

**COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
MIDDLESEX, ss.**

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

**PHILIP MORRIS INC., R.J. REYNOLDS TOBACCO
COMPANY, BROWN & WILLIAMSON TOBACCO
CORPORATION, B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY, LIGGETT
GROUP, INC., NEW ENGLAND WHOLESALE
TOBACCO CO., INC., ALBERT H. NOTINI & SONS,
INC., THE COUNCIL FOR TOBACCO RESEARCH -
U.S.A., INC., and THE TOBACCO INSTITUTE, INC.,**
Defendants.

Civil Action No. 95-7378

October 21, 1996

**DEFENDANTS' MOTION TO DISMISS THE
AMENDED COMPLAINT**

The undersigned defendants hereby move, for the reasons set forth in the accompanying memorandum of law, to dismiss the Amended Complaint in its entirety.

REQUEST FOR HEARING

Pursuant to Superior Court Rule 9A(c)(2), the undersigned defendants hereby request a hearing on Defendants' Motion to Dismiss the Amended Complaint.

Respectfully submitted,

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III. THE AMENDED COMPLAINT ALSO MUST BE DISMISSED ON GROUNDS SPECIFIC TO EACH CLAIM.

A. The Commonwealth's Fraud Claim in Count I Also Fails Because The Commonwealth Has Not Alleged Intended Reliance, Actual Reliance, Or Reasonable Reliance.

1. The Amended Complaint Does Not Allege That Defendants Intended To Induce The Commonwealth's Reliance Or That The Commonwealth Did In Fact Rely On The Alleged Misrepresentations Or Rely Reasonably.

2. The Allegation Of Fraud On The Market Adds Nothing To The Commonwealth's Fraud Claim And Highlights Its Failure To Plead Actual Reliance Or That Defendants Intended To Induce The Commonwealth To Rely.

B. The Commonwealth Also Has Not Adequately Stated A Special Duty Claim In Count II.

1. The Commonwealth Does Not Allege That It Suffered Physical Harm.

2. The Amended Complaint Does Not Allege That Defendants Assumed A Duty For The Benefit Of The Commonwealth.

3. The Amended Complaint Does Not Allege That Defendants' Conduct Increased The Risk Of Physical Harm To The Commonwealth.

4. There Is No Allegation That Defendants Recognized The Performance Of The Alleged Special Duty Was Necessary For The Protection Of The Commonwealth

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C. The Commonwealth's Breach Of Warranty Claim In Count III Also Must Be Dismissed Because It Is Barred By The Economic Loss Rule And Because The Commonwealth Lacks Standing To Bring A Claim Under G.L. C. 106, §2-318.

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1. The Commonwealth's Claim Baselessly Attempts to Extend Public Nuisance Law to Encompass Products Liability Suits.

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E. The Commonwealth's Claims For Restitution In Count V and Unjust Enrichment In Count VI Also Must Be Dismissed Because The Commonwealth Has An Adequate Remedy In Subrogation And Because Defendants Were Not Unjustly "Enriched" By The Commonwealth's Payment Of Recipients' Medical Expenses.

1. The Commonwealth Has An Adequate Remedy At Law That

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2. The Commonwealth Cannot Meet The Standard To Recover Under An Unjust Enrichment Theory Because, As A Matter Of Law, Its Medicaid Payments Did Not "Enrich" Defendants And There Is No "Injustice".

a. The Defendants Were Not "Enriched" By The Commonwealth's Payment of Individual Recipient Medical Expenses.

b. Any "Benefit" Conferred On Defendants By The Commonwealth's Payment of Individual Recipients' Medical Expenses Is Not Unjust.

3. The Commonwealth Cannot Satisfy The Elements Of A Restitution Claim Under Section 115 of the RESTATEMENT OF RESTITUTION.

a. The Commonwealth Does Not Plead That It Satisfied Defendants' Established Legal Obligation.

b. As A Matter Of Law, The Commonwealth Cannot Establish That Its Payment Of Individual Recipients' Medical Expenses Was "Immediately Necessary" To Protect The Public Health.

c. As A Matter Of Law, The Commonwealth Did Not Have An "Intent To Charge" Defendants When It Paid Medical Expenses For Individual Recipients.

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1. The Commonwealth's Claims Must Be Dismissed Because They Do Not Arise Out Of A Business Relationship With Defendants.

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3. The Commonwealth Lacks Standing To Assert Its Claim In Count VIII Under c.93A, § 9.

a. The Commonwealth Is Not A "Person" As That Term Is Used In § 9 And § 11

b. If The Commonwealth Is A "Person," Its Claim Would Arise, If At All, Under § 9, Not § 11.

4. The Commonwealth Is A1SQ Seeking Improper Retroactive Application Of c. 93A

G. The Conspiracy Count, Count IX, Also Must Be Dismissed Because Defendants Had No Peculiar Power Of Coercion Over The Commonwealth And The Commonwealth Does Not Allege That Defendants Intended To Do It Harm.

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RESTATEMENT OF RESTITUTION, § 115

The Commonwealth seeks to recover from defendants¹ more than \$1 billion in Medicaid and other payments it made on behalf of Massachusetts residents who allegedly suffered from "smoking-related" illnesses. The authorized means of seeking recovery of such medical expenses paid is a subrogation action, whereby the Commonwealth stands in the shoes of the injured recipient, and must prove that the defendant would have been *legally liable* to the injured recipient. *See* G.L. c. 118E, § 22 (authorizing the Commonwealth to proceed in subrogation to recover Medicaid expenses from a third party). Here, however, the Commonwealth has expressly eschewed its subrogation remedy and purports to assert a novel *direct* cause of action for its *own* alleged economic injuries. Amended Complaint ¶193.

The Attorney General's purported *direct* action is fatally defective on numerous grounds. *First*, each of his nine claims relies on the unprecedented and erroneous proposition that anyone who voluntarily pays the medical expenses of an injured person has a *direct* cause of action against an alleged third-party tortfeasor for reimbursement, *irrespective of whether the alleged tortfeasor would be liable to the injured party*. For at least 150 years, courts in Massachusetts and nationwide have expressly rejected such claims as

¹ This Memorandum is filed on behalf of defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., New England Wholesale Tobacco Co., Albert H. Notini & Sons, Inc., the Council for Tobacco Research - U.S.A., Inc., and the Tobacco Institute, Inc. As used herein, the term "defendants" refers to only those eight identified defendants.

too remote and indirect. The recent statutory enactments cited by the Attorney General (Amended Complaint ¶¶6, 193) do not alter this result. See Part I, pp. 3-11, *infra*.

Second, any *direct* cause of action the Commonwealth purports to have would be barred by the applicable statute of limitations. Since the Commonwealth purports to assert only *direct* causes of action wholly divorced from any rights of individual Medicaid recipients, the statute of limitations is triggered by the Commonwealth's *own* knowledge of the health risks of smoking, not the knowledge of particular recipients. The Commonwealth has publicly and repeatedly proclaimed, in judicially noticeable documents, for longer than any applicable statute of limitation before filing suit that smoking is addictive, causes death and disease, and increases the cost of medical care, and that defendants were the likely cause of its alleged *direct* injuries. Under any conceivably applicable statute of limitations, the Commonwealth's purported direct causes of action are therefore time-barred. See Part II, pp. 12-15, *infra*.

Third, in addition to the general defects described above, which require dismissal of the Amended Complaint in its entirety, the individual counts are also defective for the following reasons:

The fraud claim, Count I, fails because it lacks necessary "allegations of intended reliance, actual reliance, and reasonable reliance *by the Commonwealth*" (see Part III A, pp. 16-19, *infra*);

The special duty claim, Count II, fails because the Commonwealth does not allege (1) that the Commonwealth suffered physical harm, (2) that defendants undertook to provide services for the benefit of the Commonwealth, (3) that defendants' conduct increased the risk of physical harm to the Commonwealth, or (4) that defendants should have recognized that their "services" were necessary for the protection of the Commonwealth (see Part III B, pp. 19-24, *infra*);

The breach of warranty claim, Count III, fails because the Commonwealth did not suffer personal injury or property damage and its claim is therefore barred by the economic loss rule, and because the Commonwealth is not a person "affected by" the product at issue, as

required by G.L. c. 106, § 2-318 (see Part III C, pp. 24-26, *infra*);

The public nuisance claim, Count IV, fails because products liability claims do not constitute a claim for nuisance; because the Commonwealth has no right to monetary relief in a public nuisance claim; and because the Commonwealth did not sustain any of its alleged damages in the exercise of any public right (see Part III D, pp. 26-30, *infra*);

The restitution and unjust enrichment claims, Counts V & VI, fail because the Commonwealth has an adequate remedy at law-statutory subrogation; because Commonwealth voluntarily joined the Medicaid program and paid recipients' medical expenses; and because defendants (who had no legal duty to pay Medicaid recipients' medical expenses) were not "enriched," unjustly or otherwise, by the payments made by the Commonwealth (see Part III E, pp. 31-39, *infra*);

The c. 93A claims, Counts VII & VIII, fail because the Commonwealth's alleged injuries do not arise out of any business relationship between it and defendants; because the Commonwealth may not recover its *own* damages, as opposed to restorative damages for consumers, under § 4; because the Commonwealth lacks standing to proceed under § 9; and because c. 93A does not apply to conduct prior to its effective date (see Part III F, pp. 39-45, *infra*);

The conspiracy claim, Count IX, fails because the Commonwealth does not allege, and could not, as a matter of law, establish, that defendants had a peculiar power of coercion that resulted in harm to the Commonwealth; and because the Commonwealth does not allege that defendants intended to harm the Commonwealth (see Part III G, pp. 45-49, *infra*).

ARGUMENT

I THE COMMONWEALTH'S CLAIMS DEPEND ON AN UNPRECEDENTED THEORY

BEYOND ANY ESTABLISHED SCOPE OF LIABILITY AND MUST BE DISMISSED.

By asserting a "direct" action (and thereby hoping to avoid the defenses defendants would have to a subrogation action), the Commonwealth attempts to stretch and distort legal theories far beyond their limits. In each of its damage claims, the Commonwealth is trying to establish liability on a the theory that: (1) defendants allegedly tortiously inflicted personal injury upon Massachusetts Medicaid recipients and (2) as a result of the alleged personal injuries to the individual recipients, the Commonwealth allegedly incurred economic losses by paying the injured recipients' medical expenses through the Medicaid program.² The Commonwealth has specifically stated, however, that it is not seeking to recover in subrogation for the recipients' personal injuries, which would require proof of defendants' tort liability to individual recipients. To the contrary, although the Commonwealth's alleged economic damages are entirely *derivative* of the recipients' personal injuries, the Commonwealth insists that it is entitled to assert "direct" claims.³ Such claims are not only unprecedented, but inconsistent with 150 years of jurisprudence rejecting such claims as too remote and indirect.

A. The Commonwealth's Claims Are Inconsistent With Well-Established Principles Forbidding A Direct Action By A Plaintiff Who Pays The Medical Expenses Of An Injured Person And Seeks To Recover Them From A Defendant Who Allegedly Caused The Injuries.

The Commonwealth is asking the Court to reject a well-settled principle of Anglo-American jurisprudence: "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a

² The vast majority of the medical expenses the Commonwealth seeks to recover in this action were paid under the Medicaid program. The Commonwealth also seeks to recover, however, certain payments made under the CommonHealth program. For simplicity and convenience, defendants will use the term "Medicaid" to refer to payments made under, or recipients of, either program

³ In arguing in federal court that this case should be remanded here, the Commonwealth expressly disclaimed reliance on any theory of subrogation:

This is a direct action by the Commonwealth against the defendants.... This action is not brought on behalf of individual cigarette smokers, nor are the Commonwealth's claims premised upon an 'assignment' to the State of the rights of individual smokers, or upon any theory under which the State is subrogated to rights of individual smokers.

Memorandum of Law in Support of Commonwealth of Massachusetts' Motion to Remand at 5. Parsigian Aff. ¶9

third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) (citing 1 J. Sutherland, *LAW OF DAMAGES* 55-56 (1884)).

'[A]s a matter of policy, it must be recognized that tort liability cannot be extended without limit.' The court must carefully limit the situations in which a defendant may be liable to persons indirectly affected by injuries negligently inflicted on third persons. Otherwise, society's exposure to the threat of financial ruin will be intolerable. 'The problem for the law is to limit the legal consequences of wrongs to a controllable degree.'

Norman v. Massachusetts Bay Transp. Auth., 403 Mass. 303, 305 (1988) (citations omitted).

This principle highlights the fundamental deficiency of each of the Commonwealth's claims. In seeking to recoup health care costs, the Commonwealth stands in the same position as would an insurer, employer, friend, charity, or any other entity that pays a tortiously injured person's medical expenses. The law is clear that the payor may not recover in a direct action against the alleged tortfeasor.

1. Longstanding Massachusetts Case Law Bars the Commonwealth's Claims.

Massachusetts law furnishes one of the leading cases on the subject: *Anthony v. Slaid*, 11 Met. (52 Mass.) 290 (1846). The plaintiff had contracted to support at his own risk all the poor of a town in sickness and in health. When the defendant's wife committed assault and battery on one of the paupers, the plaintiff sued for his increased medical expenses in supporting the pauper. In an opinion of Chief Justice Shaw, the court unanimously denied recovery:

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 the defendant's wife, but by means of the special contract by which he had undertaken to support the town paupers. *The damage is too remote and indirect.* If such a principle be admitted, we do not see why the consequence would not follow . . . that in a case where an assault is committed, or other injury is done to the person or property of a town pauper, or

of an indigent person who becomes a pauper, the town might maintain an action, with a *per quod*, for damages. *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 (emphasis added).)

