

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
DEPARTMENT OF THE  
TRIAL COURT  
Civil Action No.

**95-7378-J**

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.

**SUR-REPLY MEMORANDUM OF COMMONWEALTH OF MASSACHUSETTS  
IN FURTHER OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

## INTRODUCTION

In response to the Commonwealth's Opposition, defendants desperately attempt to drain the plain language of Sections 276 and 22 of any meaningful content. They argue that these statutes do nothing more than repair alleged technical defects in the Commonwealth's subrogation remedy under G.L. c. 118E. Defendants' new argument is a complete reversal of their original position that "the authorized means of seeking recovery of . . . medical expenses paid is a subrogation action." Memorandum in Support of Defendants' Motion to Dismiss the Amended Complaint at 1. They jettison this argument in their Reply and instead maintain now that "the Commonwealth could not recover such expenses as subrogee of the tortfeasor." Reply Memorandum in Support of Defendants' Motion to Dismiss ("Reply") at 9.

The reason for defendants' about-face is clear. Continued allegiance to their original argument - that the Commonwealth is authorized to proceed only in subrogation -- leaves them, as the Commonwealth's Opposition explains, in the untenable position of either (i) claiming that the "independent cause of action" authorized by Sections 276 and 22 is merely a superfluous restatement of the Commonwealth's existing subrogation rights; or (ii) conceding that these statutes provide a remedy that goes beyond subrogation. In an effort to escape this dilemma, defendants now claim that Sections 276 and 22 give life to a previously nonexistent subrogation remedy. In the words of Justice Cardozo in MacPherson v. Buick Motor Co., however, "[t]he law does not lead to so inconsequent a conclusion." 217 N.Y. 382, 111 N.E. 1050, 1053 (1916). Defendants' new argument fares no better than the original. It is wholly unsupported by the plain language or purpose of Sections 276 and 22.

**I. Defendants’ Strained Construction of the New Massachusetts Statutes Flies in the Face of the Plain Language and Purpose of the Enactments.**

Defendants’ contention that the sole purpose of Sections 276 and 22 is to make workable the Commonwealth’s supposedly “uncertain” preexisting subrogation rights finds no support in the relevant statutory language. Section 276 specifically describes the authority granted to the Attorney General as “including but not limited to subrogation rights . . . .” Furthermore, in Section 22, immediately after the provision authorizing the Commonwealth’s subrogation actions, the Commonwealth is also authorized to bring a “separate and independent cause of action” that is “in addition to other causes of action.”

Defendants conveniently ignore this language because it so clearly demonstrates that the Legislature, in these statutes, did not merely “repair” the Commonwealth’s subrogation rights, but rather authorized an independent statutory cause of action in addition to subrogation.<sup>1</sup>

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<sup>1</sup> To support their contention that, despite clear language to the contrary, Sections 276 and 22 do not create any rights beyond subrogation, defendants point to the Legislature’s failure to enact a proposed bill in 1995 that would have specifically abrogated affirmative defenses, provided for statistical proof of causation and contained other features similar to legislation enacted in Florida in 1994. For purposes of construing Sections 276 and 22, legislative inaction on the 1995 bill proves

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nothing: “[W]eight is seldom ascribed to the failure by a legislative body to adopt a measure placed before it for consideration.” Atkinson v. Ipswich, 34 Mass. App. Ct. 663, 666 (1993). “The practicalities of the legislative process furnish many reasons for the lack of success of a measure other than legislative dislike for the principle involved in the legislation.” Franklin v. Albert, 381 Mass. 611, 615-16 (1980) (quoting Berry v. Branner, 245 Ore. 307, 311 (1966)). “[T]he reason [for legislative inaction] could be, for example, that the legislative body did not think the measure necessary . . . .” Atkinson, 34 Mass. App. Ct. at 666.

