556 A.2d 1107 (1989) for the proposition that common law rights cannot be abrogated unless a legislative does so expressly in support of its claim that the medicaid statute does not negate the State's alleged right to pursue their claim under common law. However, that proposition is not accurate. The Court of Appeals merely said in *Miles* "that repeal of the common law by implication is not favored." *Id*. at 723, 556. The State fails to acknowledge the fact that the Court says this is so merely because statutes are ordinarily drafted in such a way as to provide specific remedies, thus there is no need to "guess" whether common law rights have been superseded. In addition, as discussed *infra, Miles* is more illustrative on the issue of the Court's reluctance to alter the common law of Maryland by judicial decree.

Likewise, the State's use of the Court of Special Appeals' holding in *Roberts v. Total Health Care, Inc.*, 109 Md.App. 635, 675 A.2d 995 (1996) to support its proposition is inapposite. In *Roberts*, the Court merely affirmed the right of the State to assign its statutory subrogation claims to a third party. The question of whether or not the State could pursue independent common law causes of action in addition to the statutorily created remedy of subrogation was neither raised nor addressed. Consequently, the general rule still applies: when a legislature establishes a remedy in the clear language of a statue, that remedy is deemed to be exclusive.

Statutory Remedies Conclusively Deemed to be Exclusive Where No Alternate Remedy Exists At Common Law

There is no doubt whatsoever that, where no alternate remedy exists at common law, any remedy created by statute is deemed to be exclusive. In *White v. Prince George's Co., supra*, the Court of Appeals concluded that, despite the plaintiff's claims to the contrary, under the common law of Maryland no cause of action could be maintained to recover taxes paid in error under a mistake of law. *Id*. at 266, 651. The Court articulated the law in stating:

> In other words, the question of whether the Legislature intended a particular statutory remedy to be exclusive only arises where the claimant is pursuing a possible alternate remedy. Where the type of action which the plaintiff is attempting to bring as an alternative remedy to the special statutory remedy simply does not lie, logically no question of exclusiveness arises. In such a situation, it does not matter if the special statutory remedy is deemed inadequate or if some other exception to the general rule is present. If the only remedy presently available to a plaintiff is the special statutory remedy, that remedy obviously must be followed. *Id*.

Similarly, in *Magan v. Medical Mutual Insurance Society of Maryland*, 81 Md. App. 301, 567 A.2d 503 (1989), the Court of Special Appeals reached the same conclusion and upheld the rule as established by the Court of Appeals. In *Magan*, a physician filed suit against an insurer for refusing to insure him under its duty to insure licensed physicians. The doctor based his claim upon what he asserted to be a common law cause of action. The Court held that no common law cause of action existed to recover damages for an insurer's refusal to underwrite an insured and that "since the only underwriting obligation that exists is statutory, Magan's remedy is limited to § 55A (of Md. Code Ann. Art. 48A, his statutory remedy)." *Id*. at 309, 506. The Court then concludes its opinion by restating the rule under principles of statutory construction that, absent a legislative indication to the contrary, the statutory remedy is deemed to be exclusive. *Id*. at 310-311, 506-507.

In applying the firmly established rule to the present case, it is clear that the remedy set forth in the Maryland medicaid statute is deemed to be exclusive. Furthermore, under the rules of statutory construction, the State is even more conclusively limited to the statutory remedy of subrogation if, as discussed *infra*, an alternate cause of action at common law does not exist.

Altering Common Law Rights Is Principally a Legislative Function

Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function, and where a statute provides a remedy, courts should not interpret the statute to subsume other remedies. *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690 (1974). This principle of restraint on judicially created causes of action was established by the United States Supreme Court and has been consistently applied in all jurisdictions, particularly in Maryland where, as reflected in the discussions above,

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Maryland appellate courts have refused to create new causes of action that did not exist under common law, particularly where a remedy has already been created by statute. Perhaps the most significant and noteworthy Supreme Court case establishing this rule is *United States v. Standard Oil of California*, 332 U.S. 301, 67 S.Ct. 1604 (1947).

In *Standard Oil* the federal government brought suit against the defendant oil company for damages as a result of tortious injuries the oil company caused to a third party, who was a soldier in the army, thereby forcing the federal government to pay the medical expenses of the soldier in addition to maintaining his salary, despite the loss of services. Although the Supreme Court recognized the fact that it may be wise fiscal policy for the government to have the right to recover in such instances, it also acknowledged that there was no common law right to recover damages under such circumstances. The Court emphasized that it was the role and responsibility of Congress, as the legislative body, and not that of the courts, to create an independent cause of action to enable the federal government to recover. The Court rejected the Government's argument that such a right should be created by the Court itself and declared:

> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court of the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs…In view of these considerations, exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. *Id*. at 316, 1612.

In response to the Supreme Court's ruling in *Standard Oil*, Congress did create an independent right of recovery for the federal government in such instances under the Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. § 2651. Therefore, Congress properly discharged its responsibility to create the independent right sought by the federal government and confirmed that it was not the function of the courts to do so.

