Coughing Up the Cash: Should Medicaid Provide for Independent State Recovery Against Third-Party Tortfeasors Such as the Tobacco Industry?

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COUGHING UP THE CASH: SHOULD MEDICAID PROVIDE FOR INDEPENDENT STATE RECOVERY AGAINST THIRD-PARTY TORTFEASORS SUCH AS THE TOBACCO INDUSTRY?

Michael K. Mahoney*

I. INTRODUCTION

Public opposition to cigarette smoking is at an all-time high in the United States. Though at one time questioned, now irrefutable evidence of both its addictive nature and its link to deadly disease have spurred feelings of frustration, outrage, and betrayal from smokers and non-smokers alike. As a result, individual smokers since the 1950's have continued to file private suits against the tobacco industry based upon several common law theories.¹ Unfortunately, courts have not looked favorably on these claims. Citing problems of causation, lack of defendants' knowledge regarding smoking's dangers, and the strength of the assumption of risk defense, courts consistently have excused the tobacco industry for the harms it allegedly has caused millions of Americans for decades.²

* Articles Editor, 1996–1997, Boston College Environmental Law Review.


² See, e.g., Green v. American Tobacco Co., 304 F.2d 70, 76–77 (5th Cir. 1962) (discussing smoker's and manufacturer's knowledge of dangers of smoking); Albright, 350 F. Supp at 351 (discussing problems of causation); Pritchard v. Liggett & Myers Tobacco Co., 134 F. Supp. 829, 836 (W.D. Pa. 1955) (discussing possibility that plaintiff may have assumed risk by smoking).
Despite courts’ relative indifference toward the plight of smokers, state governments recently have thrown their hat into the ring as well. The discovery of internal tobacco industry documents allegedly recounting the industry's intentional misrepresentation, fraud, and deceit has, over the past year, spurred several states to file suits against the nation’s largest tobacco manufacturers. Though each state pursues varying theories of recovery, all the states share a common goal: recouping the tens of millions of dollars that each has spent in treating its citizens’ smoking-related illnesses via medical assistance programs like Medicaid. The state suits are not class actions filed on behalf of smokers, but instead actions filed for the benefit of all citizens whose tax dollars are spent disproportionately caring for harms that the tobacco industry allegedly has caused.

The states’ seemingly smooth road to recovery may encounter only a single barrier. That barrier is Medicaid legislation that governs the states’ ability to recoup damages caused by third-party tortfeasors like the tobacco industry. Though ambiguous, the statutory language delineating the appropriate methods of recovery arguably forbids the states’ “independent” recovery, instead limiting them to “subrogated” claims. An equitable remedy allowing one party to “stand in the shoes of” another harmed party, subrogation bestows upon the intervening party all the privileges and burdens of the harmed party. Most frequently associated with the insurance industry, subrogation allows not only the intervener to pursue any claim the harmed party may have, but also the tortfeasor to present any affirmative defenses originally applicable against the harmed party.

It is upon this statutory ambiguity that the tobacco industry hopes to capitalize. By characterizing the states’ Medicaid programs as private health insurers and presenting principles of statutory construction, the tobacco industry attempts to limit the states to subrogated claims. If this attempt is successful, the tobacco industry would be entitled to present against the states the same affirmative defenses

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6 See id. at 2.
9 Id. at § 61:212
10 See Defendant’s Brief in Opposition to Plaintiff’s Motion for Judgment on the Pleadings at
that have proven so successful in the private realm.\textsuperscript{11} To stave off such a characterization, the states not only present their own theories of statutory construction, but also analogize the Medicaid legislation to federal statutes allowing the government's independent recovery.\textsuperscript{12}

This Comment examines the Medicaid statute's subrogation issue in the context of the states' suits, and then offers a basis for concluding that the statute does not limit the states to subrogated claims. Section II provides a brief outline of smoking's harmful effects on both human health and the federal Medicaid program. Section III describes the various states' claims against the tobacco industry. Section IV provides a general introduction to subrogation and its role in Medicaid legislation. Regarding the states' suits, this section lays out each side's arguments as to why this legislation should, or should not, restrict the states to subrogated claims. Finally, section V of this Comment parses through those arguments—concluding that the courts, Congress and policy all dictate that the states rightfully can avoid subrogation and sue the tobacco industry independently.