Defendants' argument also ignores the fact that Section 276 expressly authorizes the Attorney General to bring an action against any liable third party "who is a manufacturer of cigarettes" to recover Medicaid expenses. Defendants offer no explanation, and indeed there is no imaginable explanation, why the Legislature -- if it were attempting to repair defects in the Medicaid subrogation remedy -- would do so only in regard to "manufacturer[s] of cigarettes" and not also for all other types of potential defendants.

Nor can defendants' argument be squared with the unambiguous statement in Section 276 that the Commonwealth's direct cause of action is "independent of any rights or causes of action of the recipient." The kind of revitalized subrogation rights that defendants claim Section 276 establishes would be just the opposite -- like all subrogation rights, they would be wholly dependent upon, not "independent" of, the rights of recipients. Defendants' interpretation of Section 276 is thus totally inconsistent with the relevant statutory language and should be rejected.

## **II. The Identification of Individual Medicaid Recipients Is Not an Element of the Commonwealth's Independent Action Under Sections 22 or 276.**

Because Section 276 and Section 22 expressly provide the Commonwealth with an independent cause of action, which is separate from and in addition to the Commonwealth's subrogation remedy, defendants' insistence that the Commonwealth must identify every Medicaid recipient who was treated for tobacco-related illness is entirely misplaced.

In order to prevail in this independent action, the Commonwealth assuredly bears the burden of proving that its damages were caused by the defendants' wrongful or unlawful conduct. However, the method by which the Commonwealth will prove that element of its case is an evidentiary issue that has

no bearing on whether the Commonwealth has properly stated a claim under Mass. R. Civ. P. 12(b)(6). See Gibbs Ford, Inc. v. United Truck Leasing Co., 399 Mass. 8, 13 (1987) (courts should not “confuse[] summary judgment procedure or a determination on the merits with the relatively light burden to be carried in maintaining a complaint”) (internal quotation omitted); Mullins v. Pine Manor College, 389 Mass. 47, 58 (1983) (“The question of causation is generally one of fact for the jury.”). Defendants have submitted no authority to support the contention that the identification of individual Medicaid recipients is an element of the Commonwealth’s independent action under Section 276 or Section 22.

Although the Commonwealth is not called upon at the pleading stage to present its methodology for proving damages at trial, a few words on the subject are appropriate in response to defendants’ argument that it would be “unfair” and “absurd” to allow the Commonwealth to proceed without identifying individual Medicaid recipients in the Complaint. Reply at 14. The Commonwealth intends to establish all that is relevant in this respect -- namely, the aggregate amount of Medicaid expenditures attributable to defendants’ misconduct -- through the use of statistical and epidemiological evidence. This methodology of proof will be supported by expert testimony and will comport in all respects with due process and with the rules of evidence.<sup>2</sup>

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<sup>2</sup> Courts in Massachusetts, as elsewhere, have admitted statistical evidence where relevant, helpful to the trier of fact, and properly supported by expert testimony. See, e.g., Commonwealth v. Lanigan, 419 Mass. 15, 24-26 (1994); Commonwealth v. Paradise, 405 Mass. 141, 156 (1989).

Defendants' examples of the supposed "problems" with an aggregate method of proof are, in fact, all factors that the Commonwealth's statistical model for establishing defendants' aggregate liability will take fully into account. For instance, defendants suggest that an aggregate model of damages cannot account for a situation in which a Medicaid recipient was treated for two debilitating illnesses, one smoking-related and one not. Reply at 14. The truth is precisely to the contrary. Where a patient received treatment for two medical conditions -- for example, lung cancer and a broken leg -- the methodology offered by the Commonwealth at trial for establishing aggregate damages in this case can and will limit the Commonwealth's recovery to those expenditures attributable to cigarette smoking.<sup>3</sup> To the extent that defendants believe that the statistical model offered by the Commonwealth at trial to establish damages fails to account for factors relevant to the damages calculation, defendants will have ample opportunity to challenge this evidence by offering their own proof of other factors that allegedly limit the Commonwealth's recovery. None of these issues bears on this Court's determination of whether the Commonwealth's complaint states a claim under Rule 12(b)(6).