Similarly, in *Chelsea Moving & Trucking Co. v. Ross Towboat Co.*, 280 Mass. 282 (1932), the plaintiff, an employer, sued the defendant in negligence for causing injury to one of the plaintiff's employees. The employer was obligated by contract to pay the employee's regular salary during the period of disability, and the employee, who already had won a lawsuit against the defendant, had not sought recovery for impaired earning capacity or lost wages. Nevertheless, relying on *Anthony*, the court (Rugg", C.J.) held that "[t]he damage sustained by the plaintiff is too remote from the wrong committed by the defendant and has no natural connection with it." *Id.* at 284. The court rejected the employer's claim, stating that the employer's injury "does not arise from any relation between the plaintiff and the defendant." *Id.* at 285.

Together, these cases demonstrate that, when a plaintiff seeks to recover in a direct action for purely economic harm resulting from the defendant's tortiously causing a personal injury to a third person, Massachusetts courts deny recovery because the harm is too remote. This rule applies regardless whether the harm to the third party is intentional, such as the assault and battery in *Anthony*,⁴ or negligent, such as the claim in *Chelsea Moving*.⁵ Moreover, *Anthony* is explicit that the rule -- that the payor of medical expenses of an indigent person to whom a tortfeasor has caused personal injury is not entitled to recover such expenses from the tortfeasor -- applies regardless whether the plaintiff is a private person or a governmental entity.

⁴ See also *Mobile Life Insurance Co. v. Brame*, 95 U.S. 754, 758 (1877) (life insurer denied recovery from tortfeasor who killed insured); *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Me. 253, 257 (1855) (insurer could not maintain action against defendant for malicious damage to the insured's property).

⁵ One legal principle embodying the remoteness concern is proximate causation, which is an element of each of the Commonwealth's common-law and statutory claims. See, e.g., *Whittaker v. Saraceno*, 418 Mass. 196, 198-199 (1994) (negligence); *Fernandes v. Union Bookbinding Co.*, 400 Mass. 27, 37 (1987) (breach of warranty); *Kohl v. Silver Lake Motors, Inc.*, 369 Mass. 795, 800-801 (1976) (c. 93A); *Willett v. Herrick*, 242 Mass. 471, 482-483 (1922) (conspiracy); W. Page Keeton, PROSSER & KEETON ON TORTS, § 110 at 767 (5th ed. 1984)(fraud).

Recent Massachusetts case law confirms this conclusion. In *Freetown v. New Bedford Wholesale Tire, Inc.*, 384 Mass. 60 (1981), a town sought to recover in negligence, public nuisance, and misrepresentation for costs of fighting a fire on the defendants' land. The complaint alleged that defendants' negligent dumping of tires on the land and their fraudulent representations to town boards about their use of the land had prevented the town from taking necessary precautions and had resulted in increased firefighting costs. In affirming the dismissal of the town's complaint on both common-law and statutory theories of recovery, the Court said:

There seems to be no authority for common law recovery by a town of its expenses in fighting a fire. No claim is made for fire damage to town property of a type that would give rise to damage liability to a private owner for negligence or nuisance. Expense incurred by the town in extinguishing a fire on private land stands on a different footing. Once a town establishes a fire department. . . the fire chief has 'charge of extinguishing fires in the town and the protection of life and property in case of fire.' Safeguards against fire are maintained 'for the benefit of the public and without pecuniary compensation or emolument.' (*Id.* at 61 (citations omitted).)

Like the town of Freetown, the Commonwealth has asserted claims for increased costs sounding in negligence (special duty), public nuisance, and misrepresentation, but the Commonwealth is not claiming that it suffered any damage to its *own* property as a result of defendants' conduct. Rather, the Commonwealth's claim, like the town of Freetown's, is to recover the cost of benefits it voluntarily provided to private individuals. Once the Commonwealth makes the voluntary decision to join the Medicaid program (or to establish its own health care program), it commits to pay covered medical expenses of eligible persons, and (like the town in *Freetown*) the Commonwealth has no direct right to recover such payments.

2. Courts Throughout The Nation Have Held That No One Who Pays Another's Medical Expenses (Whether Governmental Entity, Employer, or Insurer) Has A Direct Right Of Recovery Such As The Commonwealth Is Asserting Here.

Allowing the Commonwealth to proceed with a direct cause of action here would open the door for

employers, insurers, charities, and others to recover for economic harm whenever a tortfeasor causes physical injury to someone for whom they pay medical expenses. Yet, as *Chelsea Moving* demonstrates, an employer may not recover against a tortfeasor who injured his employee and thereby caused economic loss (at least absent an intentional interference with the employer-employee contract).⁶ Longstanding law across the nation also makes clear that an insurer has no such right of action.

In *Connecticut Mut. Life Ins. Co. v. New York & N.H. RR. Co.*, 25 Conn. 265 (1856), for example, the Court rejected the insurer's suit to recover \$2000 paid under a life insurance policy to the widow of a man alleged to have been killed due to the railroad's negligence. *Id.* at 265-67. The insurer's injury was "a remote and indirect consequence of the [railroad's] misconduct." *Id.* at 276-77. Where insurers had been permitted to recover from tortfeasors, they had done so "not by color of their own legal right, but under . . . subrogation." *Id.* at 277.⁷ As the court stated, recognizing a direct cause of action would raise the specter of unlimited liability, since "rarely is a death produced by a human agency, which does not affect the pecuniary interest of those to whom the deceased was bound by contract." *Id.* at 275.

Similarly, in *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Me. 253 (1856), the Maine Supreme Judicial Court affirmed dismissal of an insurance company suit, in its own name, against a defendant for maliciously setting fire to a building insured by the company. And in *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754 (1878), a diversity case, the United States Supreme Court rejected the plaintiff insurer's suit to recover a life insurance payout from the person who allegedly murdered the insured:

The relation between the Insurance Company and McLemore, the deceased, was created by a contract between them, but Brame [the alleged murderer] was no party to a contract. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to

⁶ Although economic damages may be recoverable when the defendant inflicts physical injury upon a third party for the purpose of preventing him from entering into or performing a contract with the plaintiff, there is nothing in the Amended Complaint remotely resembling an allegation that defendants sought to prevent recipients from entering into or performing a contract with the Commonwealth.

⁷ The insurance company apparently could not recover under the doctrine of subrogation, because the common law did not recognize a cause of action for wrongful death. 25 Conn. at 272-75. The latter common-law rule has been abolished by statute in most states.

injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. (*Id.* at 758-59 (citing, *inter alia*, *Connecticut Mut. Life, Boshier*; and *Anthony*).)

The Court went on to state, "[W]e are not cited to any case in this country or Great Britain where a different doctrine has been held." *Id.* at 759.

Other authorities have made unmistakably clear that, because of the remoteness of the injury, an insurer has no right to recover directly from a tortfeasor.⁸ The insurer's sole remedy is subrogation: "[I]n the absence of grounds for subrogation, insurance companies have been denied recovery for losses due to negligent injury to persons or property which they have insured" W. Page Keeton, PROSSER & KEETON ON TORTS, § 129 at 999 (5th ed. 1984) (footnotes omitted) (hereafter "PROSSER").

These rules denying employers and insurers the right to sue in a direct action based on the defendant's alleged tort inflicting personal injuries on a third person apply equally well when the plaintiff is a governmental body. *See, e.g., United States v. Standard Oil Co.*, 332 U.S. 301, 302 (1947) (where federal government sued a tortfeasor to recover medical expenses paid on behalf of a soldier injured in a collision with a truck, the Court refused to "create a new substantive legal liability without legislative aid and as an act of [federal] common law"); *Anthony v. Slaid*, 11 Met. (52 Mass.) at 291.

The only state supreme courts to consider whether a state or an insurer has a direct common-law right of action to recover Medicaid and other payments

⁸ *See, e.g., Economy Auto Ins. Co. v. Brown*, 334 Ill. App. 579, 79 N.E.2d 854 (1948) (insurance company which settled liability claim against its drunk-driving insured could not recover those costs from the person who sold liquor to the insured; the insurer's injuries were too "remote and indirect"); *Fidelity & Casualty Ins. Co. v. Sears, Roebuck & Co.*, 124 Conn. 227, 233-36, 199 A. 93, 95-96 (1938) (neither insurance company nor employer could bring a direct action to recover medical expenses paid to injured employee; injury was too remote); *St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Philadelphia*, 55 Ark. 163, 18 S.W. 43, 47 (1891) ("In this case the insurance company is not entitled to recover, if at all, in its own legal right, but under the equitable doctrine of subrogation . . ."); *Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333, 336-37 (1865) (rejecting claim that insurance company could bring a direct action in its own name against a tortfeasor who injured the insured; insurer is limited to subrogation rights); *see generally* 1 J. Sutherland, THE LAW OF DAMAGES 56 (1884) ("An insurance company cannot recover from a wrongdoer, who causes the loss insured against, the money paid to satisfy such loss.").

for recipients allegedly injured by smoking have concluded that no such right exists. In *Agency for Health Care Administration v. Associated Industries of Florida*, 1996 WL 350163 (Flat June 27, 1996), the Florida Supreme Court ruled that, in the absence of a special statute passed in 1994, the state *would not have had a direct cause of action*.⁹ Similarly, the Minnesota Supreme Court in *State of Minnesota v. Philip Morris Incorporated*, 551 N.W.2d 490 (Minn. 1996), rejected common-law claims by Blue Cross against the tobacco companies to recover medical expenses paid for smokers. The Court held that the injury asserted by Blue Cross "is simply too remote" to be recoverable in a direct action. *Id.* at 495.¹⁰ In rejecting Blue Cross's direct tort claim, the court relied heavily on *Northern States Contracting Co. v. Oakes*, 191 Minn. 88, 253 N.W. 371 (1934), a remoteness case that followed *Anthony* and its progeny. 191 Minn. at 90-91, 253 N.W. at 371-372.

B. Massachusetts Statutory Enactments Confirm That The Commonwealth Has No Direct Action Here.

The history of Massachusetts statutes

⁹ The Florida court considered constitutional challenges to the special 1994 statute that explicitly purported to authorize the state Medicaid system to bring a direct cause of action to recover alleged smoking-related health care expenditures from the tobacco manufacturers regardless of whether the manufacturers were legally liable to individual Medicaid recipients. Before addressing those challenges, however, the court analyzed the legal basis for the lawsuit and agreed with the defendants that, before the 1994 statute, the state was limited to traditional notions of subrogation, assignment, and lien and would face the same legal obstacles that the Medicaid recipient would face in pursuing a claim. 1996 WL 350163 at *7. Relying on this ruling in a suit by the state of Florida against tobacco companies, a Florida trial court dismissed all of the state's damage claims based, alternatively, on the common law or a 1990 Florida statute. *State of Florida v. American Tobacco Co.*, No. CL 95-1466 AH, slip op. at 2 (Flat Cir. Ct. Sept. 6, 1996). The Massachusetts Legislature recently declined to adopt a statute modeled on the 1994 Florida statute. 1995 Sen. Doc. No. 985.

¹⁰ Blue Cross's injury was inescapably derivative in nature: While, as Blue Cross notes, duty arising from the same facts may in some instances be owed to more than one entity, here the injury to Blue Cross appears to derive from injuries to its consumers, the smokers. While the tobacco companies may have indeed made promises to public health authorities regarding research and support of public health, the breach of those promises resulted in increased costs to Blue Cross only because its consumer-patients remain more seriously addicted to nicotine for longer periods of time, thus requiring more medical care. (*Id.* at 495). The same is true of the Commonwealth's alleged injuries here.

relating to the Commonwealth's ability to recover against third parties for Medicaid expenses provides further confirmation that the Commonwealth has no direct rights of action of the kind alleged in the Amended Complaint. As *Anthony* shows, the Commonwealth has never had a common-law right to recover in a "direct" action against a tortfeasor because it paid the medical expenses of an individual allegedly harmed by the tort. The Commonwealth also has no common-law right of subrogation against the tortfeasor. First, under Massachusetts common law, an insurer who paid medical benefits to an insured does not thereby acquire an implied right of subrogation against a tortfeasor who injured the insured. *Frost v. Porter Leasing Corp.*, 386 Mass. 425, 429 (1980). Second, Massachusetts courts have long recognized the principle that "[a] volunteer has no rights of subrogation." *United States Fidelity & Guaranty Co. v. N. J.B. Prime Investors*, 6 Mass. App. Ct. 455, 460 (1978) (collecting cases).

In 1969, the Commonwealth chose voluntarily to join the federal Medicaid program, St. 1969, c. 800, § 1. See *Shweiri v. Commonwealth*, 416 Mass. 385, 388 (1993) (noting that Commonwealth "chose" to participate in Medicaid). At that time, the state statutory scheme did not provide the Commonwealth with any remedy against a tortfeasor for medical expenses paid under the Medicaid program as a result of alleged tortious conduct. It was not until 1977 that the Commonwealth first enacted a statute providing for a right of subrogation under state law, St. 1977, c. 363A, § 52.

If at the time of this 1977 enactment the Commonwealth already had its own right to sue third parties directly for Medicaid expenses -- apart from the rights of recipients -- there would have been no need for the 1977 statute creating the more limited right of subrogation. And after the 1977 enactment, subrogation was the Commonwealth's exclusive remedy. "Where a statute creates a new right and prescribes the remedy for its enforcement, the remedy prescribed is exclusive." 3 N. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 57.18 at 46 (5th ed. 1992).