II. SMOKING AND MEDICAID

A. Health Effects of Smoking

Deemed "the most important preventable cause of . . . premature mortality in the United States," cigarette smoking kills untold numbers each and every year.\textsuperscript{13} In the United States, forty-eight million people label themselves as "smokers," and purchase over twenty-four billion packages of cigarettes annually.\textsuperscript{14} All tolled, smoking causes 400,000 people to die every year, a total exceeding the combined deaths caused by automobile accidents, AIDS, alcohol use, use of illegal drugs, homicide, suicide, and fires.\textsuperscript{15}

\textsuperscript{11} See COUCH, supra note 8, at § 61:212.

\textsuperscript{12} See Plaintiff's Brief in Support of Plaintiff's Motion to Strike Challenges to the Sufficiency of the Complaint and the Subject Matter Jurisdiction of the Chancery Court at ¶ 49–51, Mike Moore, Attorney General ex. rel., State of Mississippi v. The American Tobacco Co., (No. 94–1429) (Miss. Ch. Ct., Jackson County, 1994) [hereinafter Plaintiff's Brief Miss.].

\textsuperscript{13} See Medical-Care Expenditures Attributable to Cigarette Smoking—United States, 1993, MORBIDITY AND MORTALITY WEEKLY REPORT (U.S. Centers for Disease Control and Prevention, Wash., D.C.), July 8, 1994, at 469 [hereinafter Medical-Care Expenditures].

\textsuperscript{14} See id.

The staggering number of deaths attributable to cigarette smoking stems primarily from the great variety of illnesses caused by the activity itself. Though tobacco advocates likely would argue otherwise, the causal relationship between smoking and disease is as well established as any other in modern medicine.16 Most notable perhaps are the several forms of cancer found among smokers. Cigarette smoking causes more than eighty-five percent of all lung cancer, which now has surpassed breast cancer as the primary cause of death from cancer among American women.17 Smoking also induces cancers of the mouth, larynx, esophagus, stomach, pancreas, uterus, cervix, kidney, and colon.18 Along with cancer, smoking also gives rise to eighty percent of deaths from pulmonary diseases like emphysema and bronchitis.19 In addition, there are the thousands of heart attacks, strokes, and cases of both vascular disease and aortic aneurysm attributable to cigarette smoking.20

B. A “Medicaid” Overview

Who bears the financial costs of treating these illnesses? Historically the smoker did, paying such expenses either out-of-pocket or through a private insurance company with whom the smoker held a contractual agreement.21 Given the excessive financial costs of medical care, the poor saw physicians less than others, or faced serious financial difficulties in paying for the care they did receive.22 Consequently, the government, through a variety of programs, has tapped public funds to cover the medical expenses of millions of indigent American smokers.

Most notable among these programs, perhaps, is Medicaid. Established in 1965, Medicaid is a government-run program of medical assistance for impoverished individuals who are aged, blind, disabled,
or members of families with dependent children. During the past thirty years, Medicaid (and its companion Medicare) has provided the nation’s most vulnerable and illness-prone groups access to health services. Jointly financed by federal and state governments, Medicaid is administered largely by states within broad federal guidelines regarding the scope of services, provider payment levels, and population groups eligible for coverage. Under this system, the recipient freely chooses among participating health care providers and then asks the state to reimburse that provider for services rendered.