Similarly, in *United States v. Harleysville Mutual Casualty Company*, 150 F. Supp. 326 (D.Md. 1957), the U.S. District Court for the District of Maryland held likewise when the federal government attempted to recover from a defendant tortfeasor for harm inflicted upon a third party U.S. veteran of the army. The District Court held that the federal government could not rely on Maryland's hospital lien statute to recover from the Defendant tortfeasor but that, pursuant to regulations of the Veterans Administration, it had to rely on the right of assignment/subrogation created therein. Because the soldier refused to assign his independent right of recovery from the tortfeasor to the federal government, the Court held that the government could not maintain its cause of action:

> The operation of the Veterans' Administration regulation, intended to allow the Government to recover from tortfeasors, is conditioned at least, and expressly, on the voluntary giving of an assignment of the veteran's claim, which assignment was not given in the instant case. Absent federal legislation, or regulation promulgated under the authority of such federal statutes, no action can be brought against the tortfeasor or against the tortfeasor's insurer. *Id*. 333-334.

Finally, in *National Railroad Passenger Corp*., *supra*, the Court reiterated its repeated and consistent earlier holdings and made it clear that Plaintiffs' cannot interpret statutes as creating causes of action other than those expressly given. In *National Railroad*, Plaintiffs' tried to persuade the court that they had an independent right under the Rail Passenger Service Act of 1970 (RPSA) 45 U.S.C.A. § § 501 et seq., to bring claims against Amtrak for grievances other than those expressly permitted by the statute due to some sort of "implied" right contained within the statute. In confirming the rule of its earlier holdings, the Supreme Court stated as follows:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage to subsume other remedies. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. This principal of statutory construction reflects the ancient maxim-expressio unius est exclusio alterius. Since the Act creates a public cause of action for the enforcement of its provisions and a private cuase of action only under very limited circumstances, this maxim would clearly compel the conclusion that the

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> remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act. *Id*. at 457, 693.

Accordingly, the Supreme Court affirmed the well grounded principles applied in the area of statutory construction that, absent a legislative indication to the contrary, statutorily created remedies are deemed to be exclusive.

In adhering to the principles espoused by the U.S. Supreme Court, Maryland appellate courts have exercised similar restraint on judicially created causes of action. Although there are some situations in which the common law of Maryland can be altered by judicial decision, Maryland appellate courts have done so only in extremely rare instances and under the most exceptional of circumstances. The Court of Appeals' adherence to the principle of judicial restraint in this area is based upon Article 5 of the Maryland Declaration of Rights, which clearly establishes that the role of modifying of altering the common law of England as adopted by Maryland rests solely with the legislature. Article 5 reads in pertinent part:

> That the Inhabitants of Maryland are entitle to the Common Law of England, and the trial by Jury according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. Md. Const., D. of R., Art. 5.

The Court of Appeals has construed Article 5 of the Declaration of Rights to mean that appellate courts are only empowered to alter the common law of Maryland: "when, in light of changed conditions or increased knowledge, the former rule has become unsound in the circumstances of modern life." *Miles Labs., Inc., supra*, 315 Md. At 724, 556 A.2d. at 1117 (1989).

One of significant example of where the Court of Appeals did alter the common law of Maryland by judicial decision was in the area of employment law through the well known case of *Adler v. American Standard Corporation*, 291 Md. 31, 432 A.2d 464 (1981), where the Court declared that the common law was no longer suitable to the circumstances of Maryland citizens in that the employer was acting in contravention of clear public policy in an area where there was no statutory authority to expressly or impliedly prohibit the employer's conduct. However, the Court established a clear limitation as to the instances where it was authorized to alter the common law by judicial decree, and when the plaintiff in the case of *Makovi v. Shervin-Williams, supra*, argued that the holding of *Adler* should be extended, the Court of Special Appeals rejected Plaintiff's claims.

In *Makovi*, Plaintiff brought suit against her employer for wrongful discharge based upon the fact that she was pregnant. In deciding that Plaintiff had no cause of action other than the statutorily prescribed remedies of federal civil rights statutes, and in refusing to create a new cause of action under common law where a remedy had already been created by statute, the Court of Special Appeals discussed the limitations of the holding in *Adler*:

> It does seem clear, however, that the [*Adler*] court was focusing on what it perceived to be a void in the law--a discharge not expressly and directly precluded by some specific statute but which nevertheless contravened some other general statement of public policy. If there were already an adequate alternative remedy in existence, the legitimate interest of the employee that the Court identified as being deserving of recognition would indeed have attained that recognition, and the newly created common law remedy would be unnecessary to assure its protection. *Makovi* at 64, 497.

Thus, the Court of Speical Appeals declined to extend the holding of *Adler* in *Makovi* and held that the plaintiff was limited to the specific statutory remedy for the kind of conduct alleged. The decision of the Court of Speical Appeals was fully upheld and affirmed by the Court of Appeals in *Makovi v. Sherwin-Williams*, 316 Md. 603, 561 A.2d 179 (1989).