Finally, although the Commonwealth refers in the Amended Complaint (¶¶193, 194) to two recent statutes enacted in 1994 and 1995¹¹ as supposed "statutory authority" for bringing its suit, these statutes cannot be fairly construed as effecting any

¹¹ The two new statutes cited in Amended Complaint ¶¶193, 194, are St. 1994, c. 60, § 276, and St. 1995, c. 38, § 131 (amending G.L. c. 118E, § 22). Each was an "outside section" of an appropriations bill.

substantive change in preexisting law. For example, the new statutes cannot be construed as dispensing with the settled requirements that the Commonwealth (1) identify each individual recipient for which it seeks to recover medical expenses (which the Commonwealth has not done) and (2) prove that identified defendants have tort liability to each such recipient (which the Commonwealth has disclaimed any intent to do): "A statute should not be interpreted to 'require a radical change in established public policy or in the existing law [if] the act does not manifest any intent that such a change should be effected.'" *Cousineau v. Laramee*, 388 Mass. 859, 862 (1983) (citation omitted). See *Commonwealth v. Germano*, 379 Mass. 268, 273 (1979). Here, neither of the new statutory provisions on its face purports to create or define elements of any "new" substantive right of action in favor of the Commonwealth, and the Amended Complaint does not plead any distinct count asserting such a "new" substantive right. To the contrary, the Commonwealth's counts are limited to common-law and statutory causes of action that predated enactment of the two new statutes.

In addition, the two new statutes operate prospectively because (among other things) they contain no expression of legislative intent that they operate retroactively. See *Shelby Mut. Ins. Co. v. Commonwealth*, 420 Mass. 251, 257 (1995) ("[u]nless the legislative intent is unequivocally to the contrary, a statute operates prospectively, not retroactively.") (citation omitted). The new statutes therefore apply only to conduct that occurred after their respective effective dates, St. 1994, c. 60, § 276 (effective July 1, 1994) and St. 1995, c. 38, § 131 (effective July 1, 1995).¹² The Commonwealth makes only minimal allegations concerning wrongful conduct after July 1, 1994 and does not and cannot link that conduct to any of the alleged injuries for which it seeks recovery here.¹³

¹² This is especially so since the Massachusetts Legislature recently declined to adopt a statute modeled after the 1994 Florida statute, which would have, among other things, provided for limited retroactive application. See n.9, *supra*.

¹³ Construing the statutes as effecting a substantive change in preexisting law would also raise troubling state constitutional questions. For example, construing the two new statutes as operating retroactively -- particularly in the absence of any expression of legislative intent -- would violate the due process and separation of powers protections of the state constitution. In addition, the Commonwealth's derivative lawsuit attempts to aggregate into one proceeding a large number of factually distinct claims that would not be suitable for class treatment under conventional standards, see *Castano v. American Tobacco Co.*, 84 F.3d 734, 746-51 (5th Cir. 1996) (decertifying a nationwide class consisting of all nicotine-dependent persons . . . who have purchased and smoked cigarettes manufactured by the defendants"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1084-85 (6th Cir. 1996) (decertifying class in a products liability action involving allegedly defective

II. EACH OF THE COMMONWEALTH'S PURPORTED DIRECT CAUSES OF ACTION IS BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS.

The Amended Complaint focuses principally on alleged misconduct from the 1950's through the 1980's. The applicable statutes of limitations bar the Commonwealth's purported *direct* claims because, by its own admission in judicially noticeable documents, the Commonwealth was on notice of its claims prior to filing suit for a period of time longer than any applicable statute of limitations.¹⁴ The Commonwealth cannot avoid this result by responding that accrual of its claims should be assessed on a recipient-by-recipient basis because that ignores the *direct* nature of the Commonwealth's purported claims. The Commonwealth cannot have it both ways. If it seeks to assert its own direct causes of action, "separate and independent" (Amended Complaint ¶193) from the rights of Medicaid recipients, then it must be held to the consequences of its own knowledge, not the knowledge of the recipients. And any Medicaid payments made after the Commonwealth was on notice of its potential claims merely reflect continuing damages from the original alleged tort. See, e.g., *Kirley v. Kirley*, 25 Mass. App. Ct. 651 (1988) (claim time-barred even though effects of tort continued into the limitations period); *Maslauskas v. United States*, 583 F. Supp. 349, 351 (D. Mass. 1984) (statute of limitations

prostheses), and the elimination of these important procedural protections raises a significant constitutional issue. Cf. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (noting that the "abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause"). As a third of many possible examples, recognizing the Commonwealth's new theory would raise the possibility of defendants being held liable twice -- once to the Commonwealth and once in a tort action by a Medicaid recipient -- for exactly the same medical expenses. Imposing double liability for the same alleged damage would violate the due process protections of the Massachusetts Constitution. That the Commonwealth's novel rewriting of Massachusetts law raises such difficult constitutional concerns presents an additional reason for this Court to decline the invitation to engage in such innovation.

¹⁴ As discussed below, the Commonwealth was on notice of its claims at least by 1988, but did not file suit until December 1995. The Commonwealth's fraud, special duty, warranty, nuisance, and conspiracy claims are governed by a three-year statute of limitations. G.L. c. 260, § 2A; G.L. c. 106, § 2-318. The c. 93A claims are governed by a four-year limitations period. G.L. c. 260, § 5A. The Attorney General has publicly stated that he is seeking damages going back six years. Even if the six-year limitations period for contract actions (G.L. c. 260, § 2) could somehow be applied, the Commonwealth's purported direct claims would still be time-barred because the Commonwealth was on notice of its claims more than seven years before filing suit.

not tolled by continuing effects of the original tort).¹⁵

A. The Court Can Take Judicial Notice Of The Commonwealth's Public Declarations About Smolndg And Health On A Motion To Dismiss.

Although this is a motion to dismiss, the Court may take judicial notice of "public records or indisputably authentic public documents" without converting it into a motion for summary judgment. *See, e.g., Branch v. FDIC*, 825 F. Supp. 384, 398 n.8 (D. Mass. 1993); *see also Commonwealth v. Trumble*, 396 Mass. 81 (1986) (court took judicial notice of federal and state legislative reports containing statistics on the harm caused by drunk drivers). While there are numerous public documents that reflect the Commonwealth's long-standing knowledge of the facts underlying its purported direct claims, defendants ask this Court to take judicial notice in particular of two public documents submitted herewith: *The Massachusetts Plan for Nonsmoking and Health* (the "1988 Plan"), which was published by the Massachusetts Department of Public Health in *September 1988*, and an *amicus* brief (and Addendum) filed by the Commonwealth in the Supreme Judicial Court in November 1989 in *Kyte v. Philip Morris Incorporated*, No. SJC-5 165 ("1989 Amicus Brief"). These documents are attached to the Affidavit of Kenneth J. Parsigian, as Exhibits 1, 2 & 3, which is submitted herewith.¹⁶

B. The Commonwealth Was On Notice Of Its Claims For Longer Than The Applicable Statutes Of Limitations Before It Filed Suit.

Under Massachusetts law, a cause of action accrues once the plaintiff has "(1) knowledge or sufficient notice that she was harmed and (2) knowledge or sufficient notice what the [likely] cause of the harm was." *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 208 (1990). Actual knowledge of the specific cause of an injury is not required to trigger accrual of a cause of action. *White v. Peabody Constructzon Co.*, 386 Mass. 121, 130 (1982); *Hanson Housing Auth. v. Dryvit Systems, Inc.*, 29 Mass. App. Ct. 440, 446 (1990). "The plaintiff need not know the extent of the injury or know that the defendant was negligent for the cause of action to accrue." *Williams v. Ely*, 423 Mass. 467, 473

(1996). Once a plaintiff has sufficient notice of an injury and its likely cause, "the potential litigant has the duty to discover from the legal, scientific and medical communities whether the theory of causation is supportable and whether it supports a legal claim." *Lareau v. Page*, 840 F. Supp. 920, 925 (quoting *Fidler v. E.M. Parker Co.*, 714 F.2d 192, 199 (1st Cir. 1983)), *aff'd*, 39 F.3d 384 (1st Cir. 1994). Moreover, a plaintiff must take the consequences of a failure to investigate, and "should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance." *Melrose Housing Auth. v. Dryvit Systems, Inc.*, 402 Mass. 27, 34-35 (1988) (quoting *Fulcher v. United States*, 696 F.2d 1073, 1077 (4th Cir. 1982)).

Here, the Commonwealth had virtually the same notice of its purported *direct* claims against defendants in 1988 as it has today, yet did not file suit for more than seven years -- well beyond the three and four year statutes of limitations that apply (see n. 13, *supra*). The Commonwealth has long had sufficient notice of the harm it alleges here because it publicly proclaimed in the 1988 Plan (1) that it was "established" "[a]lmost half a century" earlier that smoking causes "chronic bronchitis, emphysema and cancer, . . . heart and blood vessel damage, [and] strokes and birth defects;" (2) that "the fact that nicotine is a drug as addictive as cocaine or heroin was established;" (3) that smoking is the "leading cause of preventable death and disease in Massachusetts resulting in 8,500 deaths each year;" and (4) that smoking "places a heavy economic burden on the state's economy and the "costs of caring for smoking related illnesses are estimated to be \$847 million per year." Parsigian Aff. Ex. 1, at 1, 4. The Commonwealth has also long had sufficient notice that defendants were the likely cause of their alleged harm because it declared in the 1988 Plan that defendants were "Merchants of Death" who promoted their products with "misleading" and "dishonest" advertising, and that "[t]obacco manufacturers refuse to acknowledge that their products cause disease and operate aggressive marketing programs throughout the state to dissuade smokers from quitting and encourage young persons to take up the practice." *Id.* at 4, 17 Similarly, in the 1989 Amicus Brief, the Commonwealth told the Supreme Judicial Court not only that smoking causes death, disease, and addiction, but also that Philip Morris used deceptive marketing, promotion, and distribution, and "designed" Marlboros to "produce dependence" and to deliver a "highly addictive" substance. Parsigian Aff. Ex. 3, at 15-24.

It is no answer for the Commonwealth to now claim that it was not *fully* aware of defendants' alleged

¹⁵ Nor can the Commonwealth claim that the statutes of limitation were tolled by fraudulent concealment. *See, e.g., Maloney v. Brackett*, 275 Mass. 479, 484 (1931) ("A cause of action cannot be said to be concealed from one who has personal knowledge of the facts which create it.") (quoting *Sanborn v. Gale*, 162 Mass. 412, 414 (1894)).

¹⁶ Other public documents that reflect the Commonwealth's long-standing knowledge of the facts underlying its claims are also attached to the Parsigian Aff. as 5, 6, 8-15.

wrongful conduct, or of the *magnitude* of its increased medical costs, by 1988 because defendants supposedly concealed such information. The statute of limitations starts to run even *before* the plaintiff has begun paying the costs it seeks to recover or knows that the defendant engaged in any wrongdoing. The Supreme Judicial Court's decision earlier this year in *Williams v. Ely*, 423 Mass. 467, 473 (1996), is instructive. In the 1970's the defendant attorneys incorrectly advised the plaintiff trust beneficiaries that they could disclaim their contingent interests under family trusts without liability for federal gift tax when the correct advice at the time would have been that the law was unsettled. Relying on the advice, the beneficiaries disclaimed their interests. In December 1984, however, the plaintiffs were advised that the United States Supreme Court had decided a case effectively determining that the plaintiffs would have to pay the gift tax. The plaintiffs paid the tax in 1986. The trial court ruled that the plaintiffs first learned of their *potential* claim in December, 1984 and that the statute of limitations thus began to run at that time. The Supreme Judicial Court agreed, stating: "[T]he statute of limitations began to run when the plaintiffs reamed or should reasonably have reamed that they had gift tax obligations, and not later when they paid their gift taxes and the precise measure of harm caused by the defendants was fixed." *Id.* at 474475. The statute began to run, in other words, when the plaintiffs became aware that they were likely to incur an obligation to pay money, and were therefore on notice that the attorneys' advice *may have been* incorrect. The statute began to run even though defendants had not yet paid the money, and did not know when or how much they would pay or whether the attorneys had in fact engaged in wrongdoing.

By analogy, the Commonwealth's claims accrued at least by the time it became aware that it was *likely* to incur medical expenses for treating "smoking-related" illnesses and addiction *it* believed were caused by defendants' conduct. The statute began to run regardless whether the Commonwealth had not yet paid all of the money it would ultimately pay and did not know when or how much it would have to pay. In fact, the present case is far stronger than *Williams* because here the Commonwealth publicly declared in the 1988 Plan and 1989 Amicus Brief not only that defendants' conduct was the likely cause of its alleged injuries but also that defendants had engaged in nefarious wrongdoing.

III. THE AMENDED COMPLAINT ALSO MUST BE DISMISSED ON GROUNDS SPECIFIC TO EACH CLAIM.

A. The Commonwealth's Fraud Claim in Count I Also Fails Because The Commonwealth Has Not

Alleged Intended Reliance, Actual Reliance, Or Reasonable Reliance.