### **III. Defendants Misstate the Case Law under the Federal Medical Care Recovery Act.**

Although defendants concede that the federal Medical Care Recovery Act ("MCRA") provides an analogy to the cause of action provided by the new Massachusetts statutes, they misstate the jurisprudence under the MCRA to support their labored interpretation of the Massachusetts enactments. First, they assert that the MCRA "requires that the government identify particular injured

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<sup>3</sup> Similarly, the expert statistical and epidemiological evidence will account for the possibility of alternative causes for diseases associated with cigarette smoking, and for the possibility of false or fraudulent Medicaid claims. While defendants may take issue with the Commonwealth's expert testimony on these matters -- and will be perfectly free to challenge this evidence at trial -- that challenge has no bearing on the present motion to dismiss for failure to state a claim.

parties . . . .” Reply at 5. Defendants cite no authority to support that proposition, however, and the Commonwealth is not aware of any such authority.<sup>4</sup>

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<sup>4</sup> Because the federal government has not yet brought a case like this one under the MCRA, seeking to recover for aggregated health care expenditures caused by a third party’s tortious conduct, the reported decisions under the MCRA naturally involve individual, identifiable victims. But this does not mean that the MCRA “requires” the government to identify particular injured parties, as defendants baldly assert in their brief.

Next, defendants assert that the MCRA does not allow the federal government to recover against the tortfeasor if the injured person could not recover under state law. See, e.g., Reply at 7. In fact, as demonstrated in the Commonwealth's Opposition, the federal courts have consistently held that the right created by the MCRA is not merely a right of subrogation, and therefore the United States can recover against the tortfeasor even in circumstances where the injured person could not. See Opposition at 16. Thus, for example, the defense of comparative negligence, which might limit or bar the injured person's own recovery against the tortfeasor, cannot be asserted against the United States. United States v. Theriaque, 674 F. Supp. 395, 399 (D. Mass. 1987). Defendants' only response is that Theriaque was "wrongly decided" and "in any event does not control the analysis of the 1994 and 1995 Statutes." Reply at 8 n.4.<sup>5</sup>

The cases relied upon by defendants in their Reply are not contrary to Theriaque or the interpretation of the new Massachusetts statutes set out in the Commonwealth's Opposition. Only those defenses which negate "circumstances creating a tort liability upon some third person" -- the

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<sup>5</sup> Theriaque does not stand alone. The courts have consistently held that other defenses which would bar recovery by the injured party but would not absolve the defendant of culpability -- including statute of limitations, spousal immunity, automobile guest statutes and settlement and release by the victim -- cannot be asserted against the government in a MCRA action. See, e.g., Holbrook v. Andersen Corp., 996 F.2d 1339, 1341 (1st Cir. 1993) (settlement and release); United States v. Moore, 469 F.2d 788 (3d Cir. 1972) (state family immunity law), cert. denied, 411 U.S. 905 (1973); United States v. Gera, 409 F.2d 117, 119-20 (3d Cir. 1969) (statute of limitations); United States v. Jackson, 572 F. Supp. 181, 184 (W.D. Mich. 1983) (same); United States v. Forte, 427 F. Supp. 340, 342 (D. Del. 1977) (automobile guest statute).

statutory prerequisite for recovery under the MCRA -- can be asserted against the United States in a recovery action under that statute. See Opposition at 14-16. Thus, in United States v. Trammel, 899 F.2d 1483 (6th Cir. 1990), on which defendants chiefly rely, the court held that the Kentucky no-fault statute, Ky. Rev. Stat. § 304.39.060(2)(a), which explicitly “abolishes” tort liability for the first \$10,000 of medical expenditures, negates the existence of tort liability and prevents recovery under the MCRA. If there were an analogous statute in Massachusetts, for example, abolishing liability arising out of the manufacture and sale of cigarettes, defendants might have an argument that Sections 22 and 276 do not render them liable to the Commonwealth. But there is no such statute. The analogy to the MCRA therefore supports completely the Commonwealth’s recovery under the new Massachusetts statutes.