The rule as applied to the present case clearly indicates that the State is limited to the statutory remedy contained in Maryland's medicaid statute and that it is the role of the legislature, not the courts, to create an independent cause of action upon which Defendants may be sued. Nothing in the medicaid

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statute precludes the State from asserting the common law claims contained in Counts 6 through 13 of its complaint, the statute merely directs that the State must pursue those claims by means of subrogation.

II. Does the Plaintiff have a cause of action under the common law of Maryland to recover in its own name for injuries alleged to have been caused to individual third party medicaid program recipients by Defendants?

The State does not have a cause of action under the common law of Maryland to recover from Defendants in its own name for injuries Defendants allegedly caused to individual third party medicaid recipients. Under the common law of England, as incorporated into the common law of Maryland, a plaintiff did not have a right to recover damages from a defendant tortfeasor in his own name or of his own right as a result of a defendant's injuries to a third party because the damage was too remote and indirect a consequence of the act of the wrongdoer.

At Common Law, Plaintiffs Had No Independent Right of Recovery Against Tortfeasors for Injuries to Third Parties

At common law a plaintiff had no right to recover damages from a defendant tortfeasor as a result of the defendant's injuries, harm, or lack of care to a third person, regardless of the fact that the defendant's actions may have put the plaintiff to what otherwise would have been unnecessary or increased expense.

The best case on point to reflect this principle is that of *Anthony v. Slaid*, 11 Metc. 290 (1846). In *Slaid*, the plaintiff had agreed to provide and pay for the medical expense of all of the poor people in a small town. The defendant's wife committed a battery on one of the town paupers, which resulted in the plaintiff's being put to increased expense for the pauper's medical treatment as a result of the defendant tortfeasor's battery. The Court of Common Please dismissed Plaintiff's claim upon Defendant's demurrer, and in affirming the decision, the appellate court held as follows:

> It is not by means of any natural or legal relation between the plaintiff and the party injured, that the plaintiff sustains any loss by the act of defendant's wife, but by means of the special contract by which he had undertaken to support town paupers. The damage is too remote an d indirect…That there is no precedent for such an action, where there must have been many occasions for bringing it, if maintainable, is a strong argument against it. *Id*. at 291.

Therefore, a plaintiff was not permitted to maintain a cause of action against a defendant tortfeasor as a result of the tortfeasor putting plaintiff to increased medical expenses resulting from the tortfeasor's injuries to a third party.

The case of *Connecticut Mutual Life Insurance Company v. New York and New Hampshire Railroad Company*, 25 Conn. 265, 65 Am.Dec. 571 (1856) is even more illustrative of the principles involved. In *Connecticut Mutual*, Plaintiff insurance company paid the proceeds of a life insurance policy to the estate of a third party as a result of a contract between the now dead third party and the plaintiff insurance company. The third party's death was caused by the negligence of the defendant railroad company, as the third party died as a result of an accident while a passenger aboard the defendant's train. When the insurance company attempted to recover its payment against the defendant railroad company, the court determined that the insurance company had no right to recover because the acts affected the insurer only through his artificial relationship wit the third party, and thus that loss was a remote and indirect consequence of the act of the wrong doer. The court stated:

> The single question is, whether a plaintiff can successfully claim a legal injury to himself from another, because the latter has injured a third person in such a manner that the plaintiff's contract liabilities are thereby affected. An individual slanders a merchant and ruins his business; is the wrong doer liable to all the persons, who, in consequence of their relations by contract to the bankrupt, can be clearly shown to have been damnified by the bankruptcy? Can a fire insurance compnay, who have been subject to loss by the burning of a building, resort to the responsible author of the injury, who had no design of affecting their interest, in their own name and legal right? Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property, that rarely is a death produced by human agency, which does not affect the pecuniary interest of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs

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> received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to …invite a system of litigation more portentous that our jurisprudence has yet know. *Id*. at 274-275.

The Court further states:

> It would be unfair to argue, that when two parties make a contract, they design to provide for an obligation to any other persons than themselves and those named expressly therein, or to such as are naturally within the direct scope of the duties and obligations prescribed by the agreement. On this point it is enough to say, that when an agreement is entered into, neither party contemplates the requirement from the other, of a duty towards all persons to whom he may have a relation by numberless contracts, and who may therefore be affected by breach to the other'' undertakings...We decide, that in absence of any privity of contract between the plaintiffs and defendants, and of any direct obligation of the latter to the former growing out of the contract or relation between the insured [third party] and the defendants, the loss of the plaintiffs, although due to the acts of the railroad company [defendant]…was a remote and indirect consequence of the misconduct of the defendants and therefore not actionable. *Id*. at 276-77.