To establish a fraud claim under Massachusetts law, the plaintiff must plead and prove "that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff [reasonably] relied upon the representation as true and acted upon it to [its] damage." *Kilroy v. Barron*, 326 Mass. 464, 465 (1950) (citations omitted). *See Robichaud v. Owens-Illinois Glass Co.*, 313 Mass. 583, 585 (1943); *Forbes v. Thorpe*, 209 Mass. 570, 577-578 (1911) (reliance must be reasonable); *see generally* J. Nolan & L. Sartorio, TORT LAW, §§ 144-145 (2d ed. 1987). Yet, the Commonwealth does not and cannot assert that any of defendants' alleged misrepresentations or omissions was intended to induce reliance or actually did induce reliance *by the Commonwealth* or that the Commonwealth reasonably relied. At most, the Commonwealth has alleged that defendants "defrauded" individual smokers, an irrelevant allegation here because the Commonwealth has renounced any intention of asserting the individual recipients' purported rights.

1. The Amended Complaint Does Not Allege That Defendants Intended To Induce The Commonwealth's Reliance Or That The Commonwealth Did In Fact Rely On The Alleged Misrepresentations Or Rely Reasonably.

The Commonwealth does not plead any of the reliance elements of a fraud claim under Massachusetts law. First, the Amended Complaint fails to allege that defendants specifically intended to induce *the Commonwealth* to rely upon their supposed misrepresentations, that defendants had "reason to expect [*the Commonwealth* to] act or refrain from action in reliance upon the misrepresentation," or that *the Commonwealth* suffered pecuniary loss through its "justifiable reliance in the type of transaction in which [defendants] intend[ed] or ha[d] reason to expect [*the Commonwealth's*] conduct to be influenced." *See* RESTATEMENT (SECOND) OF TORTS § 531 (1977). *See also* J. Nolan & L. Sartorio, TORT LAW § 144 at 246 (2d ed. 1987). Instead, the Amended Complaint attempts to circumvent these required elements of a fraud claim by asserting or implying that defendants' alleged misrepresentations were addressed not to the Commonwealth, but to "the public" or "citizens of the Commonwealth" or "consumers." *See, e.g.,* Amended Complaint ¶197 ("[d]efendants represented to *citizens of the Commonwealth* that they would discover and disclose all material facts") (emphasis added); *id.*

¶203 ("[d]efendants sought to induce *the public's* reliance....") (emphasis added); *id.* ¶205 ("[t]he facts concealed by defendants ... were material in that a reasonable *consumer* would have considered them important....") (emphasis added); *id.* 1206 "[c]itizens of *Massachusetts, and the public* at large, collectively, through the market, reasonably relied on defendants' ... representations") (emphasis added). Those allegations cannot sustain the Commonwealth's purported *direct* action, however, because "[o]ne cannot maintain an action of deceit merely by acting upon a representation that was not directed to him." *Robichaud v. Owens-Illinois Glass Co.*, 313 Mass. 583, 586 (1943).

Second, the Amended Complaint contains no allegation that the Commonwealth in fact did act, or refrain from acting, in reliance on defendants' purported misrepresentations. Finally, since there is no allegation that the Commonwealth actually relied, *a fortiori* there is no allegation that reliance was reasonable.

2. The Allegation Of Fraud On the Market Adds Nothing To The Commonwealth's Fraud Claim And Highlights Its Failure To Plead Actual Reliance Or That Defendants Intended To Induce The Commonwealth To Rely.

In a cryptic paragraph in Count I, ¶204, the Commonwealth alleges a "fraud on [the] market for cigarettes in Massachusetts," which "was a substantial cause persuading *citizens* of the Commonwealth to purchase and use a deadly and addictive product" (emphasis added). A transparent substitute for an allegation that defendants intended to induce the Commonwealth to rely and that the Commonwealth actually did rely, this paragraph says nothing about the *Commonwealth's* purchasing cigarettes, relying upon the price of cigarettes, participating in the cigarette market, or having otherwise been defrauded because of an alleged fraud on the market. Therefore, the allegation adds nothing to the Commonwealth's fraud claim. It merely highlights the Commonwealth's inability to allege its own actual reliance or defendants' intent to induce the Commonwealth's reliance.

Beyond this, the fraud on the market doctrine is irrelevant here. First, no Massachusetts court deciding a fraud case has ever adopted a fraud on the market doctrine *in any context*. Second, the limited fraud on the market doctrine that has developed in federal securities cases is wholly irrelevant in the product liability context of the present case.¹⁷ *See*

¹⁷ Even in the securities context, all but one of the federal decisions applying Massachusetts law reject the fraud on the

Basic, Inc. v. Levinson, 485 U.S. 224, 241-249 (1988). The premise of the doctrine is that securities markets are highly efficient and incorporate information rapidly, and that securities traders may be presumed to rely on the securities *price* as incorporating all relevant information bearing upon such *price*; *id.* at 241-247; therefore, in a case based on a claim that the *price* was artificially inflated or deflated, reliance may be presumed. *Id.* at 248-249. That premise has no relevance here whatsoever because, among other reasons, consumers do not act in reliance on the presumption that the *price* incorporates all available information about the qualities, characteristics, or health risks associated with a consumer product like cigarettes.¹⁸

B. The Commonwealth Also Has Not Adequately Stated A Special Duty Claim In Count II.

Massachusetts recognizes special duty, or "good Samaritan," liability under the principles set forth in the RESTATEMENT (SECOND) OF TORTS § 323:

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

market theory. *See Mallozzi v. Zoll Medical Corp.*, 1996 WL 392146, pg. 11 (D. Mass. March 5, 1996); *Van De Velde v. Coopers & Lybrand*, 899 F. Supp. 731 (D. Mass. 1995); *Rand v. Cullinet Software, Inc.*, 847 F. Supp. 200, 214 (D. Mass. 1994); *In re Bank of Boston Corp. Securities Litigation*, 762 F. Supp. 1525, 1536 (D. Mass. 1991) ("Investors may not invoke fraud on market as substitute for actual reliance."); *Tolan v. Computervision Corp.*, 696 F. Supp. 771,772 (D. Mass. 1988) (plaintiff required to show actual reliance, not fraud on the market, to survive directed verdict motion). *But see Hurley v. FDIC*, 719 F. Supp. 27, 34, n. 4 (D. Mass. 1989) (limiting fraud on the market to securities-type markets).

¹⁸ Thus, courts have rejected attempts to apply fraud on the market outside the securities context. *See Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994) (refusing to apply the theory to the real estate market because "[t]he real estate market, unlike the stock market, is not a well-developed market in which the price of a building reflects all publicly available information,"); *Rosenstein v. CPC International*, 1991 WL 1783 (E.D. Pa. 1991) (rejecting application of fraud on the market to a claim for fraud in the advertising of a food product); *Strauss v. Long Island Sports, Inc.*, 401 N.Y.S. 2d 233 (N.Y. App. Div. 1978) (rejecting application of a fraud on the market theory to the market for basketball tickets).

See *Davis v. Westwood Group*, 420 Mass. 739, 746 n. 12 (1995) (quoting § 323) (emphasis added). The special duty count must also be dismissed for the separate and independent reasons that the Commonwealth does not plead any of the required elements as they pertain to the Commonwealth's purported direct action. Pleading deficiencies aside, the special duty count also fails because, as a matter of law, the Commonwealth cannot establish that defendants voluntarily assumed any duty to the Commonwealth as a result of advertising or other public statements.

1. The Commonwealth Does Not Allege That It Suffered Physical Harm.

One who assumes a "special duty" is liable only for *physical harm* to the plaintiff. *Davis*, 420 Mass. at 746 n. 12. Defendants deny that they assumed any duty to the Commonwealth, but the Court need not reach that question because the Commonwealth clearly does not (and could not) plead that it suffered physical harm. The Commonwealth attempts to circumvent the physical harm requirement by alleging that defendants "increased the risk of harm to the public." Amended Complaint ¶ 212. But any alleged physical harm to the public is irrelevant here because the Commonwealth has forsaken its subrogation rights and claims to be suing in its own right to recover its own economic damages. Far from alleging that it suffered physical harm, the Commonwealth makes clear that it seeks to recover purely economic losses: "Defendants' failure to use due care in performing the duty they voluntarily undertook . . . has increased . . . the cost of health care for the Commonwealth." *Id.* (emphasis added). Such pecuniary harm is not physical harm and is not recoverable in a special duty claim.

2. The Amended Complaint Does Not Allege That Defendants Assumed A Duty For The Benefit Of The Commonwealth.

"Good Samaritan" liability, as the name suggests, applies only to one who is acting to benefit another. Yet the Commonwealth nowhere alleges that defendants assumed any duty *for the benefit of the Commonwealth*. In fact, the Commonwealth alleges precisely the opposite:

Defendants undertook to render such services in order to protect cigarette sales and to control the material information disseminated to the market about their product....

Defendants intended to protect profits by controlling the public information about smoking and health Although

the unlawful actions described herein *were done to benefit the conspirators*, the natural and necessary consequence thereof was the prejudice of the Commonwealth and the public in the form of public subsidy and provision of health care and health-related services and oppression of smokers.

Amended Complaint ¶¶211, 256 (emphasis added). Such alleged self-serving conduct is the antithesis of acting as a "good Samaritan," and, as the Supreme Judicial Court has ruled, does not constitute the voluntary assumption of a duty.

In *Wheatley v. Peirce*, 354 Mass. 573 (1968), the plaintiff was a passenger in an automobile driven by the defendant and was injured in an accident. The defendant did not dispute that his negligence had caused the accident. *Id.* at 575. Instead, the defendant claimed that he had gratuitously agreed to drive the car for the benefit of the plaintiff and therefore was liable only for gross negligence under Massachusetts special duty law. *Id.* The Court acknowledged that if defendant had acted gratuitously to benefit the plaintiff he would be liable only for gross negligence. *Id.* at 575-76. The Court found, however, that the defendant had acted for his *own benefit*¹⁹ and therefore, "as a matter of law, did not undertake to confer any benefit on" the plaintiff, and the special duty rule did not apply. *Id.* at 576-77.

The Supreme Court of Michigan reached the same conclusion more directly in *Smith v. Allendale Mut. Ins. Co.*, 410 Mich. 685, 303 N. W. 2d 702 (1981). Employees injured by fires in the workplace sued their employer's insurer claiming that by routinely inspecting the premises the insurer had assumed a duty to the employer, which it should have recognized was necessary for the protection of the plaintiffs. 410 Mich. at 704-05, 303 N.W.2d at 705-06. The Court ruled that the plaintiffs could not satisfy "the threshold requirement of an undertaking to render services to another" because they could not show that the insurer "had agreed or intended to benefit the insured or its employees by the inspections." 410 Mich. at 705, 716, 303 N.W.2d at 706, 711 (emphasis added). The Court held that "the rule stated in [RESTATEMENT] § 324A by its terms does not apply to an actor following a self-serving course of conduct." 410 Mich. at 717, 303 N.W.2d at 711.

¹⁹ Both the defendant and the plaintiff were car enthusiasts. The defendant was driving the plaintiff's car, a Daimler, which the defendant had never before seen. 354 Mass. At 574.

3. The Amended Complaint Does Not Allege That Defendants' Conduct Increased The Risk Of Physical Harm To The Commonwealth;

The Commonwealth's sole allegation concerning this essential component of a special duty claim is that defendants' alleged breach of duty "has increased the risk of *harm to the public* and increased the *cost of health care for the Commonwealth*." Amended Complaint ¶187. In other words, the Commonwealth seeks to base its alleged *direct* cause of action on the alleged increased risk of harm *to the public*. The Commonwealth cannot have it both ways. If the Commonwealth sues in subrogation, it may as subrogee assert the alleged increased risk of physical harm to the Medicaid recipients in whose right it sues; but if it seeks to pursue its purported *direct* action, the Commonwealth must assert an increased risk of physical harm to *itself*. Because the alleged increased "cost of health care" to the Commonwealth plainly does not constitute an increased risk of physical harm to the Commonwealth, the special duty claim must be dismissed.

4. There Is No Allegation That Defendants Recognized The Performance Of The Alleged Special Duty Was Necessary For The Protection Of The Commonwealth.

To recover in special duty, one must show that the defendant recognized that performance of the alleged duty was "necessary for the protection" of the plaintiff's "person or things." *Davis*, 420 Mass. at 746 n. 12 (quoting RESTATEMENT § 323). Once again the Commonwealth seeks to avoid the consequences of its purported *direct* cause of action by alleging that defendants "undertook to render such services recognizing that they were necessary for the protection of the *public* health." Amended Complaint ¶210. Because the Commonwealth does not allege that defendants recognized that performance of their alleged special duty was necessary for the protection *of the Commonwealth*, the special duty claim must be dismissed. See *Fireman's Fund Ins. Co. v. Kelly*, 1989 WL 149282 (D. Mass. 1989), *aff'd*, 926 F.2d 84 (1st Cir. 1991) (no special duty assumed as a result of defendant's inspection of roofing work where plaintiff also regularly inspected the work and defendant therefore had no reason to know its inspections were "necessary" for the protection of the plaintiff); *Arvanis v. Noslo Engineering Consultants, Inc.*, 739 F.2d 1287, 1291 (7th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985) (no special duty because plaintiff "need not have

passively relied on the [defendant] to protect their rights").²⁰

5. As A Matter Of Law, Defendants Did Not Voluntarily Assume Any Duty To The Commonwealth.

Finally, as a matter of law, defendants simply did not assume any duty to the Commonwealth. The Commonwealth alleges that defendants assumed a duty to research the health effects of smoking and to disclose that research. Amended Complaint ¶185. According to the Commonwealth, defendants assumed this duty by virtue of their advertising and other public statements including, notably, the so-called "Frank Statement," a paid advertisement published in newspapers nationwide in 1954. Amended Complaint ¶¶53-58, 62-67. Because the Attorney General has stretched the special duty doctrine so far from its roots, there are few cases on point, but no case anywhere supports the Attorney General's theory that one can assume a special duty through advertising or other public statements. Indeed, the two courts that have addressed special duty claims against cigarette manufacturers have ruled that advertising generally, and the "Frank Statement" in particular, did *not* trigger special duty liability -- even to an individual smoker.