#### **IV. The Legislature Plainly Intended the New Massachusetts Statutes to Apply to the Misconduct That Precipitated the Enactment of the Statutes.**

Recognizing the futility of their effort to restrict the plain meaning of the new Massachusetts statutes, defendants also assert, relying largely on Landgraf v. USI Film Products, 511 U.S. 244 (1994), that “[w]hatever the effect of the [new statutes]” they cannot be applied “retroactively” to defendants’ conduct predating the statutes’ enactment. Reply at 16. Defendants assert that the Commonwealth has not identified any misconduct by defendants occurring solely after 1994 that caused Medicaid losses, and therefore, defendants say, the Commonwealth cannot recover under the statutes.

Defendants do not argue that retrospective application of the new Massachusetts statutes to their conduct would violate due process or any other state or federal constitutional provision. Nor could defendants make any such argument; as the Court in Landgraf stated, “the constitutional impediments to retroactive civil legislation are now modest.” 511 U.S. at 272 (emphasis in original). Indeed, in Leibovich v. Antonellis, 410 Mass. 568 (1991), the court rejected a challenge to the retrospective application of a statute, G.L. c. 231, §85X, which established the right of parents to recover damages for loss of consortium against third parties whose negligent conduct injured their child. Because the defendant could not “reasonably claim a right to act negligently,” the court rejected his constitutional attack:

The new statute in no way alters the standards for determining what kind of behavior constitutes negligence. The defendants always had the obligation to drive in a non-negligent manner, and this obligation was not affected by G.L. c. 231, § 85X. . . . The statute merely expands the class of potential plaintiffs who may recover for their injuries caused by the negligence of tortfeasors such as the defendant.

410 Mass. at 578-79.<sup>6</sup>

Because the Legislature can constitutionally enact retroactive legislation, the only issue here is one of legislative intent: Did the Legislature intend the new Massachusetts enactments to apply to conduct by defendants prior to their enactment? In Landgraf, the Court made it clear that where there is “clear congressional intent” favoring retroactive application, the legislature’s intent controls. 511 U.S. at 280; see also United States v. Olin Corp., 107 F.3d 1506, 1512 (11th Cir. 1997) (holding that Congress intended the recovery cost liability provisions of CERCLA to apply retrospectively, and emphasizing that, under Landgraf, “courts must effectuate congressional intent regarding retroactivity”).

The Supreme Judicial Court has emphasized this point:

It is our duty in construing a statute to discern the intent of the Legislature on the basis of all pertinent evidence. . . . If it appears by necessary implication from the words, context or objects of a particular enactment that the Legislature intended it to be retroactive in operation, this court will give effect to the intent of the Legislature in so far

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<sup>6</sup> Cf. Payton v. Abbott Labs, 386 Mass. 540, 566-70 (1982) (applying retrospectively new judicial rule of tort liability under which plaintiff can recover for injuries sustained in utero as a result of mother’s ingestion of drug during pregnancy).

as the State and Federal Constitutions permit.

Town of Canton v. Bruno, 361 Mass. 598, 606 (1972).

The statute at issue in Landgraf was the Civil Rights Act of 1991 (the “Act”), which created a right to recover compensatory and punitive damages for sexual harassment and certain other violations of the Civil Rights Act of 1964. Prior to the Act, plaintiffs were limited to equitable remedies and back pay. See 511 U.S. at 252-53. The Court could find no indication in the text, history or purpose of the statute to indicate that Congress intended the new damages provisions to apply to conduct pre-dating their enactment. Because the Congressional purpose would be effectuated by applying the new civil damages provisions solely to cases arising out of post-enactment conduct, the Court stressed that the Act was “plainly not the sort of provision that must be understood to operative retroactively because a contrary reading would render it ineffective.” See id. at 286 (emphasis in original).