Finally, in *Rockingham Mutual Fire Ins. Co. v. Bosher*, 39 Maine R., 253, the highest appellate court in Maine affirmed the same principles espoused in *Slaid* and *Connecticut Mut. Life*. In *Rockingham*, an insurer attempted to recover from the defendant tortfeasor the proceeds it paid to a third party pursuant to a private insurance contract as a result of the defendant tortfeasors intentional burning down of the third party's building. The court held that the insurer could not maintain an action in tis own name and of its own independent right against the defendant tortfeasor because there existed no privity between the tortfeasor and the plaintiff, the consequences being too indirect and remote. *Id*. at 257.

It should be noted that the holdings in all of the above cases interpreting common law rights (or more accurately lack thereof) of a plaintiff to maintain an action against a defendant tortfeasor as a result of the tortfeasor's injuries to a third party are based upon firmly rooted common law legal principles established by the English Courts of Common Pleas. The principle cases upon which the holdings were based are *Yates v. Whyte*, 4 Bing. N.C. 272, 33 Eng. C.L., 349 and *Mason v. Sainsbury*, 3 Doug. 60.

The English common law appellate courts (particularly Lord Mansfield in the famous and oft cited case of *Mason v. Sainsbury*) clearly established in these cases that plaintiffs (who were often insurers) had no independent right to maintain an action against a tortfeasor for harm caused by the tortfeasor to the third party. Therefore, as established by the English courts and affirmed by early American courts interpreting and applying English common law, a plaintiff had no right under common law to maintain a cause of action in his own name against a defendant tortfeasor for injuries that the defendant tortfeassor caused to a third party, regardless of the magnitude or increase in expenses the plaintiff was subject to as a result of the defendant's tortious conduct to the third person.

Accordingly, the State of Maryland in the present action had no right at common law, and consequently has no right now, to assert claims in its own name against Defendants as alleged tortfeasors for the harm Defendants allegedly caused (whether intentional or not) to third party smokers.

At Common Law, Plaintiffs Could Only Recover from Tortfeasors for Injuries to Third Parties by Means of Subrogation

However, the same cases that concluded that a plaintiff has no right under common law to recover from a defendant tortfeasor as a result of injuries to a third party in the plaintiff's own name conclude that, in some instances, the plaintiff can recover from the defendant if the plaintiff has a legal right, under equitable principles of subrogation, to assert the legal claims of the injured third party in the name of the injured third party. In *Connecticut Mut. Life*, supra, based upon the holdings of the common law courts in *Yates* and *Sainsbury*, the court stated as follows:

> The cases in which insurers have been permitted to recover against the authors of these losses, are not in contravention of htese principles. They have recovered, not of their own legal right, *but under a general doctrine of equity jurisprudence, commonly know as the doctrine of subrogation,* applicable to all cases, wherein a party, who has indemnified another in pursuance of his

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> obligation to do so, succeeds to , and is entitled to a cession of, all the means of redress held by the party indemnified against the party who occasioned the loss…By virtue of this doctrine, there is no doubt of the right of an insurer, who has paid a loss, to use the name of the insured, in order to obtain redress from the author of the wrong; a right to be exercised for the party equitable entitled to its benefits, not to be enforced by its possessor in his own name, but by him as the successor to the remedies of the person whom he has indemnified. Having no independent claim on the wrong doer, he might be successfully met by the superior equities of the wrong doer. Nothing can be plainer than that an indirect liability of this kind is an argument rather against the claim of a direct responsibility to the wrong doer, than a suggestion in its favor. *Connecticut Mut. Life.*, supra, at 277-278.

Similarly, the court in *Rockingham*, supra, reached the same conclusion based upon the common law precedent in holding that an indemnifying plaintiff has no independent right or recovery against a defendant tortfeasor, but may only recover in the name of the injured party:

> "And the reason of the doctrine [of equitable jurisprudence, or subrogation] of the cases, in which it was held that an action may be maintained in the name of the owner, as the trustee of the insurer, who has paid the loss, against the wrong doer or party first liable as principal, is wholly inconsistent with the principle that the insurer [plaintiff] can in his own name recover for money paid. . . . in an action against the wrong doer. For the insurer and the assured being in effect one person, each cannot maintain an action at the same time, and for the same loss where there can be but one satisfaction. *Rockingham*, supra, at 256.

Accordingly, in the present action, the State had no right at common law, and consequently has no right now, to assert claims in its own name against the Defendants as tortfeasors for the harms Defendants allegedly caused to third party smokers, unless such claims are made in the name of each of the individually injured third party medicaid program recipients under the equitable doctrine of subrogation.

Modern Courts Have Adopted the Common Laws Rule Barring Recovery From Tortfeasors for Injuries to Third Parties

There are numerous federal and state cases illustrative of the fact that a plaitiff cannot recover from a defendant tortfeasor for harm levied upon third parties. As indicated by the United States Supreme Court in *Holmes v. Security Investor Protection Corporation*, 503 U.S. 258, 268, 112 S.Ct. 1311, 1318 (1992), the basis for any determination of a tortfeasor's liability for a wrongful act begins with whether the tortfeasor is the proximate cause of the plaintiff's injury, not merely the cause in fact. The Court asserts:

> Here we use proximate cause to label generically judicial tools to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." *Id*. quoting, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts*, § 41, p. 264 (5th ed. 1984).

