

IN THE CIRCUIT COURT OF THE FIFTEENTH  
JUDICIAL CIRCUIT, IN AND FOR  
PALM BEACH COUNTY, FLORIDA

**THE STATE OF FLORIDA, et al.,**  
Plaintiffs,

v.

**THE AMERICAN TOBACCO COMPANY, et al.,**  
Defendants.

Case No. CL 95-1466 AH

September 16, 1996

**ORDER GRANTING, IN PART, DEFENDANTS'  
MOTIONS TO DISMISS; ORDER DENYING, IN  
PART, DEFENDANTS' MOTIONS TO DISMISS;  
AND ORDER TO PARTIES TO CONDUCT  
FURTHER MEDIATION**

**Harold J. Cohen**, Circuit Court Judge

This cause came on to be heard before this Court on the 6<sup>th</sup> day of September, 1996, upon the various Motions to Dismiss filed by Defendants in this cause.

Defendants B.A.T. Industries, plc, Loews Corporation; and Batus Holdings, Inc., have moved to dismiss the Plaintiffs' Second Amended Complaint by attacking this Court's jurisdiction to proceed in their respective cases. The other Defendants' Motions to Dismiss seek dismissal of the Plaintiffs' Second Amended Complaint for failure to state a proper and permissible cause of action.

Extensive legal memoranda with supporting documents and exhibits have been filed in support of the motions and in opposition thereto. A full day of oral arguments was heard by this Court. First, this Court must determine what cause of action the State/Plaintiff is permitted to bring in the State of Florida. The Court is aware that many other states have brought actions against some or all of the Defendants enumerated in the Plaintiffs' Second Amended Complaint. However, the Supreme Court of Florida has given direction to trial courts in this state as to precisely what causes of action the State of Florida may maintain. They are set forth in *Agency for Health Care Admin. v. Associated Industries of Florida, Inc.*,

No. 86,213, slip op. (Fla. June 27, 1996) ("*Associated Industries*"). It is the *Associated Industries* case that defines how the State may seek reimbursement for Medicaid payments from third parties in Florida.

It never ceases to amaze the Court how some of the finest lawyers in the land can disagree over the meaning of one Florida Supreme Court opinion. The parties spent a half-day doing just that. The *Associated Industries* case includes a scholarly historical review followed by specific *holdings* that control the litigation in this case.

As the Florida Supreme Court stated:

We now must address the nature of the State's cause of action. We recognize that many aspects of the Act have been challenged on constitutional grounds. However, in view of the numerous theories as to the origin and substance of the State's action, we choose to first define the contours of that action and then evaluate the Act against constitutional standards.

Associated Industries asserts that the State was limited to traditional notions of subrogation, assignment, and lien until the legislature amended the Act in 1994, and that, under these traditional theories, the State would be subject to the same legal obstacles that the Medicaid recipient would face in pursuing a claim. Associated Industries contends that it was the 1994 modifications that gave the State an independent cause of action and abrogated the affirmative defenses available to a third-party tortfeasor. *We agree that it was the 1994 modifications, coupled with the 1990 amendments, that established an independent cause of action. See Associated Industries at pp. 15-16. (Emphasis added.)*

There can be absolutely no question that prior to the 1994 law there was no *independent* cause of action permitting the State to go forward in seeking Medicaid reimbursement. As the Florida Supreme Court stated in *Associated Industries*:

Once again, there can be no argument after 1994 that the State's cause of action is derivative in the nature of a subrogation, assignment, or lien. Rather, it is a *new, independent cause of action*

that requires the State to prove: (1) either negligence or a defective product; (2) causation; and (3) damages. *We have now defined the cause of action as it exists after the 1994 amendments. See Associated Industries* at p. 19. (Emphasis added.)

The Florida Supreme Court has ruled that before the 1994 law that the State's cause of action was "derivative in the nature of a subrogation, assignment or lien." Therefore, the Plaintiffs in this cause of action are limited to bringing complaints for negligence and/or defective products in seeking Medicaid reimbursements. By separate actions the State may pursue subrogation, assignment, and/or lien regarding any and all damages occurring prior to the 1994 amendments.