Unlike the damages provision in Landgraf, the new Massachusetts statutes are precisely the sorts of provisions that must be understood to apply to pre-enactment conduct because a contrary reading would render them ineffective. The statutes were enacted following extensive Congressional hearings in the spring of 1994 at which, among other things, the Food and Drug Administration revealed its conclusions concerning the defendants’ manipulation of nicotine delivery in cigarettes. At the same time, internal documents of defendant Brown & Williamson were made public which identified widespread wrongdoing by the defendant cigarette manufacturers in connection with the manufacture and sale of cigarettes, and the first Medicaid reimbursement action was filed by the Attorney General of Mississippi in May 1994. The plain, express purpose of the Massachusetts enactments is to enable the Commonwealth to recover from liable third parties the “full amount” of Medicaid expenditures provided

by the Commonwealth.<sup>7</sup> Yet defendants would have this Court conclude that the Massachusetts Legislature intended to limit application of the statutes to defendants' conduct in connection with the manufacture and sale of cigarettes occurring solely after 1994 -- a construction that, according to defendants, would preclude the Commonwealth from any recovery of Medicaid expenditures in this case. Nothing in Landgraf requires this absurd result, which would be contrary to settled rules of statutory construction. See Hayon v. Coca Cola Bottling Co. of New England, 375 Mass. 644, 648 (1978) (legislative intent is to be divined in light of, inter alia, "the evil to be remedied, and the object to be accomplished by the enactment").

Indeed, defendants themselves seem to recognize that prospective application of the Statutes cannot be squared with the Legislature's intent, because they concede that "at the very least, the Statutes should not apply to a loss -- an illness or injury -- occurring before the effective date." Reply at 20 (emphasis added); see also id. at 19 n.19. Because of the latency period of smoking-induced

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<sup>7</sup> In Commonwealth v. Pace, 616 F. Supp. 815 (D. Mass. 1985), the court held that the Legislature intended G.L. c. 21E, which authorizes the Commonwealth to recover the costs of cleaning up hazardous waste sites, to apply retroactively to costs incurred before the statute was enacted. Because the statute provided in the past tense for recovery of all costs "incurred" by the Commonwealth as a result of the release of hazardous wastes, the court found that "the very terms of the statute provide for retroactive application." Id. at 818 (emphasis added) (quoting G.L. c. 21E, § 5(a)). Like chapter 21E, the new Massachusetts enactments expressly provide in the past tense for recovery of expenditures "provided" by the Commonwealth (in the case of Section 276) or "provided"

illnesses, some portion of the losses occurring after the effective dates of the statutes must have been caused by defendants' conduct prior to enactment. This concession therefore completely undercuts defendants' assertion that the Statutes cannot be applied to pre-enactment conduct.

Moreover, even if there were no clear indication that the Legislature intended the new statutes to apply retrospectively, there is an equally fundamental reason to reject defendants' "retroactivity" argument. As explained in the Commonwealth's Opposition, under Massachusetts rules of statutory construction, the judicial presumption in favor of prospective application applies only to statutes that impose new substantive obligations on a defendant. Remedial statutes, however, are presumed to apply to both past and future conduct. See Opposition at 23 n.12. Under Massachusetts law, moreover, a statute is considered remedial even if it "increase[s] the consequences of the plaintiff's prior wrongdoing," Welch v. Taunton, 343 Mass. 485, 488 (1962), or "provid[es] a more effective remedy for the enforcement of a prior right." Wynn v. Board of Assessors of Boston, 281 Mass. 245, 249 (1932).

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to a claimant (in Section 22).

The new Massachusetts statutes are clearly remedial under this standard. The statutes establish an independent, statutory right of action on behalf of the Commonwealth to recover a category of damages resulting from conduct which was already unlawful. The statutes do not, by contrast, create a cause of action to recover damages arising out of conduct that, previously, was not wrongful and could not foreseeably have subjected the defendant to liability. Cf. St. Germaine v. Pendergast, 416 Mass. 698, 703 (1993) (striking down statute that would have imposed retroactive liability, without regard to fault, on party whose conduct was not unlawful at the time, “where no significant public interest is served by creating liability”). Here, as in Leibovich, the defendants cannot reasonably claim a right to act unlawfully “without an effect on [their] liability in damages beyond what had been provided for in the case law.” Leibovich, 410 Mass. at 579. Therefore, even if it were not apparent that the Legislature meant the new statutes to apply to unlawful conduct pre-dating their enactment, Massachusetts rules of construction would not require prospective application.<sup>8</sup>