The Court continues in stating:

> Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus a plaintiff who complained of harm flowing from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote distance to recover. *Id*. citing 1 J. Sutherland, *Law of Damages* 55-56 (1882).

Clearely, the Supreme Court merely reiterates the same principles espoused time and again in *Connecticut Mut. Lif.*, *Rockingham*, *supra*, and numerous other cases from the English Courts of Common Pleas by articulating the standard into what has modernly been known as proximate cause. It is almost universally and unequivocably conclusive in all jurisdictions that defendant and tortfeasors who cause harm to third persons are not the proximate cause of economic harms or increased expenses suffered by plaintiffs, regardless of the fact that such defendants may be the cause in fact of plaintiffs' losses. The Court articulates some of the policy reasons for this conclusion as follows:

> First the less direct an injury is, the more

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> difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors. Second, quite apart from problems of proving factual causation, recognizing claims of the complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely. *Id*. at 270, 1319, quoting in part, from *Associated General Contractors of Ca;., Inc. v. State Council of Carpenters*, 459 U.S. 519 (1983)

Accordingly, it is clear that for purposes of the case at bar, that federal and state courts follow the common law rule barring plaintiffs from recovering from defendant tortfeasors as a result of the defendants' injuries to third parties. In the absence of some special statute allowing recovery, the damages are deemed under the proximate cause analysis to be too remote and indirect for plaintiffs to recover. Therefore the State of Maryland cannot recover damages from Defendants' as a result of Defendants' alleged tortious conduct toward third party smokers in Maryland in the present action because the damages are too remote and indirect a consequence of the acts of the wrongdoers under both the common law of Maryland, as adopted from the common law of England, and pursuant to the modern day proximate cause analysis as often articulated by federal and state courts.

This does not mean that the Court is unmindful of the dilemma faced by the State and the magnitude of the harm which may have been caused by the defendants. Assuming the truth of all relevant facts as argued by the Plaintiff, it is clear that the State of Maryland has borne the tremendous burden of this health care crisis, in both lives and financial resources. Unfortunately, as Judge Berger aptly stated in her opinion dismissing the plaintiff's common law claims in West Virginia, without proper legal remedy, there exists no claim upon which relief can be granted.

In light of this Court's ruling on the issue of subrogation, there is no need to address Defendants' contention that all of the State's common law tort claims should be dismissed on independent grounds. Accordingly, the Court declines to address this issue.

III. Has the Plaintiff properly asserted a claim for restitution based upon unjust enrichment?

The State has not properly asserted a claim for restitution is actually a legal claim and not a claim in equity, thus relieving the State of the requirement to demonstrate the lack of an adequate remedy at law as a predicate to pursuing its cause of action. However, despite conflicting legal authority on the issue of whether or not an exclusive claim for money damages based upon unjust enrichment is legal or equitable, this Court finds that the State actually resolved the issue in the language it chose to use in drafting its Complaint. The State alleges as follows in Count Five, paragraph 215 of its Complaint:

> The State of Maryland is therefore entitled to restitution from Defendants for the benefits the State of Maryland conferred on them *and to the extent required by equity* to prevent Defendants' unjust enrichment as a result of their fraudulent and wrongful conduct.

Taken in light of the ordinary interpretation of words and phrases in context, in addition to the legal doctrine of construction known as ejusdem generis, the Court finds this language dispositive of the fact that the State *is* asserting an equitable claim for restitution based on unjust enrichment.

The State Must Show the Lack of An Adequate Remedy At Law

The State next contends that, even if its claim for restitution is equitable, it is not required to demonstrate lack of an adequate remedy at law because, in essence, a modern trend has developed such that the adequacy rule is no longer viable. *See Plaintiff's Memorandum in Opposition*, p. 22, n.5. However, the Court finds this argument unpersuasive. Though there are some instances wherein lack of an adequate remedy need not be shown to maintain a cause of action for unjust enrichment, the general principle adhered to in Maryland is that a plaintiff must demonstrate the lack of adequate legal remedy before seeking an equitable remedy. *Manning v. Potomac Electric Power Co*., 230 Md. 415, 422, 187 A.2d 468 (1963); *Klein v. Pepsico, Inc*., 845 F.2d 76, 80 (4th cir. 1988). No meritorious exception to the law exists in this case. The State is not pursuing an action in *quantum meruit*, it is not in direct or even implied privity with Defendants on the issue for which its equitable claim is being asserted and, as discussed below, the damages

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sought are recoverable in tort. *Yost v. Early*, 87 Md.App. 364, 589 A.2d 1291 (1991); *Mass Transit Admin. v. Granite Constr. Co*., 57 Md.App. 766, 471 A.2d 1121 (1984).