In *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987), the plaintiff sued both cigarette and asbestos manufacturers, as well as the Tobacco Institute, alleging that the synergistic effects of smoking cigarettes and working with asbestos had caused him to develop lung cancer. Among other claims, the plaintiff sought to impose special duty liability on the tobacco defendants based on the "Frank Statement" and on the Tobacco Institute's Articles of Incorporation, which stated that its corporate purpose was "to collect and disseminate information . . . and scientific and medical material relating to tobacco." *Id.* at 1156. The federal court ruled that, as a matter of law, neither promises made in advertising nor statements of corporate purpose suffice to create special duty liability:

Neither the Tobacco Institute's corporate purposes nor the American Tobacco Company's general statements in

²⁰ Although the Commonwealth alleges that defendants assumed a special duty to conduct and disclose research on smoking's effects on health, the judicially noticeable facts set forth in the Parsigian Affidavit, Exhibits 5-15 make clear that the Commonwealth did not rely on defendants, research, but itself conducted extensive research into the health risks of smoking. Thus, as in *Fireman's Fund*, there was no reason for defendants to recognize that their research was "necessary" for the protection of the Commonwealth.

advertising constitute an assumption of a duty to plaintiff to perform research and inform him of the dangers of cigarette smoking. The Pennsylvania courts have not yet extended "good Samaritan" liability to companies for failure to comply with corporate purposes or promises made in advertising. (*Id.* at 1157.)

A federal district court in New Jersey reached precisely the same conclusion, without discussion, in *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1495 (D.N.J. 1988).

C. The Commonwealth's Breach Of Warranty Claim In Count III Also Must Be Dismissed Because It Is Barred By The Economic Loss Rule And Because The Commonwealth Lacks Standing To Bring A Claim Under G.L. C. 106, § 2-318.

The Commonwealth's breach of warranty claim also fails for two additional, independent reasons.

1. The Economic Loss Rule Bars The Warranty Claim.

First, the economic loss rule bars the claim. The rule bars "recovery for economic losses in tort-based strict liability or negligence cases absent personal injury or physical damage to one's property." *Garweth Corp. v. Boston Edison Co.*, 415 Mass. 303, 305 (1993) (contractor could not recover for oil spill from defendant's tanks which migrated to sewer where contractor was working and caused costly construction delays). *See FMR Corp. v. Boston Edison Co.*, 415 Mass. 393, 395 (1993) (no recovery in negligence or breach of warranty for interruption of investment business caused by power outage). A breach of warranty claim arising out of personal injuries is tort-based. *Bay State-Spray & Provincetown Steamship Co. v. Caterpillar Tractor Co.*, 404 Mass. 103, 108-110 (1989). The Commonwealth alleges that defendants marketed a defective and unreasonably dangerous product to users and consumers which allegedly injured certain persons who incurred medical expenses which the Commonwealth paid through the Medicaid program. Amended Complaint ¶¶217, 220.

The Commonwealth does not assert that it had any contractually or even commercial relationship with defendants. Rather the Commonwealth in Count m seeks to impose strict liability based on an allegation that defendants' breach of warranty caused individuals' personal injuries, which in turn caused the Commonwealth to suffer an economic loss, the claim is tort-based. Because the Commonwealth does not

assert any personal injury or physical damage to *itself*, the economic loss rule bars the warranty claim.

2. The Commonwealth Is Not A Proper Plaintiff On A Warranty Claim.

Second, the Commonwealth is not a proper plaintiff under Massachusetts' breach of warranty statute. A plaintiff can recover for breach of warranty only if it either purchased the goods or "was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods." G.L. c. 106, § 2318. The Commonwealth does not allege that it purchased, used, or consumed cigarettes.

Furthermore, the Commonwealth does not allege and obviously could not show that it was a person whom the defendants "might reasonably have expected to . . . be affected by the goods." The Commonwealth does not allege that it "actually [came] in contact with the goods." H. Alperin & R. Chase, CONSUMER RIGHTS AND REMEDIES, § 72 at 167 (1979). When contact is merely indirect, courts have denied recovery. For example, *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327, 338 (1983), involved negligence and breach of warranty claims for emotional distress and resulting death sustained by a mother of a passenger killed in an airplane crash that defendants allegedly caused. Rejecting the emotional distress claim where the mother's injuries were reasonably foreseeable, but she had not been physically present to perceive the injury to her son, the Court stated: "We think that the Legislature, in enacting G.L. c. 106, § 2-318, did not intend that recovery be allowed in all cases where the injury is reasonably foreseeable." *Id.* at 339. It would be "consistent with legislative intent" to impose the same limits on the scope of liability under both the negligence and breach of warranty theories, and "the class of plaintiffs would be unreasonably large" if liability were expanded to include persons such as the decedent. *Id.* at 343.

Here the Commonwealth was not a foreseeable plaintiff. More important, even if it were reasonably foreseeable that cigarettes would "affect" the Commonwealth, that would not be enough; the considerations underlying cases such as *Anthony*, *Chelsea Moving*, and *Cohen* still require dismissal. After all, under the Commonwealth's theory, any goods sold to Medicaid recipients could lead to implied warranty claims by the Commonwealth; any manufacturer could expect that its product might malfunction and injure a purchaser for whom the Commonwealth might pay Medicaid benefits. There is nothing to suggest that the Legislature in enacting § 2-318 intended warranty liability to stretch so far.

Similarly, insurers, employers, and others who pay injured persons' medical expenses are "affected" by allegedly defective products in exactly the same sense that the Commonwealth claims to have been "affected" by cigarettes. Yet such insurers, employers, and others have no action for breach of warranty.

D. The Commonwealth's Public Nuisance Claim In Count IV Also Must Be Dismissed Because Products Liability Claims Do Not Constitute A Nuisance Because The Commonwealth Has No Right To Monetary Relief For Public Nuisance; And Because The Commonwealth Was Not Injured In the Exercise Of A Public Right.

The Commonwealth's nuisance claim also fails for three additional, independent reasons.

1. The Commonwealth's Claim Baselessly Attempts to Extend Public Nuisance Law to Encompass Products Liability Suits.

The Commonwealth's fourth claim, while entitled "Public Nuisance," is in reality nothing more than a potpourri of its fraud, special duty and warranty claims, and its allegations simply do not state the elements of public nuisance claim.²¹ The RESTATEMENT (SECOND) OF TORTS defines public nuisance as an "unreasonable interference with a right common to the general public" which is "collective in nature and not like the individual right that everyone has not to be . . . defrauded or negligently injured." § 821B and comment g. Because the only right at stake here is the individual right "not to be defrauded or negligently injured," there is no public nuisance.

In essence, the Commonwealth has simply recast a products liability claim for defective design and failure to warn as a public nuisance claim. But no court anywhere has extended the public nuisance doctrine to include products liability claims, because such claims depend on duties running to product users, not the public at large. *E.g.*, *Boston v. Keene Corp.*, No. 82254 (Suffolk County Superior Court, July 17, 1991), *aff'd sub nom. Boston v. United States Gypsum Co.*, 37 Mass. App. Ct. 253 (1994) (Parsigian Aff., Exhibits 22 & 23); *Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 & n.4 (7th Cir. 1989) (dismissing nuisance claim and noting there were no "cases holding manufacturers liable for public or

private nuisance arising from the use of their product subsequent to the point of sale"); *Tioga Public School Dist. v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (absence of cases applying nuisance law to products liability claims supports inference that nuisance law was not intended to apply to such claims). This Court should not be the first to do so.

In *Keene Corp.*, the only Massachusetts court to consider the question flatly rejected the plaintiff's attempt to transform a products liability claim into a claim for public nuisance. There, the plaintiff had alleged that:

as a result of defendants' negligent, intentional and ultra-hazardous conduct and/or omissions, asbestos materials are present in plaintiffs' public schools and public buildings, which defendants have wrongfully refused and failed to abate, and which constitute a continuing threat to the health and well being of the public . . . (Parsigian Aff., Ex. 21 at 19).

The Court granted the defendants' motion for a directed verdict from the bench on the ground that the facts as alleged did not "conform to the types of activities which in the Commonwealth of Massachusetts have been found to be nuisances." Parsigian Aff., Ex. 22 at 137; Ex. 23 at 324. To rule otherwise would convert every products liability suit into a nuisance claim, obviate the need for plaintiffs to meet elements of proof required in tort and warranty law, and turn nuisance into "a monster that would devour in one gulp the entire law of tort." *Tioga Public School Dist. v. United States Gypsum Co.*, 984 F.2d at 920.²²

Because the case's true nature is a products liability claim, it is not surprising that the Commonwealth also cannot demonstrate another fundamental element of a public nuisance claim: that the activity caused harm while within the defendant's control. The health injury alleged by the Commonwealth occurred, if at all, once the product was in the control of individual consumers. Nuisance law does not provide a cause of action under such circumstances. *See, e.g., Turner v. Oxford*, 338 Mass. 286 (1959) (town may be liable for a nuisance where it controls the land in question to the exclusion of all

²¹ The Commonwealth alleges that defendants "manufacture, promotion, advertising and sale" of tobacco products "in a manner calculated to mislead the public about the health consequences of smoking and cause addiction in the majority of smokers" constitute a public nuisance. Amended Complaint ¶¶223-24.

²² Nuisance law is notoriously difficult to define, and nuisance claims are frequently the last resort of a plaintiff with a meritless case. As one treatise describes it, a nuisance claim is frequently "a substitute for any analysis of a problem; the defendant's interference with the plaintiffs interests is characterized as a 'nuisance,' and there is nothing more to be said." PROSSER, § 86 at 616-17 (5th ed. 1984).

others); *Catino v. Sorrentino*, 288 Mass. 89 (1934) (owner of land not liable for nuisance unless caused by agencies under his control); *Manchester v. National Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986) (rejecting nuisance claim because of insufficient proof that defendants were in control over the instrumentality, a "basic element of the tort of nuisance"); *Johnson County v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984) ("as an elementary principle of tort law, a nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality").

2. The Commonwealth Has No Right To Monetary Relief For A Public Nuisance.

The Commonwealth asserts that it has "been required to expend substantial sums of money . . . abating the public nuisance" and "has suffered and will continue to suffer substantial injuries and damages for which [it] is entitled to recover." Amended Complaint ¶¶225, 226. While it is unclear whether the Commonwealth seeks to recover alleged abatement costs, damages, or both, the law on this issue is crystal clear: the Commonwealth is not entitled to any monetary relief for public nuisance. *Freetown v. New Bedford Wholesale Tire, Inc.* 384 Mass. 60 (1981). Accord RESTATEMENT (SECOND) OF TORTS, § 821C and comment j; PROSSER, § 90 at 643.

In *Freetown*, as discussed at page 6, *supra*, the town alleged that the defendants had created a nuisance and fire hazard on land in the town, which caused the town to incur greater expenses than usual or necessary in fighting the resulting fire. The Supreme Judicial Court's holding that *Freetown* had no common-law recovery for its abatement costs (firefighting costs) in public nuisance, is equally applicable to the Commonwealth's claims for its so-called abatement costs (medical expenses paid) here.

Just as *Freetown* did not assert an injury to its person or property, the Commonwealth has not asserted an injury to its person or property, and the economic loss rule bars the nuisance claim.²³ Moreover, just as the town was obliged to provide firefighting services "for the benefit of the public and

²³ Massachusetts allows recovery in public nuisance for purely economic losses only in highly limited circumstances. In *Stop & Shop Cos. V. Fisher*, 387 Mass. 889, 894 (1983), the Supreme Judicial Court held:

In public nuisance claims we now decide that, absent physical harm or immediate or direct loss of access to the plaintiff's property, relief is warranted only where the plaintiff has suffered special pecuniary harm and substantial impairment of access.

The narrow exception to the economic loss rule recognized by the Court has no application here.

without pecuniary compensation or emolument" once it opted to establish a fire department under G.L. c. 48, § 42, so too was the Commonwealth obliged to provide Medicaid benefits for the public benefit once it voluntarily chose to participate in the Medicaid program.

3. The Commonwealth Was Not Injured While Exercising A Public Right.

Finally, even if the Court should find that the Commonwealth may pursue monetary relief for public nuisance, the Commonwealth could recover only if it incurred its alleged damages while exercising the public right alleged to be the subject of the interference. RESTATEMENT § 821(C)(1); PROSSER, § 91 at 645; *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950 (R.I. 1994); *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1984). The Commonwealth does not allege that it incurred damage while in the exercise of its right to be free from unwarranted injury, disease and sickness -- the "public right" alleged in the Amended Complaint, 1224. (Indeed, it requires extreme mental gymnastics even to conceptualize the Commonwealth as having such a right.)

Hydro-Manufacturing is instructive. There, the plaintiff sought to recover damages for contaminated land. The Supreme Court of Rhode Island, citing the RESTATEMENT, held that "because Hydro's harm was not suffered in the exercise of a right common to the general public, Hydro lacks standing to pursue a public nuisance action." *Hydro-Manufacturing*, 640 A.2d at 957:

The public right that has been interfered with by the contamination of the land is the right to pure water. Hydro did not allege that it suffered special damages stemming from Kayser-Roth's interference with Hydro's . . . right to pure water . . . Hydro, rather, maintained that it suffered pecuniary harm in the forfeiture of the land. The CERCLA action that resulted in forfeiture of the land was brought against Hydro because of Hydro's status as current owner of the contaminated land. Therefore, the alleged damages suffered by Hydro were in Hydro's exercise of its private-property right, not in the exercise of a public right. (*Id.*) The Commonwealth has alleged that it has incurred costs paying for the health care expenses of certain smokers as a result of its voluntary participation in the federal Medicaid program (Amended Complaint 116, 193-94), not in the exercise of any right to be free from unwarranted injury, disease, and sickness. Like the plaintiff in *Hydro-Manufacturing*, the Commonwealth has merely alleged that it has incurred pecuniary damages, and accordingly, its nuisance claim

must be dismissed.