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<sup>8</sup> Defendants respond by relying entirely on Landgraf. They argue that, under Landgraf, a statute increasing the consequences of prior wrongdoing is considered substantive, and therefore the presumption is against retrospective application. See Reply at 16-18. Because the issue of statutory construction is a matter of state law, however, defendants’ reliance on a federal decision governing the construction of federal enactments is misplaced. To the extent there is any conflict between Landgraf and the Massachusetts rule governing the construction and application of remedial statutes, the Massachusetts rule prevails. Moreover, unlike the statute at issue in Landgraf, which created a new liability for compensatory and punitive damages which did not exist previously, the Massachusetts statutes create a statutory cause of action for the Commonwealth to recover damages for which defendants were already subject to liability. The Landgraf Court reaffirmed Bradley v. Richmond School Bd., 416 U.S. 696 (1969), in which the Court approved the retroactive application of a statute authorizing payment of attorneys fees to a prevailing party, on the ground that, even before the enactment of the statute, the trial court had equitable authority to award attorneys fees in appropriate cases. The Court stated that “[i]n light of the prior availability of a fee award . . . under pre-existing theories, . . . the new fee statute simply ‘did not impose an additional or unforeseeable obligation’ upon the [defendant].” 511 U.S. at 278 (quoting Bradley, 416 U.S. at 721). The identical situation exists here. Even before the enactment of the new statutes, defendants were subject to suit by the

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Commonwealth for damages caused by their unlawful conduct with respect to the manufacture and sale of cigarettes. See, e.g., G.L. c. 12, § 5 (authorizing Attorney General to bring suit to recover state’s monetary losses). Thus, under Bradley and Landgraf, the new Massachusetts statutes do not impose “additional or unforeseeable obligation[s]” and do not trigger a presumption against retrospective application. 511 U.S. at 278.

## V. The Statutes' Enactment as Outside Budget Sections Does Not Render Them Invalid.

For several reasons, there is no merit to defendants' claim that Sections 276 and 22 are constitutionally invalid because they were enacted as outside sections to annual budgets.

First, defendants fail to acknowledge the settled principle that if a statute is “sufficiently related to the subject of the appropriation of funds,” it may be enacted as an outside section. Mitchell v. Secretary of Administration, 413 Mass. 330, 337 (1992) (quoting Brookline v. Governor, 407 Mass. 377, 382 (1990)). Here, both Sections 276 and 22 were directly aimed at assisting the Commonwealth in recovering, from liable third parties, amounts expended on the state Medicaid program. That program was by far the most costly program in the annual budget in the years those sections were enacted, costing over \$3.4 billion annually, and it continues to be so.<sup>9</sup> It is constitutionally permissible for appropriation bills to include outside sections that “specify the ‘means’ by which expenditures shall be ‘defrayed.’” Mitchell, 413 Mass. at 337 (citing amend. art. 63, §§ 2, 4). Sections 276 and 22 are “means” to “defray” part of the cost of the Commonwealth’s Medicaid program and therefore were permissibly enacted as outside sections.<sup>10</sup>

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<sup>9</sup> St. 1994, c. 60, § 2, items 4000-0300 to 4000-0830 (FY 95 Medicaid appropriations totaling \$3.403 billion); St. 1995, c. 38, § 2, items 4000-0300 to 4000-0830 (FY 96 Medicaid appropriations totaling \$3.498 billion); St. 1996, c. 151, § 2, items 4000-0300 to 4000-0830 (FY 97 Medicaid appropriations totaling \$3.567 billion).