The Statutory Remedy of Subrogation is Not Inadequate

The Court is also unpersuaded by the State's claims that the remedy of subrogation, as mandated by the Maryland medicaid statute, is not an adequate remedy at law because bringing thousands of individual lawsuits would be procedurally impractical. The Court agrees that this procedure may be inconvenient and somewhat burdensome. But the mere fact that a legal remedy is inconvenient does not render it inadequate, so long as the remedy can still be granted at law. *Manning, supra*, at 422, 472 (1963).

In addition, as indicated by the State in its *Memorandum in Opposition* on page 26:

> Restitution developed 'as a series of innovations to fill gaps in the rest of the law.' Unjust enrichment lies when 'a defendant . . . enriches himself by means we condemn as unjust but for which we would not impose tort liability in the absence of enrichment. *Id*., *quoting from* Laycock, *The Scope and Significance of Restitution*, 67 Tex.L.Rev. 1277, 1284 (1989).

In the instant case, the State is not precluded from tort recovery in the absence of a claim for unjust enrichment. On the contrary, the State is pursuing numerous common law tort claims against Defendants for which the State can recover money damages from Defendants, if successful at trial. The fact that the State is required by statute to pursue its tort claims by means of subrogation does not alter the fact that the State is still able to pursue its claims. Consequently, there is an adequate remedy at law.

The State Has Not Sufficiently Alleged That It Conferred a Benefit Upon Defendants

Finally, the State alleges that it has conferred a benefit on Defendants by paying the staggering cost of medical treatment for medicaid recipients harmed by Defendants' tobacco products. The State claims that by sparing Defendants "the full political and social consequences as well as meeting the crippling expense of the public disaster [they] were creating" it conferred a benefit on Defendants as defined in the Restatement of Restitution § 1 comment b. *See Plaintiff's Memorandum in Opposition* at p. 27. The Court does not agree with this proposition.

The Restatement of Restitution § 1, comment b states in pertinent part:

> A person confers a benefit upon another if he . . . satisfies a debt of the other or in any way adds to the others security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the others from expense or loss. The word benefit therefore denotes any form of advantage. *Id*.

In order to sustain a cause of action for unjust enrichment in Maryland, a plaintiff must show:

> 1) a benefit conferred on the defendant by the plaintiff;
> 2) an appreciation or knowledge by the defendant of the benefit; and,
> 3) the acceptance or retention by the defendant of the benefit under circumstances that would make it inequitable for the defendant to retain the benefit without payment of its value.

Everhart v. Miles, 47 Md.App. 131, 136, 422 A.2d 28, 31 (1980); *Mass Transit Admin. v. Granite Constr. Co*., 57 Md.App. 766, 774, 471 A.2d 1121, 1125 (1984); *Kline v. Signet Bank*, 102 Md.App. 727, 731, 651 A.2d 442, 445 (1995). Defendants interpret these requirements to mean that the State must show that Defendants were legally liable for the health care costs of individual medicaid recipients; and that the State satisfied their legal obligation to those recipients by providing treatment to them under the medical assistance program. While this Court rejects Defendants' contention that the State must allege that defendants were legally liable to the individual medicaid recipients, the State must nevertheless allege a benefit conferred on Defendants that is not speculative in order to sustain a cause of action for unjust enrichment.

In Francis O. Day, Inc. v. Montgomery County, 102 Md.App. 514, 650 A.2d 303 (1994), a subcontractor attempted to recover from Montgomery County under the theory of unjust enrichment, the value of work he performed on the infrastructure of a building after the subdivision developer defaulted on its obligation to pay. The subcontractor based his claim in part on the fact that a Montgomery County statute required him to perform the work. In rejecting the subcontractor's claim and holding that he had not conferred a benefit on Montgomery County, the Court concluded:

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> Unjust enrichment is an equitable doctrine and is inapplicable where the plaintiff is an action fails to provide the proof necessary to establish the value of the benefit conferred upon defendant. *Id*. at 529, 316 [Citations Omitted]

According in the present case, bald assertions by the State that it theoretically spared Defendants thousands of individual lawsuits from medicaid recipients is too speculative and remote, without more, to constitute a benefit, knowingly acknowledged and accepted by Defendants, that would enable the State to recover under a claim of unjust enrichment. In addition, the Court notes that the courts in both California and Washington State reached similar conclusions on this issue. Consequently, without more, the State's complaint fails to properly assert a claim for restitution based upon unjust enrichment.

IV. Has the State properly asserted a cause of action pursuant to the Maryland Consumer Protection Act, found in Title 13 of the Maryland Commercial Law Code Annotated?

The State of Maryland has properly asserted a cause of action against Defendants pursuant to the Maryland Consumer Protection Act, found in Title 13 of Maryland Commercial Law Code Annotated. The legislature established the authority of the State, through the Office of the Attorney General, to pursue claims under the CPA in clear and unambiguous statutory language.

