

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

**THE STATE OF FLORIDA, LAWTON M. CHILES,
JR., Individually and as GOVERNOR OF THE STATE
OF FLORIDA, DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION, and THE AGENCY
FOR HEALTH CARE ADMINISTRATION,**
Plaintiffs,

v.

THE AMERICAN TOBACCO COMPANY, et al.,
Defendants.

Case No.: CL 95-1466 AH

February 3, 1997

**ORDER GRANTING PLAINTIFFS' MOTIONS TO
STRIKE AFFIRMATIVE DEFENSES TO THIRD
AMENDED COMPLAINT**

Harold Jeffrey Cohen
Judge, Circuit Court (Civil Division H)

This cause came on to be heard before me on the 24th day of January, 1997 upon the Plaintiffs' Motion to Strike Affirmative Defenses to Third Amended Complaint and To Strike, in particular, RJR Nabisco's affirmative defense concerning jurisdiction. It is

ORDERED AND ADJUDGED the Plaintiffs' Motion To Strike Affirmative Defenses To Third Amended Complaint and Plaintiffs' Motion To Strike, in particular, RJR Nabisco's affirmative defense concerning jurisdiction be and the same are hereby GRANTED.

The affirmative defense of RJR Nabisco concerning personal jurisdiction is DISMISSED WITH PREJUDICE in that the Court finds said defense was waived by the earlier actions of that particular Defendant in this case.

As to all other affirmative defenses to the Third Amended Complaint raised by the Defendants, the Plaintiffs' Motion To Strike is GRANTED without prejudice.

The Third Amended Complaint contains four "categories" of remaining counts: counts pursuant to the 1994 amendments to the Medicaid Third-Party Liability Act; counts alleging civil actions for violations of the Florida RICO (Racketeer Influence Corrupt Organization) Act; civil action for damages under Florida Statute 817.41; and a prayer for injunctive relief.

First, when, and if, affirmative defenses are pleaded the Court shall require that affirmative defenses be directed specifically to allegations in *each specific count*.

Second, the Court hereby limits those affirmative defenses that may be filed with respect to the four enumerated "categories" of counts as follows:

The counts seeking relief pursuant to the 1994 amendments to the Medicaid Third-Party Liability Act are controlled by the law set forth in *Agency for Health Care Administration, et al., v. Associated Industries of Florida, Inc., et al.*, 678 So.2d 1239 (Fla. 1996).

As set forth in *Agency for Health Care v. Associated Industries*, at p. 1253:

To recap, we hold that the provision abrogating affirmative defenses is facially constitutional. We do not address whether the provision will always survive a constitutional due process attack as to its application. It would be inappropriate to speculate as to such application. "When such application shall be made it will be time enough to pronounce upon it" ... Further, any speculation as to the application of this provision would be flawed because *we* have no record containing facts, evidence, or expert opinions... (emphasis added).

In following *Agency for Health Care v. Associated Industries*, this Court finds no affirmative defenses shall be filed with respect to those counts in the complaint brought pursuant to the 1994 amendments to the Medicaid Third-Party Liability Act.

... On its face, the provision allowing for the abrogation of affirmative defenses is constitutional under both the federal and Florida Constitutions...

At bottom, we can find no case in the

United States Supreme Court that would prohibit the Florida Legislature from abolishing affirmative defenses in the circumstances addressed by the Act ... See *Agency for Health Care v. Associated Industries* at pp. 1250-1251.

With affirmative defenses abolished and a record being developed in this case, the application of the abolition of affirmative defenses to the facts in this case will be subject to a review on the appellate level.

As to claims pursuant to the 1994 amendments to the Medicaid Third-Party Liability Act this case will be tried on the issues of:

... (1) either negligence or a defective product; (2) causation; and (3) damages.... See *Agency for Health Care v. Associated Industries* at p. 1250.

As to the RICO counts this Court has previously ruled in its Order Denying Defendants' Motions to Dismiss Counts Five through Eight of the Third Amended Complaint dated December 13, 1996;

Therefore, for the purposes of pleading and proving a civil action for RICO brought by the *State* - as opposed to a civil action for RICO brought by a *private* party - the Court will *require the same standard of pleading and proof required in criminal prosecutions by the State* ... See *Order Denying Defendants' Motions to Dismiss Counts Five through Eight, etc.* at p.3 (emphasis added).

Therefore, as to all RICO counts the Court will permit the filing of affirmative defenses that apply to criminal actions only, if applicable, such as insanity, entrapment, alibi, etc. Mere allegations that there was no pattern of racketeering activity, etc. which are simply denials will be treated as denials and not affirmative defenses.

As to civil action for damages under Florida Statute 817.41, the same issue set forth with regard to the RICO counts applies.

As to the count for injunctive relief, the Court will permit the filing of traditional affirmative defenses in injunction cases. However, these defenses must be pled with specificity and may include such allegations as "unclean hands," etc. provided a specific factual basis is pled.

Finally, the revelation made in open Court on

January 24, 1997 concerning the State's alleged manufacture, production, and/or sale of cigarettes and/or tobacco products in this State's prison system is not an affirmative defense. Evidence concerning this activity by another state agency may or may not be considered as evidence going to damages when the State presents its market-share theory at trial.

In entering this order the Court is well aware that it is limiting significantly those matters which may be raised as affirmative defenses in this case and consequently, the type and depth of discovery that may proceed in this case. However, we are dealing with a new and unique statutory scheme enacted by the Florida Legislature which has been upheld by the Florida Supreme Court in *Agency for Health Care Administration, et al. v. Associated Industries of Florida, Inc., et al.* The case at bar is the first application of this unique act which has no comparable statute in our sister-states. In this case we are developing a record which will eventually result in a decision to be appealed to our higher Courts enabling them to have an opportunity to review the application of the Medicaid Third-Party Liability Act under the facts and circumstances developed in this case. It is not for this Court to substitute its personal opinion or philosophy for that of the Florida Legislature which decided to abrogate affirmative defenses and restrict the proof in this case. The case is being handled as prescribed by the Florida Legislature.

The Court having stricken all affirmative defenses, it is

ORDERED AND ADJUDGED that the Defendants may file and serve amended affirmative defenses pursuant to the dictates of this Order on or before the 14th of February, 1997. Motions to Strike these Amended Affirmative Defenses shall be heard by the Court at its next regularly scheduled full-day hearing on February 29, 1997.

As discovery proceeds in this case, any further affirmative defenses which the Defendants discover that they may have in good faith may be pled at a later time after seeking and receiving leave of Court to do so. The Court will not permit a "shot-gun" approach to the filing of affirmative defenses. Any future affirmative defenses pled must be pled with specificity with regard to a specific count and under a legal theory supported by admissible evidence permitted under this Order.