<sup>10</sup> It does not help defendants that Section 276 specifies that any recovery from a claim against a manufacturer of cigarettes should, with the exception of that portion retained by the Attorney General, be deposited in the Health Protection Fund created under G.L. c. 29, § 2T. There, the money may be used to “defray” expenditures from the Health Protection Fund, e.g., St. 1994, c. 60, § 2, items 4510-0110 to 4570-1500 (appropriations from Fund). Moreover, because money in the Fund is “subject to appropriation,” G.L. c. 29, § 2T, the Legislature may appropriate it directly for Medicaid purposes or may transfer it to another fund. See Gilligan v. Attorney General, 413 Mass. 14, 18-19 (1992); Mitchell, 413 Mass. at 336. Under any of these scenarios, the recovery under Section 276 is used to

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defray expenditures in the budget, and thus Section 276 is “sufficiently related” to the budget to validate its enactment as an outside section.

Second, even if Sections 276 and 22 were unrelated to appropriations, this Court should not take the extraordinary step of invalidating them because of the procedure by which they were enacted. Out of respect for the separation of powers requirement of article 30, the courts should not impose any particular procedures on the Legislature that are not expressly required by the Constitution. Backman v. Secretary of the Commonwealth, 387 Mass. 549, 555 (1982) (“mindful of the principle of separation of powers so carefully stated in art. 30 of the Declaration of Rights, this court should not infer specific constitutional procedure that the executive and legislative branches of government must follow”); see also LIMITS v. President of the Senate, 414 Mass. 31, 35 (1992) (“courts should be most hesitant in instructing the General Court when and how to perform its constitutional duties”); Powers v. Secretary of Administration, 412 Mass. 119, 125 n.7 (1992) (court “traditionally has avoided involvement in the internal workings of the Legislature in deference to the unique role of the Legislature and its expertise with regard to internal legislative processes”). This is particularly so where no language in amend. art. 63 or anywhere else in the Constitution either (1) says that an appropriation bill may only contain items of appropriation or (2) expressly restricts what subjects the Legislature may address in an appropriation bill. “An intention to restrict legislative action is not lightly to be implied when not shown by the language used in the Constitution or an amendment thereto.” Opinion of the Justices, 308 Mass. 601, 614 (1941) (construing amend. art. 63).

**VI. The Legislature Did Not Intend to Authorize a Cause of Action that Was Already Time-Barred.**

The Commonwealth demonstrated in its Opposition that the independent action expressly authorized by Sections 276 and 22 is not time-barred. Defendants now seek to sow confusion by

referring to an alleged distinction between a “direct” cause of action, in which the Commonwealth seeks to recover for its “own” injuries, and an “independent” cause of action to recover for expenses based on injuries to Medicaid recipients. Defendants argue that “for purposes of the statute of limitations analysis in particular, the distinction is critical.” Reply at 25.

Sections 276 and 22, however, make no such distinction. Under the statutes, the Commonwealth’s loss (or “injury”) is the legally mandated expenditure of funds to provide medical services to Medicaid recipients harmed by defendants’ conduct. The Commonwealth’s action is both “independent” and “direct.” The statutes expressly authorize the Commonwealth to sue liable third parties directly for reimbursement of its Medicaid expenses, and the statutes expressly make that action “in addition to” subrogation, G.L. c. 118E, § 22, and “independent of any rights or causes of action of the recipient.” St. 1994, c. 60, § 276. The statutes therefore clearly contemplate an action for Medicaid reimbursement that is independent of the statutes of limitations and accrual rules governing damages suits by individual smokers -- and, indeed, independent of the success or failure of such individual suits.<sup>11</sup> If not, the Commonwealth would be left with nothing more than subrogation by a different name.

For the reasons stated in the Commonwealth’s Opposition, the Commonwealth’s statutory claims for reimbursement of Medicaid expenditures accrue each time the Commonwealth makes Medicaid payments for which reimbursement is sought. See Opposition at 19-23. This explains why

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<sup>11</sup> Moreover, the Legislature was undoubtedly well aware of the publicly reported practical obstacles to multiple individual damages suits against an industry whose resources and litigation endurance are virtually limitless. See Rabin, Robert L., “A Sociolegal History of the Tobacco Tort Litigation,” 44 Stan. L. Rev. 853 (April 1992) (noting the almost insurmountable financial and practical obstacles of private plaintiffs suing the tobacco industry on product liability theories).