The State's Claims Are Consistent With Purposes of the CPA

Under the CPA, the State is entitled to pursue any and all causes of action that reasonably fall within the broad scope of the statute. *Consumer Protection Division Office of Attorney General v. Consumer Publishing Co.*, 304 Md. 731, 501 A.2d 48 (1985); *State v. Cottman Transmission Systems, Inc.*, 86 Md.App.. 714, 507 A.2d 1190 (1991), cert. Denied, 324 Md. 121 (1991); and *State v. Andrews*, 73 Md.App. 80, 89 n.7, 533 A.2d 282, 287 (1987).

In § 13-102 of the CPA, the legislature set forth its findings and purposes as follows:

> The General Assembly of Maryland finds that consumer protection is one of the major issues which confront all levels of government, and that there has been mounting concern over the increase of deceptive practices in connection with the sales of merchandise, real property, and services and the extension of credit. . . . It is the intention of this legislation to set certain minimum statewide standards for the protection of consumers across the State, and the General Assembly strongly urges that local subdivisions which have created consumer protection agencies at the local level encourage the function of those agencies at least to the minimum level set forth in the standards of this title. Md. Com.Law. Code Ann. §§ 13-102(a)(1), 13-102(b)(1).

The State's pursuit of its cause of action against the Defendants under CPA is consistent with the findings and purposes as established by the General Assembly.

The State Is A "Person" Within the Meaning of the CPA and Duly Authorized to Pursue its Claims

Defendants argue that the State is not a "person" within the meaning and intent of the Act and cite the ruling of the Superior Court in Washington for support on this issue. *See Defendants' Motion to Dismiss*, pg. 32 and *Reply Memorandum in Support of the Motion to Dismiss*, pg. 26, n.27. But the clear language of the Maryland CPA, as opposed to the Washington CPA, belies this proposition. The Maryland CPA defines "person" as: "an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint common interest, *or any other legal or commercial entity. Id*. at § 13-101(h).

The Washington CPA did not contain the clause italicized above. Black's Law Dictionary defines a legal entity as: "an entity, other than a natural person, who has sufficient existence in legal contemplation that it can function legally, be sued or sue, and make decisions through agents…" *Black's Law Dictionary*, 5th Ed. In light of the broad purposes of the Act as set forth by the General Assembly, the clear inclusion of the term "legal entity" in the definition of "person" , and the fact that the Office of the Attorney General is expressly charged with pursuing causes of action in court on behalf of the State and citizens of Maryland, this Court concludes without reservation that the State is a person within the meaning of the statute.

In addition, the CPA specifically authorizes the State to take appropriate action against persons who engage in unfair or deceptive trade practices, as defined in § 13-301 of the Act, in "the sale [or offer for] sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services." *Id*. at § 13-303. For purposes of the Motion to Dismiss, the

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State has properly pled its complaint that Defendants' engaged in unfair and deceptive trade practices in their sale of tobacco products in Maryland, in violation of the Maryland CPA.

The State Need not Be A Consumer to Assert Claims Under the CPA

Finally, contrary to Defendants' assertions, the State is entitled to seek injunctive relief, civil penalties, and damages under the Act, regardless of the fact that the State is not a consumer. Section § 13-408(a) sets forth the requirement for damages as follows:

> In addition to any action by the Division or Attorney General authorized by this title and any other action otherwise authorized by law, any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title. *Id*.

Thus, neither the State nor any other plaintiff is required to be a consumer in order to assert a cause of action for damages under the CPA. The State must merely allege that it has sustained an injury or loss as a result of Defendants' prohibitive conduct which, despite the difficulties of proof that may arise at trial, it has properly done in claiming that it lost millions of dollars due to the tortious acts of Defendants. In addition, the State is entitled to injunctive relief and civil penalties pursuant to §§ 13-406(a) and 13-410© of the Act.

Accordingly, this Court concludes that the State of Maryland has properly asserted its claims under the Maryland Consumer Protection Act, and is entitled to seek damages, injunctive relief, and civil penalties.

V. Does the Plaintiff have standing to seek equitable relief, civil penalties and treble damages for Defendants' alleged antitrust violations under the Maryland Antitrust Act, found in Title 11 of the Maryland Commercial Law Code Annotated?

The State of Maryland has standing to seek equitable relief, civil penalties, and treble damages for Defendants' alleged violations under the Maryland Antitrust Act. AS with the Maryland CPA, the legislature embodied its intent that the State have extensive authority to pursue causes of action under the MATA in clear and unambiguous statutory language.

The State's Claims Are Consistent With the Purposes of the MATA

In section 11-202 of the MATA, the legislature set forth the purpose of the Act as follows:

> The General Assembly of Maryland declares that the purpose of this subtitle is to complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest intrastate competition. . . . It is also the intent of the General Assembly that, in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition within the State, determination of the relevant market or effective area of competition may not be limited by the boundaries of the State. For the purpose and intent stated . . . this subtitle shall be liberally construed to serve its beneficial purposes. Md. Com.Law Code An.. §§ 11-202(a)(1), 11-202(b)(1).