Second, the Florida Supreme Court held in *Associated Industries*:

As part of the 1994 amendments to the Act, the legislature enacted a paragraph that allows the State to proceed without identifying each individual recipient of Medicaid payments .... We find that this portion of the statute does in fact encroach upon due process guarantees of the Florida Constitution under article I, section 9.... The current Act would prevent a defendant from demonstrating the impropriety of individual payments. Impropriety could be the result of fraud, misdiagnosis of the patient's condition, or unnecessary treatments. The defendant's inability to determine individual Medicaid recipients would also preclude that defendant from probing that its product was never used by the recipient. Hence, the statutory provision results in a conclusive presumption that every Medicaid payment is proper and necessitated by the defendant's product. It is illogical and unreasonable to call this a fair process. A defendant cannot rebut this presumption because there is *no mechanism* for determining for whom the payments were made.... *See Associated Industries* at pp. 29-30. (Emphasis added.)

What the Florida Supreme Court has done in this section of the *Associated Industries* case is to strike any portion of the 1994 amendments disabling any defendant from questioning the propriety of

individual payments. The Florida Supreme Court did *not* require that identity of recipients of Medicaid payments be plead in the complaint. A specific *mechanism* to identify must be afforded to the Defendants so a challenge to any improper payments to individuals can be made. The specific *mechanism* to allow for compliance with this portion of the Florida Supreme Court's opinion in *Associated Industries* will be set forth below.

Third, the Florida Supreme Court held in *Associated Industries*:

... Consequently, the State may proceed independently with its new cause of action *to recover all payments made after the effective date of the 1994 Act, specifically July 1, 1994*. Of course, the State may also pursue claims occurring prior to that date under the 1978 traditional subrogation action... *See Associated Industries* at p. 36. (Emphasis added.)

Therefore, in this case the State may pursue only damages for negligence and/or products liability for payments made after the effective date of the 1994 Act, i.e., July 1, 1994. As stated in *Associated Industries*, the State by separate actions may pursue claims before that date under separate traditional subrogation actions.

Having defined the State's cause of action as set forth in *Associated Industries*, only Counts One and Two of the Second Amended Complaint are proper courses of action to obtain monetary damages in this case. With one exception all the remaining counts must be dismissed with prejudice. Damages for claims occurring prior to July 1, 1994 must be sought by the Plaintiffs through traditional subrogation actions.

However, Count Eighteen of the Second Amended Complaint is a prayer for injunctive relief. Count Eighteen seeks to protect minors within the State of Florida and seeks, in part, to enjoin violations of the criminal laws of the State of Florida including the distribution and sale of cigarettes to minors under the age of 18. In addition, under Chapter 817, Florida Statutes, injunctive relief is provided for in cases involving fraudulent practices including misleading advertising. Furthermore, in giving the State the widest latitude in pleading a cause of action for injunctive relief, the Court recognizes that the allegations of the Second Amended Complaint may very well describe a public nuisance endangering the health of Florida's citizens, and especially its children. The Florida Supreme Court has held:

The power of a court of equity to abate a public nuisance where no property rights of the complainant are involved, even in the absence of a statute, we find affirmed.... See *Pompano Horse Club v. State*, 111 So. 801 (Fla. 1927) at p. 810.

In the aforementioned opinion, the Florida Supreme Court went on to quote a treatise in Equity Jurisprudence. The importance of the holding goes to the State's ability to maintain Count Eighteen, the Injunction Count:

... "Therefore, whenever a public nuisance is shown, equity must enjoin it at the suit of the government. Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated is a public nuisance..." See *Pompano Horse Club* at p. 810.

The State's Second Amended Complaint asserts, in part, repeated, continuous, persistent and open violations of Florida's public statutes concerning fraudulent practices and sales to minors. Consequently, Count Eighteen stands on its own and separate from the 1994 amendments discussed above.

The Court having ruled that Counts One, Two and Eighteen may stand, and that all remaining counts cannot in this action, the Motions to Dismiss attacking the allegations of the Second Amended Complaint be and the same are hereby GRANTED, In PART, and DENIED, IN PART. As to Counts One, Two and Eighteen, the Motions to Dismiss attacking the Second Amended Complaint be and the same are hereby DENIED. As to all other remaining counts the Motions to Dismiss be and the same are hereby GRANTED WITH PREJUDICE. However, the Plaintiffs may pursue traditional subrogation in separate actions.