Section 276 authorizes the Commonwealth to bring “two or more actions to recover any amount under this section . . . against the same cigarette manufacturer.” Rather than supporting defendants’ awkward construction of the statute, see Reply at 15, this language parallels exactly the observation of the Supreme Judicial Court that, with respect to the statutory reimbursement action authorized by Chapter 21E, “it is possible to have more than one cause of action and more than one accrual date.” Oliveira v. Pereira, 414 Mass. 66, 74 n. 11 (1992).

Defendants’ last argument is essentially that legislative intent should be divined from what the Legislature did not say. Defendants argue that Sections 276 and 22 “do not mention the words ‘limitations’ or ‘accrual’ at all,” and therefore cannot support the Commonwealth’s supposedly “absurd proposition” that the reimbursement remedy provided by these statutes is governed by a separate limitations period and principle of accrual. Reply at 33.<sup>12</sup> Statutes, however, are often silent as to the governing limitations period -- so often that a doctrine has developed to address that very eventuality. The “borrowing” doctrine provides that where a statute is silent as to the governing limitations period, the court examines the essential nature of the claim and borrows the most analogous limitations rule. See Hendrickson v. Sears, 365 Mass. 83, 85 (1974). Indeed, G.L. c. 21E, which defendants

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<sup>12</sup> Defendants similarly argue that because Sections 276 and 22 do not use the word “reimbursement,” they cannot be interpreted to provide for a right of reimbursement like the reimbursement action authorized by G.L. c. 21E. Reply at 34. As the Supreme Judicial Court has held, reimbursement is simply “repaying or making good the amount paid out.” Oliveira, 414 Mass. at 73 (quoting Boston v. Commonwealth, 322 Mass. 177, 179 (1947)). The essential nature of the remedy afforded under Sections 276 and 22 is determined not by the Legislature’s failure to invoke the word “reimbursement,” but by its express provision of an independent right of action to require liable third parties to repay or make good the amount of Medicaid expenditures paid out as a result of their unlawful conduct. Nevertheless, the “magic” word appears in the federal Medicaid statute, which obligates the Commonwealth to “seek reimbursement” for Medicaid expenditures from liable third parties. 42 U.S.C. § 1396a(a)(25)(B). Sections 276 and 22 directly effectuate that federal mandate.

themselves call a statutory reimbursement or indemnification statute, was also enacted without “mention[ing] the words ‘limitations’ or ‘accrual.’” Reply at 33-34. Yet the Supreme Judicial Court did not think it an “absurd proposition” that the limitations period and accrual rule governing c. 21E reimbursement actions should be determined by examining the “essential nature” of the claim and borrowing the applicable limitations principles. Oliveira, 414 Mass. at 72-74 (applying the most analogous limitations and accrual rule to actions under c. 21E, prior to the Legislature’s addition of a specific limitations provision).

Here, too, the reimbursement claim authorized by Sections 276 and 22 is governed by a limitations period and principle of accrual independent of the statutory and common law rules that render defendants “liable third parties” within the meaning of these statutes. The reimbursement claims asserted in the Amended Complaint cannot be time-barred because they accrue when expenditures are made, and the Commonwealth continues to incur Medicaid expenses caused by defendants’ unlawful conduct with every passing day. And common sense dictates a result that effectuates the Legislature’s express intent that Sections 276 and 22 provide the Commonwealth with a meaningful right of reimbursement against the cigarette industry, not a right of reimbursement that was already time-barred at the time of its enactment.

### **CONCLUSION**

For the reasons stated in this sur-reply and in the Commonwealth’s memorandum in opposition to defendants’ motion to dismiss, the Commonwealth respectfully requests that defendants’ motion be denied.

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Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

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