E. The Commonwealth's Claims For Restitution In Count V and Unjust Enrichment In Count VI Also Must Be Dismissed Because The Commonwealth Has An Adequate Remedy In Subrogation And Because Defendants Were Not Unjustly "Enriched" By The Commonwealth's Payment Of Recipients' Medical Expenses.

Because the Commonwealth has no direct common-law claim against defendants, and the Attorney General has forsaken the Commonwealth's statutory subrogation remedy, the Attorney General resorts in his unjust enrichment and restitution claims to an amorphous appeal to equity. But equitable relief is unavailable if there is an adequate remedy at law, and the Commonwealth does have an adequate remedy at law -- statutory subrogation. The equitable claims should also be dismissed for the independent reason that, as a matter of law, the Commonwealth's payment of Medicaid recipients' medical expenses did not "enrich" or confer any benefit upon defendants because the Commonwealth has not alleged -- and disclaims any intent to prove -- that defendants were legally liable to each individual recipient whose medical expenses it seeks to recover.

1. The Commonwealth Has An Adequate Remedy At Law That Precludes Equitable Relief.

One of the most venerable principles of equity is that "a bill in equity cannot be maintained to obtain precisely what the plaintiff can secure by an action at law." *Spector v. Loreck*, 342 Mass. 685, 687 (1961); see *Infusaid Corp. v. Internedics Infusaid, Inc.*, 739 F.2d 661, 668 (1st Cir. 1984) (Mass. law) ("[If there is an adequate remedy at law, equitable relief is unavailable"). Yet that is exactly what the Attorney General seeks to do here. The relief the Commonwealth seeks in its restitution and unjust enrichment claims is reimbursement of Medicaid expenses for illnesses allegedly caused by smoking. Amended Complaint 11193, 229, 234. But the Commonwealth could have pursued the same relief in law under G.L. c. 118E, § 22, which provides in relevant part as follows:

The Commonwealth shall be subrogated to a claimant's entire cause of action or right to proceed against any third party and to a claimant's claim for monies to the extent of the assistance provided under this Chapter.

Presumably, the Commonwealth ignored its statutory subrogation remedy because it felt it would

be less "convenient" to pursue each individual recipient's case separately and to prove that defendants were in fact liable to any individual recipient. But the relative convenience of a legal remedy does not define its legal inadequacy or entitle the plaintiff to equitable relief. Rather, a legal remedy is inadequate only if it provides relief different in kind from the relief sought in equity. See 1 D. Dobbs, REMEDIES, § 2.5(1), at 126. *Spector v. Loreck* illustrates the principle.

In *Spector*, the plaintiff sought equitable relief against two leaders of a union. Although the plaintiff had a legal remedy, he would have been required in a suit at law to join all the members of the union as parties. Although less convenient, the legal remedy was "adequate," and the Court upheld dismissal of the suit:

The only ground for equitable jurisdiction asserted by the plaintiff is that there is no adequate remedy at law, presumably because at law all the members of the association would have to be made parties. This ground is not good, because it has been held that in such a case there is an adequate remedy at law. In *Maguire v. Reough*, 238 Mass. 98, 100 (1921), where the precise point was involved, it was said, "If the plaintiff desires to hold each of . . . [the union members] liable, there is nothing inequitable in requiring that each should have due notice and an opportunity to defend Undoubtedly the necessity of joining all the members as defendants at law makes the expense of process greater than in equity, where a number of defendants may be made parties defendant as representative of the class.... But that does not constitute a subject for equity jurisdiction.... (342 Mass. at 647.)

Federal courts applying Massachusetts law have expressly ruled that statutory reimbursement remedies, like those available to the Attorney General here, are adequate remedies at law that preclude equitable claims for unjust enrichment and restitution. In *One Wheeler Road Associates v. Foxhoro Co.*, 843 F. Supp. 792, 799 (D. Mass. 1994), the plaintiff sought cleanup costs and damages pursuant to CERCLA and G.L. c. 21E. The plaintiff also brought claims for unjust enrichment and restitution. *Id.* at 799. The court rejected the unjust enrichment and restitution claims because the statutory reimbursement remedy was "adequate":

Wheeler's claims for cleanup costs under CERCLA and Mass. Gen. Law Chapter 21E § 4 are the statutory equivalent at law of the equitable claims sought to be asserted by Wheeler in count m.[unjust enrichment claim and restitution claim] Since Wheeler has an adequate remedy at law for the damages that might be awarded for unjust enrichment and restitution, no independent equitable claim will lie.

Id.; accord *Commonwealth v. Pace*, 616 F. Supp. 815, 822 (D. Mass. 1985) ("[B]ecause the court has found the Commonwealth has an adequate remedy at law under c. 21E and 1978 Mass. Act chapter 407, we dismiss its claim of unjust enrichment.").

Finally, the Attorney General's legal remedy under G.L. c. 118E, § 22, is not "inadequate" merely because the Commonwealth might ultimately lose on the merits. In *Ben Elfinan and Son, Inc., v. Criterion Mills, Inc.*, 774 F. Supp. 683, 687 (D. Mass. 1991), for example, the court granted summary judgment against the plaintiff on his statutory antitrust claims yet still rejected plaintiff's unjust enrichment claim because of the "adequate remedy" provided by the antitrust laws. *Id.* at 687. In other words, the legal remedy was adequate even though the plaintiff lost.

2. The Commonwealth Cannot Meet The Standard To Recover Under An Unjust Enrichment Theory Because, As A Matter Of Law, Its Medicaid Payments Did Not "Enrich" Defendants And There Is No "Injustice".

The unjust enrichment claim is also defective as a matter of law because the Commonwealth cannot show that its actions "enriched" defendants or that any enrichment was "unjust."

a. Defendants Were Not "Enriched" By The Commonwealth's Payment of Individual Recipients' Medical Expenses.

No Massachusetts court has defined "enrichment," but a federal court applying Massachusetts law has observed that "[t]ypically, unjust enrichment involves a direct benefit conferred on one party by another." *Taylor Woodrow Blitman Construction Corp. v. Southfield Gardens Co.*, 534 F. Supp. 340, 347 (D. Mass. 1982). The RESTATEMENT OF RESTITUTION, which Massachusetts courts have cited favorably, defines "benefit" as follows:

A person confers a benefit upon another if he gives the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, *satisfies a debt or duty of the other*, or in any way adds to the other's security or advantage.

RESTATEMENT OF RESTITUTION § 1, comment b (emphasis added). The Commonwealth claims that it has "satisfie[d] a debt or duty" of the defendants because it has "borne a duty that . . . ought to have been borne by defendants" by paying recipients' medical expenses for alleged smoking-related illnesses. Amended Complaint ¶¶230, 235. But the Commonwealth has not alleged, and disclaims any intent to establish, that defendants had any legal duty particular to any individual recipient to pay any medical illness. But no court has sustained an unjust enrichment claim based on the plaintiff's satisfaction of the defendant's purported "moral obligation," and the federal court sitting in Massachusetts has rejected such a theory of recovery. In *A.N. Deringer, Inc. v. Consolidated Computer Services International, Inc.*, 381 F. Supp. 1208 (D. Mass. 1974), a Canadian company was selling computers on consignment to a U.S. company. The plaintiff importer paid customs duties on the computers. When the consignor became bankrupt, the plaintiff attempted to recover the duties from the defendant consignee under an unjust enrichment theory. The Court rejected the theory because the plaintiff had not established that the defendant had a *legal* obligation to pay the duties:

Plaintiff has not adduced any evidence that the defendant was *obliged under the tariff laws* to pay the duties. Plaintiff has shown . . . that it has borne the economic burden of paying the customs duties. But plaintiff has not shown that in a normal transaction of the type involved herein . . . a consignee such as defendant would ultimately assume that tax burden.... Thus, on this -record it is not proven that a consignee like defendant would have to bear the tax burden as between it and its consignor and *thus it is not shown that defendant has escaped a burden it would normally shoulder. Absent such a showing, no unjust enrichment has been proved herein.*

Id. (emphasis added). Thus, to recover in unjust enrichment, the Attorney General must show that (1) defendants were "obligated under the [tort] laws" to pay medical expenses for smoking-related illnesses of particular individual recipients and (2) that by paying such medical expenses, the Commonwealth assumed a burden defendants would normally shoulder. Because

the Commonwealth has not alleged that defendants were *legally* obligated to pay the medical costs of particular individual recipients, or that such costs are a burden defendants "would normally shoulder," defendants were not "enriched" by the Commonwealth's payments.

b. Any "Benefit" Conferred On Defendants By The Commonwealth's Payment Of Individual Recipients' Medical Expenses Is Not Unjust.

Even if the Commonwealth could establish that defendants have somehow been "enriched" by the Commonwealth's payment of individual recipients' medical expenses, it would still have to prove that such enrichment is "unjust." RESTATEMENT OF RESTITUTION § 1, comment c, explains that:

Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not in and of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution

As a matter of law, it is not unjust not to pay for a benefit that has been voluntarily or officiously conferred. *E.g.*, *Blair v. Claflin*, 310 Mass. 186, 191 (1941) ("an intermeddler, by gratuitously paying the debt of another, does not create a legal obligation between himself and that other, and the plaintiff in such a case, as a rule, stands no better in equity than at law") (citations omitted); *Bartholomew v. Stobbs*, 280 Mass. 559, 562-63 (1932) (plaintiff "volunteer" has no action at law or in equity to recover from defendant monies paid by plaintiff for the benefit of a third party); *United States Fidelity & Guaranty Co. v. N. J.B. Prime Investors*, 6 Mass. App. Ct. 455, 461 (1978) (when "plaintiff acts as a volunteer, it cannot recover on the grounds of unjust enrichment unless it alleges facts amounting to a wrongful conversion by the defendant"). *See also Salamon v. Terra*, 394 Mass. 857, 859-62 (1985) (when party confers benefit without *reasonable* expectation of payment, no recovery for unjust enrichment); *Bolen v. Paragon Plastics, Inc.*, 747 F. Supp. 103, 107 (D. Mass. 1990) (same).

The Commonwealth chose to participate in the Medicaid program and thus voluntarily obligated itself to make the very payments for which it now seeks reimbursement. *See Shweiri v. Commonwealth*, 416 Mass. 385, 388 (1993) (noting that Commonwealth "chose" to participate in the Medicaid program). There is nothing "unjust" about not charging defendants for the Commonwealth's voluntary policy decisions.

3. The Commonwealth Cannot Satisfy The Elements Of A Restitution Claim Under Section 115 of the RESTATEMENT OF RESTITUTION.

Although it is not spelled out in the Amended Complaint, it appears that the Commonwealth intends to pursue a restitution claim under RESTATEMENT § 115.²⁴ To recover under that theory, recognized in *Nassr v. Commonwealth*, 394 Mass. 767, 776-77 (1985), a plaintiff must establish: (1) that the defendant had a legal duty to pay the expenses of a third party; (2) that the plaintiff paid the expenses of the third party with the intent to charge the defendant therefor; and (3) that payment of such expenses was "immediately necessary to satisfy the requirements of public decency, health or safety." *Nassr*, 394 Mass. at 376-77 (citing *Keith v. DeBussigney*, 179 Mass. 255, 259 (1901)).²⁵ The restitution claim must be dismissed because the Commonwealth does not allege either the first element of the *Nassr* test, and cannot, as a matter of law, satisfy the second or third requirements.

a. The Commonwealth Does Not Plead That It Satisfied Defendants' Established Legal Obligation.

Under Massachusetts law, restitution is available only in narrowly prescribed circumstances:

[W]hen the law imposes upon one an obligation to do something which he

²⁴ RESTATEMENT OF RESTITUTION, Section 115 provides:

A person who performs the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if (a) he acted unofficiously and with intent to charge therefor, and (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health or safety.

²⁵ The elements of a restitution claim largely parallel those of an unjust enrichment claim. The distinction between the two claims is in the measure of damages. *See, e.g., Nassr*, 394 Mass. at 772 n.4 ("Costs . . . are not the proper measure of damages under an unjust enrichment theory of recovery. Thus, despite the confusing language in the Commonwealth's brief, we will treat their common law claim as one for restitution").

declines to do, and which must be done to meet some legal requirement, the law in some cases treats performance by another as performance for him, and implies a contract on his part to pay for it.

Keith, 179 Mass. at 259, *quoted in Nassr*, 394 Mass. at 767-77. Thus, like its claim for unjust enrichment, the Commonwealth's restitution claim must be dismissed because the Commonwealth does not plead that the "law impose[d] upon" defendants an obligation to pay the individual recipients' medical expenses. Moreover, it is clear under RESTATEMENT § 115, that a plaintiff must *establish* defendant's statutory or common law liability to the third party in order to recover. The *possibility* that the defendant could eventually be found liable to the third party is not enough. As the Supreme Court of Illinois held in *Board of Education of City of Chicago v. A, C & S, Inc.*, a Section 115 claim does not arise merely because the defendant's product is hazardous or *may* cause damage,

[n]or does the fact that there *may be* a contract or tort action automatically invoke section 115. There must be an independent basis which *establishes* a duty upon defendant to act and the defendant must have failed to abide by that duty. To hold otherwise would create a restitution action any time there is a products liability claim.