The Court must now turn to the three Motions to Dismiss attacking this Court's jurisdiction over B.A.T. Industries, plc; Loew's Corporation; and Batus Holdings, Inc. The issue is whether any or all of these three entities can be sued for negligence, products liability, and/or enjoined in this state in this action.

In essence, the question is whether any and/or all of these entities transacted business in Florida during the pertinent times in question *or* committed the torts of negligence and/or a marketing of allegedly defective products in Florida. The answer in each case is "no."

Whatever allegations the Plaintiffs have made have been controverted by the Defendants in affidavits and/or supporting documentation and evidence shifting to the Plaintiffs the burden of proof by a preponderance of the evidence to support jurisdiction. The burden having been shifted, the State has failed to prove in each of the cases that these three entities have transacted business on a regular basis in this state or committed any tort in this state. The facts themselves are not substantially in controversy. The question is whether the facts are sufficient by a preponderance of evidence to support the theories of alter-ego, aiding and abetting, agency, and/or "mere instrumentality" regarding the aforementioned torts. None of the required indicators have been proven to this Court's satisfaction. B.A.T. Industries, plc; Loew's Corporation; and Batus Holdings, Inc., do not market, manufacture, sell, or deliver tobacco products in Florida or place these products in the stream of commerce. These companies are holding companies not actively operating tobacco businesses.

The Court has not even reached the "minimum contacts" considerations required in any analysis if the facts had warranted a finding of the commission of a tort. Almost by definition, this Court's finding that the Plaintiffs have failed to meet their burden to show statutory jurisdictional grounds to maintain actions against these three entities means that there certainly could be no minimum contacts in the State of Florida. Certainly the evidence submitted does not show any sufficient minimum contacts. It is therefore

ORDERED AND ADJUDGED that the jurisdictional Motions to Dismiss filed by B.A.T. Industries plc; Loews Corporation; and Batus Holdings, Inc. be and the same are hereby GRANTED and all three Defendants are DISMISSED from the Second Amended Complaint with Prejudice.

Having found that the Plaintiffs do maintain a viable cause of action in Counts One, Two and Eighteen of the Second Amended Complaint as to the remaining Defendants, the Court must require answers to the Second Amended Complaint to be filed by the remaining Defendants. The Court must also address the issue of the identity of recipients of Medicaid payments. The State cannot proceed without identifying each individual recipient of Medicaid payments. It is therefore

ORDERED AND ADJUDGED that the Plaintiffs provide the identity of each individual recipient of Medicaid payments for which damages will be claimed under the 1994 Act. The State shall file with the Clerk of this Court a list identifying each such individual recipient within thirty days of the entry of

this Order and provide a copy of the same list to all remaining Defendants at the time of said filing. It is further ORDERED AND ADJUDGED that within twenty days of the filing of the aforementioned list each Defendant remaining in this cause of action shall answer the State's Second Amended Complaint as to Counts One, Two and Eighteen.

The Court has also been in receipt of the Mediator's Report in this case which has been filed in the official Court file. Without referencing any details, the Mediator has indicated that further mediation might be fruitful in this case. Now that the Court has ruled as stated in this Order the Court directs further mediation. It is therefore

ORDERED AND ADJUDGED that all remaining parties in this cause of action shall submit to Mediation with the Court Mediator in this case for a second session to mediate in good faith, said session to commence no later than sixty days from the entry of this Court Order. It is further

ORDERED AND ADJUDGED that the Special Master previously appointed in this case may now proceed to hear all outstanding discovery matters relevant to the remaining three counts in this cause, i.e. negligence, products liability, and those issues pertinent to the issuance of injunctive relief set forth in Count Eighteen. It is further

ORDERED AND ADJUDGED that this Court shall not entertain Motions to Rehear and/or Reconsider matters relating to the Motions to Dismiss set forth in this Order having had a full day of oral arguments and extensive legal memoranda submitted on these issues.

Once again all parties and the Special Master are reminded that in conducting discovery and other hearings in this case that this Court fully intends to abide by its Order Setting Trial to commence on August 4, 1997.