The action filed by the State in the present case is consistent with the broad purposes set forth by the statute, as liberally construed pursuant to the requirements of the General Assembly.

The State Has Standing to Pursue Its Claims Under the MATA, Regardless of whether It Has Standing Under the Clayton Act

Defendants argue that, in accordance with the construction of the federal courts in interpreting sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, the State of Maryland lacks standing to pursue its claims under the MATA. Their contention is based upon the fact that (1) in accordance with the MATA, Maryland courts are to be "guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters" (§ 11-202(a)(2)) and; (2) pursuant to the interpretation of those federal statutes, the Supreme Court held in *Illinois Brick*, 431 U.S. 720, 97 S.Ct. 2061 (1977), and *Associated General Contractors*, *supra*, that indirect purchasers and plaintiffs at too remote a distance from the alleged antitrust violator cannot pursue claims under the Clayton Act. Defendants' reliance on these propositions is misplaced.

While § 11-202(a)(2) of the MATA does direct that Maryland courts are to be guided by the

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interpretation of federal courts construing federal antitrust statutes, it does not direct that Maryland courts are to be bound by them. On the contrary, § 11-202(a)(1) established that the MATA is intended to *complement* the body of federal law; a clear indication of the fact that the General Assembly anticipated circumstances under which federal legislation may not provide a sufficient remedy for potential antitrust violations. Hence, the MATA and comparable federal legislation cannot and should not always be read *in pari materia*. *Greenbelt Homes, Inc. v. Nyman Realty, Inc.*, 48 Md.App. 42, 426 A.2d 394 (1981); *Quality Discount Tires, Inc. v. Firestone Tire and Rubber Co.*, 282 Md. 7, 382 A.2d 867 (1978). Therefore, although Maryland tribunals should look to the decisions of federal courts for guidance where relevant and appropriate, it is clear that Maryland courts are not to be bound by those decisions in construing the MATA.

Thus, the proposition put forth by Defendants' that the holdings in Illinois Brick and Associated General Contractors, supra, bar the State of Maryland from asserting claims under the MATA, is without merit. Unlike the provisions drafted by Congress in § 4 of the Clayton Act, the provisions of § 11-209(b)(2)(ii) of the MATA make it absolutely clear that the Maryland legislature intended for the State to pursue causes of action against potential antitrust violators regardless of whether injuries sustained by the State were remote and regardless of whether or not the State dealt directly with the alleged violator. The Maryland statue provides as follows:

> The United States, the State, and any political subdivision organized under the authority of the State may maintain an action . . . for damages or for an injunction or both regardless of whether it dealt directly or indirectly with the person who has committed the violation. *Id*.

Consequently, the fact that the so called "indirect purchaser rule" may bar the State from asserting federal antitrust claims does not mean that the State is barred from asserting antitrust claims under the MATA. The State's claims are properly made and actionable under § 11-209(b)(2)(ii) of the MATA.

In accordance with the liberally construed purposes of the Act, the state has properly alleged in its complaint that Defendants engaged in prohibited conduct as defined in § 11-204 of MATA. Furthermore, the State is a person and has standing to maintain its cause of action pursuant to § 11-209(b)(2)(ii). Therefore, the State is entitled to seek injunctive relief, civil penalties, and treble damages under the Maryland Antitrust Act, in accordance with the clear and unambiguous language of the statute.

For the aforegoing reasons, it is this ____ day of _____, 1997 ORDERED that Defendants' Joint Motion to Dismiss as to:

> Count 1 - Violations of the Maryland Consumer Protection Act as to all Defendants is herewith DENIED.
>
> Count 2 - Violations of § 11-204(a)(1) Maryland Antitrust Act as to all Defendants is herewith DENIED.
>
> Count 3 - Violations of § 11-204(a)(2) of Maryland Antitrust Act as to all Defendants is herewith DENIED.
>
> Count 4 - Violations of § 11-204(a)(2) of the Maryland Antitrust Act as to all Defendants is herewith DENIED.
>
> Count 5 - Restitution based upon Unjust Enrichment is herewith GRANTED, with Leave to Amend.
>
> Count 6 - Breach of Voluntarily Undertaken Duty is herewith GRANTED, With Leave to Amend.
>
> Count 7 - Fraud and Deceit is herewith GRANTED, With Leave to Amend.
>
> Count 8 - Negligent Misrepresentation is herewith GRANTED, With Leave to Amend.
>
> Count 9 - Breach of Express warranty is herewith GRANTED, With Leave to Amend.
>
> Count 10 - Breach of Implied Warranty is herewith GRANTED, With Leave to Amend.
>
> Count 11 - Negligence is herewith GRANTED, With Leave to Amend.
>
> Count 12 - Strict Liability is herewith GRANTED, With Leave to Amend.
>
> Count 13 - Conspiracy is herewith GRANTED, With Leave to Amend.
>
> All Subject to the Further Order of the Court

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Judge Roger W. Brown

Signature appears on the original document only.

Roger W. Brown
Judge

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