131 Ill.2d 428, 466, 546 N.E.2d 580, 598 (1989) (emphasis added);

Because the Commonwealth has not alleged, and has disclaimed any intent to prove, that defendants had an *established* legal duty to pay any individual recipient's medical expenses, the restitution claim should be dismissed.

b. As A Matter Of Law, The Commonwealth Cannot Establish That Its Payment Of Individual Recipients' Medical Expenses Was "Immediately Necessary" To Protect The Public Health.

Although the Commonwealth alleges in conclusory fashion that its "expenditures were and are immediately necessary to protect the public health and safety," it is evident that the payment of individual recipients' medical expenses is not the kind of activity for which Massachusetts courts have provided a restitutionary remedy. In *Nassr*, the Court noted that to recover in restitution, a plaintiff must show that "the

things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety." 394 Mass. at 776 (quoting RESTATEMENT OF RESTITUTION § 115). The Court also listed several examples of the types of activities that would satisfy this requirement, including removing an obstruction from or repairing an "imminently dangerous" public road "if the town or person whose duty it is to care for the road fails to do and also removing a "dead whale stranded on the shore close to a town." *Id.* at 776 n.9 (quoting RESTATEMENT § 115, comment b).

The Commonwealth's routine payment of medical expenses for private individuals simply does not constitute services that were "immediately necessary" to prevent "imminent[] danger[]" to the public health and safety. If they were, every health insurer would have a direct claim in restitution against any manufacturer whose product allegedly injured an insured.

c. As A Matter Of Law, The Commonwealth Did Not Have An "Intent To Charge" Defendants When It Paid Medical Expenses For Individual Recipients.

Finally, although the Commonwealth alleges in conclusory fashion that it intended to charge defendants at the time it paid the Medicaid recipients' expenses, Amended Complaint ¶229, as a matter of law, the Commonwealth cannot establish that it had any such "intent to charge." The Commonwealth has had a statutory subrogation right under state law to seek reimbursement for Medicaid expenditures from third-party tortfeasors since 1977. Yet never once prior to the filing of this lawsuit in December 1995 did it seek to recover the cost of any such payments from defendants. Although, on this motion to dismiss, the Commonwealth's allegations generally must be taken as true, this Court is not required to accept patently baseless, false, and conclusory allegations. *See generally* SA C. Wright & A. Miller FEDERAL PRACTICE & PROCEDURE, § 1363 at 464-66. Because the Commonwealth plainly did not intend to charge defendants for any of the Medicaid expenses at issue at the time they were paid, the restitution count should be dismissed.

F. The Commonwealth's Claims Under G.L. c. 93A In Counts VII And VIII Must Also Be Dismissed Because They Do Not Arise Out Of A Business Relationship Between Defendants And The Commonwealth And For Other, Independent Reasons As Well.

All of the Commonwealth's c. 93A claims must

be dismissed for the independent reason that the Commonwealth's alleged losses were not the result of any "business relationship" between defendants and *the Commonwealth*. Furthermore, the Commonwealth seeks only two types of relief in its c. 93A claims: "restoration of *its* losses pursuant to G.L. c. 93A, §9." Amended Complaint ¶¶243, 249. Because the Commonwealth may not recover its *own* economic losses under §4 or obtain damages under §9, its c. 93A claims must be dismissed for these independent reasons as well.

1. The Commonwealth's Claims Must Be Dismissed Because They Do Not Arise Out Of A Business Relationship With Defendants

As a matter of law, no c. 93A claim will lie unless the claim arises out of a business or commercial relationship between the plaintiff and the defendant. Since no such relationship is here alleged, the Commonwealth's claims under c. 93A must be dismissed in their entirety.²⁶

Chapter 93A proscribes only unfair and deceptive practices "perpetrated in a business context." *Lantner v. Carson*, 374 Mass. 606, 611 (1978). As a result, Massachusetts courts do not impose liability under c. 93A where there was no business or commercial relationship between the parties. For example, in *Arthur D. Little, Inc. v. East Cambridge Savings Bank*, 35 Mass. App. Ct. 734 (1994), the plaintiff attached by trustee process funds held by the defendant bank in the account of one who owed a debt to the plaintiff. The 'bank adopted a 'now you see it, now you don't' position," as it attempted to avoid turning the debtor's funds over to the plaintiff. Although the court held the bank liable to the plaintiff/creditor in trustee process, it rejected the c. 93A claim because the bank's misconduct did not arise out of a "commercial relationship" between the plaintiff and the bank; "their only contact occurred in the context of this litigation." *Id.* at 743; *see also Nei v. Boston Survey Consultants, Inc.*, 388 Mass. 320, 325 (1983) (rejecting c. 93A claim where there was no "business relationship" between surveyor hired by sellers of land and the purchaser); *Waickowski v. Perry*, 1994 Mass. App. Div. 40, 42 (1994) (no liability under c. 93A where the parties had no business relationship); *Redstone v. Signore*, No. 924190, slip op., at 5 (Mass. Sup. Ct. Dec. 4, 1995) (same).

²⁶ In addition, any damage claim under c. 93A arising out of conduct by a product manufacturer is barred by the economic loss rule discussed at pp. 24-25, *supra*. *See Canal Elec. Co. v. Westinghouse Elec. Corp.*, 756 F. Supp. 620, 629-31 (D. Mass. 1991).

Based on this authority, the federal district court for the District of Massachusetts has concluded that "some business connection between the parties is an essential element of liability under" c. 93A. *John Boyd Co. v. Boston Gas Co.*, 775 F. Supp. 435, 440 (1991); *accord, Chestnut Hill Development Corp. v. Otis Elevator Co.*, 653 F. Supp. 927, 933 (D. Mass. 1987). In *John Boyd*, the plaintiffs had purchased land that they later learned had been contaminated by owners who preceded the seller. Although the plaintiffs had no connection with the prior owners, they argued that defendants' liability under c. 93A should extend to "all foreseeable future purchasers." 775 F. Supp. at 439. In dismissing the c. 93A claims for lack of any "business connection" between the parties, the court observed that the "[p]laintiffs' proposed foreseeability test would extend liability indefinitely and, in so doing, would eviscerate the business relationship requirement." *Id.* at 440.

Precisely the same is true here. The Commonwealth has alleged no business relationship between the state and the defendants pertinent to the asserted claims, and plainly cannot do so. The Commonwealth cannot rely on the same sort of "foreseeability" theory rejected in *Boyd* -- a theory likely to "extend liability indefinitely" and "eviscerate the business relationship requirement."

2. The Commonwealth Lacks Standing To Assert Damages Claims Under c. 93A, § 4 For Its Own Account Based On Medicaid Expenditures For The Treatment Of Alleged Smoking Related Illnesses.

As enacted in 1967, the only relief authorized by c. 93A was an action under § 4 by the Attorney General "to restrain by temporary or permanent injunction" any violation of the statute. In 1969, the statute was amended to permit the court to "make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice *any moneys or property*, real or personal, which may have been *acquired* by means of such method, act, or practice" (emphasis added). On its face, this amendment authorizes the award of restitution, *i.e.*, a repayment to injured consumers of "moneys or property . . . acquired by means of" the violation of c. 93A (emphasis added). *See Commonwealth v. DeCotis*, 366 Mass. 234, 235 (1974) (restitution of transfer charges awarded to mobile home owners who had paid them under § 4).

Nothing in this "restoration" language permits

the Commonwealth to seek damages for its *own* account (and as a non-consumer), and defendants have found no case that permits the Commonwealth to seek such damages under § 4. On the contrary, § 4 only gives the Attorney General the power to seek an order that consumers who are victims of unfair and deceptive acts in effect "get their money back" from the defendant. Section 4 creates a remedial process analogous to a class action brought by the Attorney General to seek restitution on behalf of similarly situated consumers, *DeCotis*, 366 Mass. at 24546. But here, the Commonwealth expressly disclaims seeking a recovery on behalf of, or in the right of, any individual recipient.

In any event, the Commonwealth has not alleged, and obviously cannot allege, that the defendants have in any sense "acquired" the amounts spent by the Commonwealth for the treatment of alleged tobacco-related illnesses suffered by Medicaid beneficiaries. Rather, the Commonwealth asks for "restoration of its losses," Amended Complaint ¶243 (emphasis added), and simply ignores that the defendants "acquired" none of the payments for which the Commonwealth seeks to be reimbursed. Accordingly, c. 93A, § 4 does not create a right to the relief sought by the Commonwealth in this case.

3. The Commonwealth Lacks Standing To Assert Its Claim In Count VIII Under c. 93A, § 9.

a. The Commonwealth Is Not A "Person" As That Term Is Used In § 9 and § 11.

When enacted in 1967, the only remedial provision in c. 93A was the power granted to the Commonwealth to seek injunctive relief under § 4. Faced with inability of the Attorney General's office to address the volume of consumer complaints itself, the Legislature in 1969 expanded the authorized to seek restitution for the benefit of consumers injured by violations of the statute, St. 1969, c. 814, § 3, and a private right of action was created for consumers in § 9. *See generally Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 697-700 (1975). In 1972, § 11 was added, extending the private right of action to plaintiffs acting in a commercial, instead of a consumer, context.

Certainly, in 1969, when § 9 was added to c. 93A, the Commonwealth was not granted standing to seek a recovery under § 9 for its own account since standing under § 9 was expressly limited to persons "who purchase[d] or lease[d] goods, services or property . . . primarily for personal, family or household purposes and thereby suffer[red] any loss of money or

property," *i.e.*, consumers. The Commonwealth itself plainly did not meet that standard, and there is no reason to think that the 1979 amendment, which authorized any "person" not entitled to bring suit under § 11 to sue under § 9, was intended to create a right on behalf of the Commonwealth to sue for its own damages.

Moreover, as a matter of statutory construction, the statutory term "person" generally does not encompass the Commonwealth. "It is a widely accepted rule of statutory construction that general words in a statute such as 'persons' will not ordinarily be construed to include the State or political subdivisions thereof." *Hansen v. Commonwealth*, 344 Mass. 214, 219 (1962). *Accord Perez v. Boston Housing Authority*, 368 Mass. 333, 339 (1975); *Commonwealth v. ELM Medical Laboratories, Inc.*, 33 Mass. App. Ct. 71, 76-77 (1992). It makes no sense to suppose that the definition of "person" in c. 93A, § 1(a), which does not refer to the Commonwealth, includes it, particularly where the Commonwealth, unlike all other governmental entities, is granted standing to seek restitution for consumers of moneys "acquired" as a result of unfair and deceptive practices.

The structure of the statute buttresses this conclusion. The procedural differences between the Attorney General's right to seek injunctive relief and restitution for consumers under § 4 and the "private" remedies of §§ 9 and 11 indicate that the two remedial schemes were intended to run in parallel and that the Commonwealth was not intended to have a private action in its own right.²⁶

b. If The Commonwealth Is A "Person," Its Claim Would Arise, If At All, Under § 11, Not § 9.

Even if the Commonwealth were permitted to invoke c. 93A's private remedies, in this case it has invoked the wrong one. As a matter of law, the claims asserted by the Commonwealth for recovery of Medicaid expenditures arise, if they arise at all, under § 11, not § 9. Accordingly, the Commonwealth's claim under § 9 must be dismissed.

The controlling case is *Boston v. Aetna Life Ins. Co.*, 399 Mass. 569 (1987). There, the City of Boston sought to assert claims against private medical

²⁶ For example, c. 93A, § 10, directs the clerk of court to mail a copy of any suit brought under §§ 9 or 11 to the Attorney General, a requirement that makes little sense in the context of actions brought by the Attorney General on behalf of the Commonwealth.

insurers for the costs of caring for patients, many of them indigent, at Boston City Hospital. The predicate for the city's assertion of these claims was a series of *assignments* that the city obtained from those patients of any claims the patients might have against their medical insurers. The Supreme Judicial Court squarely held that the city "has no standing to maintain any G.L. c. 93A, § 9 claim, . . . but does have standing to assert G.L. c. 93A, § 11 claims." *Id.* at 571. Here too, the Commonwealth claims to have incurred expenses in connection with the care of indigents for which the defendants are alleged to be liable. That makes § 11 the pertinent private remedy provision, if the Commonwealth has any private remedy at all, because c. 93A specifically makes standing under §§ 9 and 11 mutually exclusive.²⁸

4. The Commonwealth Is Also Seeking Improper Retroactive Application Of c. 93A.

The Commonwealth seeks to predicate liability on alleged conduct of defendants that occurred as early as the 1950's, long before the earliest version of c. 93A was even enacted. Massachusetts "statutes are prospective in their operation unless a contrary intent is manifested by the Legislature." *Goldstein Oil Co. v. C.K Smith Co.*, 20 Mass. App. Ct. 243, 250 (1985). This principle has been consistently applied to amendments of c. 93A that expand the liabilities created by the statute or apply the statute's prohibitions to new categories of defendants. *See Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 380 Mass. 212, 214 (1980). If the conduct complained of would not have been actionable under c. 93A at the time it occurred, then it cannot be the basis for liability under c. 93A. *Goldstein Oil*, 20 Mass. App. Ct. at 250; *Smith v. Caggiano*, 12 Mass. App. Ct. 41, 43 (1981).

As a result of these principles, *if* any portion of the c. 93A claims survives the grounds for dismissal set forth in subsections 1, 2, and 3, above, this Court should rule that liability cannot be premised upon conduct prior to the earliest amendments to c. 93A that allow liability to be imposed. Most notably, liability

²⁸ Several decisions have also recognized that the standing of governmental entities (other than the Commonwealth) to seek damages under the private remedy provisions of c. 93A arises under § 11, not § 9. *See, e.g., United States v. United States Trust Co.*, 660 F. Supp. 1085 (D. Mass. 1986) (United States had standing under § 11 to maintain an action based on the defendant bank's mishandling of money deposited by a federal agency); *Spence v. Boston Edison Co.*, 390 Mass. 604, 615-16 (1983) (Boston Housing Authority may proceed against a utility under § 11 to recover an alleged overcharge); *cf. Town of Norwood v. Adams-Russell Co.*, 406 Mass. 604, 614 (1990) (assuming without deciding that town has standing to sue under c. 93A, § 11).

cannot be imposed on these defendants for any conduct that occurred before the elimination of the interstate commerce exemption of c. 93A, § 3 in 1983, St. 1983, c. 242, an amendment found to operate only prospectively in *Goldstein Oil, supra*. Before that amendment, c. 93A did not apply to "any person of whose gross revenue at least twenty percent is derived from transactions in interstate commerce, excepting however transactions and actions which (i) occur primarily and substantially within the commonwealth and (ii) as to which the Federal Trade Commission or its designated representative has failed to assert in writing within fourteen days of notice to it and to said person by the attorney general its objection to action by him and set forth in said notice." At all times covered in the Amended Complaint, the manufacturer defendants (at least) plainly satisfied the "20%" standard.²⁹

G. The Conspiracy Count, Count IX, Also Must Be Dismissed Because Defendants Had No Peculiar Power Of Coercion Over The Commonwealth And The Commonwealth Does Not Allege That Defendants Intended To Do It Harm.

²⁹ In addition to the impact of the 1983 enactment, liability should be precluded according to the following schema:

Liability under c. 93A obviously cannot be predicated on conduct that occurred before the earliest version of the statute was enacted on December 26, 1967. St. 1967, c. 813.

Liability for restoration of consumers' moneys or property acquired by means of violation of c. 93A, § 4 cannot be predicated on conduct that occurred before the Legislature created that remedy on August 26, 1969. St. 1969, c. 814, § 3.

Liability for damages under c. 93A, § 9 cannot be predicated on conduct that occurred before the 1979 amendment to § 9, which had previously applied only to "any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any loss of money or property," St. 1979, c. 406, § 1, a requirement that the Commonwealth plainly did not meet with respect to claims that it asserts on its own behalf.

The Supreme Judicial Court "has held that 'in some circumstances, if persons who possess peculiar powers of coercion or who stand in certain fiduciary relations with another combine to accomplish an illegal act, or a legal act by illegal means to be exerted against that other, an actionable tort may arise for which they may be jointly or severally held liable.'" *Robitaille v. Morse*, 283 Mass. 27, 31 (1933) (citation omitted). The independent tort of civil conspiracy largely developed in the context of labor disputes, and defendants have found no Massachusetts case outside the labor context sustaining a claim of this kind since 1939.³⁰ See *Potter Press v. C. W. Potter, Inc.*, 303 Mass. 485 (1939). Compare *North Station Wine Co. v. United Liquors, Ltd.*, 323 Mass.48 (1948) (dismissing conspiracy claim); *Boylston Housing Corp. v. O'Toole*, 321 Mass. 538 (1947) (same); *Fleming v. Dane*, 304 Mass. 46 (1939) (same); and cases cited therein. Based on this dearth of case law, defendants question the continuing vitality of the "civil conspiracy" tort in Massachusetts and reserve the right to contest its vitality, should such an argument become necessary.

Nevertheless, the United States Court of Appeals for the First Circuit recently stated: "There is precedent supporting a 'very limited cause of action in Massachusetts' for 'civil conspiracy' of a coercive type. 'In order to state a claim of [this type of] civil conspiracy, plaintiff must allege that defendants, acting in unison, had some peculiar power of coercion over plaintiff that they would not have had if they had been acting independently.'" *Aetna Casualty Surety Co. v. P&B Autobody*, 43 F.3d 1546, 1563 (1st Cir. 1994) (citation omitted) (quoting *Jurgens v. Abraham* 616 F. Supp. 1381, 1386 (D. Mass. 1985)). Furthermore, "[i]t is essential to a conspiracy claim under Massachusetts law that the alleged conspirators have intended to harm the plaintiff." *Brinkley & Co. v. Matteuci*, No. 94-2284, 1995 U.S. App. LEXIS 15928 (1st Cir. 1995) (per curiam). In addition to the grounds applicable to all claims, the Commonwealth's civil conspiracy claim fails on two specific grounds.

First, defendants lacked a peculiar power of coercion over the Commonwealth.³¹ The essence of the

³⁰ It is doubtful that there is an independent tort of civil conspiracy distinct from the doctrine of concert of action, which is merely a form of joint liability. See, e.g., *Kyte v. Philip Morris, Inc.*, 408 Mass. 162, 166-687 and n.5 (1990). See also *Aetna Casualty Surety Co. v. P&B Autobody*, 43 F.3d 1546, 1564 (1st Cir. 1994). To the extent that the Commonwealth is asserting a concert of action claim, it survives only if some other underlying claim of the Commonwealth also survives. For the reasons stated in this Memorandum, none of the other counts in the Amended Complaint states a claim upon which relief can be granted. Therefore, any concert of action claim necessarily fails.

³¹ Although the quotation from *Robitaille* at

Commonwealth's conspiracy claim is that the defendants conspired to cause information about cigarettes' alleged adverse health effects to be suppressed.³² The Commonwealth Amended Complaint ¶252. The apparent basis for this assertion is contained in the next sentence of Paragraph 252: "Through their combined actions of intentional misrepresentation and concealment over the last four decades, defendants have managed to control the material information concerning smoking and health"

But the Amended Complaint contains no allegation that the defendants did anything to coerce the Commonwealth.³³ Moreover, both on their face and in light of the judicially noticeable materials attached to the Parsigian affidavit, these allegations of a peculiar coercive power over the Commonwealth cannot stand. They depend on the fallacy that defendants somehow controlled the market of information about cigarettes and prevented others from conducting research about the effects of smoking on health. Because defendants did not control medical research into the health effects of smoking, any insinuation by the Commonwealth to the contrary would be disingenuous. This is evident from the 1988 Plan quoted in Part II, above, in which the Commonwealth declares that "[a]lmost half a century ago, overwhelming proof of cigarette diseases was established," and then goes on to list many

the beginning of this section mentions not only a peculiar power of coercion, but also a fiduciary relationship between plaintiff and defendant as a possible basis for a conspiracy claim, the Commonwealth had no fiduciary relationship with defendants and does not allege otherwise.

³² For example, Amended Complaint ¶251 states: "At least as early as the 1950's, defendants entered into an agreement and/or tacit understanding for the unlawful purposes of suppressing and concealing material scientific and medical information concerning smoking addiction and diseases; representing falsely to the public at various times that they would undertake a special responsibility and duty to citizens of the Commonwealth of Massachusetts to undertake all possible efforts to learn all the facts and to discover and disclose the truth about smoking and health; and of keeping the public ignorant of the defective and unreasonably dangerous condition of

³³ Amended Complaint ¶256 provides in pertinent part: "Although the unlawful actions described herein were done to benefit the conspirators, the natural and necessary consequence thereof was the prejudice of the Commonwealth and the public in the form of public subsidy and provision of health care and health-related services and oppression of smokers." There is no suggestion that defendants, conduct coerced the Commonwealth to do or not to do anything.

specific medical conditions. Parsigian Aff. Ex. 1 at 4.

Plainly, in the face of the Commonwealth's own statements, even if the Commonwealth's allegations about four decades of intentional misrepresentation and concealment were true, it would be absurd to suggest that defendants controlled the flow of information about smoking and health. Furthermore, the Commonwealth has itself for decades engaged in medical research, *id.* ¶5, and the Commonwealth was hardly alone. The 1990 Surgeon General's Report stated: "It is safe to say that smoking represents the most extensively documented cause of disease ever investigated in the history of big-medical research." Parsigian Aff. ¶4, Ex. 4. As a matter of law, defendants had no peculiar power of coercion in the market of information about cigarettes.

Smoking represents the most extensively documented cause of disease ever investigated in the history of big-medical research." Parsigian Aff. ¶4, Ex. 4. As a matter of law, defendants had no peculiar power of coercion in the market of information about cigarettes.

Second, Count IX fails the requirement articulated by the First Circuit in *Brinkley* that, under Massachusetts law, a claim of conspiracy requires an intent to injure the *plaintiff*. Here the Amended Complaint contains no allegation that the defendants intended their alleged conspiracy to harm the *Commonwealth*. See note 32, *supra* (quoting Amended Complaint ¶256). This furnishes an independent ground of dismissal.

In *North Station Wine Co. v. United Liquors, Ltd.*, 323 Mass. 48 (1948), the Court rejected a conspiracy claim on grounds similar to those that require dismissal here. *North Station* alleged that United Liquors had entered into an agreement with another liquor seller and several newspapers not to accept advertisements for a particular brand of rum for less than a certain price. Two newspapers rejected *North Station's* attempt to place such an advertisement. On appeal, after assuming that a combination had been sufficiently alleged, the Court ruled that the allegations of the character, purpose, and effect of the combination were insufficient:

The only harm alleged is that the two newspapers carried out their agreement not to advertise the particular brand of rum at less than \$3.81 per four fifths of a quart. This seems to fall short of the kind of intentional invasion of a known and well recognized right of the plaintiff which commonly calls for affirmative justification by a defendant... A combination so to limit advertising would not seem to

have been directed against the plaintiff... No motive of injuring the plaintiff is alleged. There is no discrimination against the plaintiff as compared with other dealers. There is nothing more than a suggestion or insinuation that there are no other newspapers outside the combination in which the plaintiff can advertise at any price it wishes. It does not appear that other effective methods of advertising are not open to it. The allegations of 'a peculiar power of coercion,' a 'fraud on the general public,' and of 'unlawful interference' are mere generalizations unsupported by the necessary allegations of particular facts. *Id.* at 51-52. So here, the Amended Complaint has not alleged any intentional invasion of any well-recognized right of the Commonwealth. There is no indication that any alleged conspiracy of defendants was directed against the Commonwealth at all or that the Commonwealth was singled out compared to others who may have paid alleged injured persons' medical expenses. There is no suggestion that the Commonwealth could not perform its own medical research or obtain information about smoking and health from sources other than defendants. The Commonwealth's conclusory allegations of conspiracy cannot stand.³⁴

³⁴ Besides the numerous principles of Massachusetts state law raised on this motion that mandate dismissal of the Amended Complaint, the cigarette manufacturer defendants wish to inform the Court that the Attorney General's suit also violates numerous federal constitutional and statutory rights of the defendants. The cigarette manufacturers are asserting those federal rights in a federal action, *Philip Morris Incorporated, et al. v. Harshbarger*, Civ. No. 95-12574-GAO (the "Federal Action"), which was commenced prior to the Attorney General's commencement of this action. The Attorney General has claimed in the Federal Action (among other things) that the federal court should apply *Pullman* abstention, under which a federal court stays (but does not dismiss) an action presenting both state-law and federal-law issues pending resolution in the state court of the state-law issues. See *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

If the federal court does determine to abstain under *Pullman*, defendant cigarette manufacturers wish to pursue the "*England* reservation" procedure established by the Supreme Court to govern *Pullman* abstention cases. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). That procedure is as follows: (1) the federal court temporarily stays the Federal Action as to the claims to which *Pullman* abstention applies, retaining jurisdiction over those claims but "deferr[ing]" resolution "until the potentially controlling state-law

Respectfully submitted,

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issue[s] [can be] authoritatively put to rest" by the state court, *id.* at 416 n.7; (2) the federal plaintiffs must "inform" the state court "what [their] federal claims are," so that the state court may "construe[]" state law "in light of" the federal claims, *id.* at 420; (3) the federal plaintiffs can refrain from "litigat[ing]" their federal contentions in state court, and instead Uinform " the state court that they "intend[]," should the state-law issues be decided adversely to them, "to return to [federal] Court for disposition of [their] federal contentions," *id.* at 421; and (4) the federal plaintiffs then have a "right to return" to the federal court for adjudication of their federal claims if the state-law issues are ultimately decided adversely to them by the state court, *id.* at 421-22.

Accordingly, in order to comply with *England*, a description of the claims presented in the Federal Action is appended to the Affidavit of Thomas J. Griffin, Jr. sworn to on October 21, 1996 as Exhibit B, and a copy of the Complaint in the Federal Action is annexed to the Griffin Affidavit as Exhibit A. As noted, in accordance with *England*, these federal issues are not being raised for resolution by this Court, but rather are described in Exhibit B accompanying the Griffin Affidavit simply to "inform" the Court of the federal issues so that it may construe state law "in light of" the federal issues. *See also Worcester Cty. Nat 'l Bank v. Commissioner of Banks*, 340 Mass. 695 (1960) (stating duty of Massachusetts courts to "construe[]" state law "so as to avoid" conflicts with the United States Constitution). (It should be noted, however, that the Attorney General has also moved to dismiss the federal action on the grounds of, among other things, alleged lack of jurisdiction and *Younger* abstention; if that motion is granted, defendants reserve the right to present their federal law contentions to this Court.)

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