This payment system has made Medicaid one of the most popular, and thus most costly, government programs in existence today. Since its enactment, Medicaid membership has grown tremendously: from nineteen million members in 1972 to nearly thirty-five million in 1994. Today, nearly thirteen percent of the American population receives some health coverage from the government via Medicaid. Not surprisingly, such staggering membership increases have placed a significant financial strain on federal and state governments alike. At the federal level, this growth has forced the government to become the nation’s “single largest payer for health care services”—with payments totalling $272 billion annually. Specifically, Medicaid alone has cost the government upwards of $125 billion annually, accounting for nearly six percent of the entire federal budget. At the state level, pressure from the federal government, courts, and even state legislators has forced Medicaid planners to increase coverage for pregnant

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23 Medicaid Eligibility-Services, 3 Medicare & Medicaid Guide (CCH) ¶ 14,010 (Feb. 10, 1994) [hereinafter Medicaid Eligibility-Services].

24 Enacted alongside Medicaid as part of the Social Security Act, Medicare provides basic health care funding to individuals over the age of 65. See Nancy De Lew, The First 30 Years of Medicare and Medicaid, 274 JAMA 262, 263 (1995).

25 Id.

26 See id. at 265. Typically, a particular state’s Medicaid plan provides its recipients with hospital services, health center and ambulatory services, laboratory/X-Ray services, screening and diagnosis, and physician services. See Medicaid Eligibility-Services, supra note 23, at ¶ 14,010.

27 Id.

28 De Lew, supra note 24, at 262. Between 1985 and 1993 alone, expansion of coverage to include pregnant women and families whose income was up to 133% of the poverty level added 11 million Americans to the program. See id. at 262, 265.

29 See id. at 262.

30 See id. at 263.

31 See id. Medicare and Medicaid spending represents 31% of all health spending in the United States, 41% of all hospital spending, 28% of all physician spending, and 61% of all nursing home spending. See id.

32 See Rowland, supra note 21, at 272.
women, children, individuals with disabilities, and the low-income uninsured.\textsuperscript{33} This rapid spending growth predictably has outpaced that of federal, state, and local revenue.\textsuperscript{34} Consequently, a “growing share of public spending has been devoted to . . . Medicaid each year.”\textsuperscript{35} Today, “Medicaid has grown to be the second largest expenditure item in state budgets,” exhausting nearly twenty percent of state general revenue spending annually.\textsuperscript{36}

Not surprisingly, tobacco use has played a major role in draining both the federal and state governments of vital resources. Along with diseases involving alcohol abuse, “tobacco-related diseases are the most common disorders found among hospitalized populations and disproportionately affect low-income, medically indigent [individuals].”\textsuperscript{37} At the same time, these individuals are among the most intense users of emergency medical services, one of the most expensive services in the health care system.\textsuperscript{38} A 1987 study of the medical care costs attributable to smoking revealed that $21.9 billion is spent annually in treating smoking-related illnesses like cancer, heart disease, and stroke.\textsuperscript{39} Of this amount, Medicaid payments alone accounted for over ten percent.\textsuperscript{40} A report by the University of California and the U.S. Centers for Disease Control and Prevention estimated that in 1993, smoking-related illnesses cost United States taxpayers a total of approximately $50 billion.\textsuperscript{41} Though such huge figures and percentages are staggering, looking at a single pack of cigarettes perhaps best captures tobacco’s enormous impact on Medicaid spending.\textsuperscript{42} For each of the twenty-four billion packs of cigarettes sold each year, society spent approximately $2.06 on medical care for illnesses attributable to smoking.\textsuperscript{43} Of that amount, the government alone paid $.89 through public programs like Medicaid.\textsuperscript{44}

\textsuperscript{33} See id.
\textsuperscript{34} De Lew, supra note 24, at 263. While health care spending in the United States increased by 12% generally between 1970–1992, Medicaid spending increased at a faster rate—16% during that same period. Id.
\textsuperscript{35} Id.
\textsuperscript{37} Gangarosa, supra note 16, at 87.
\textsuperscript{38} Id. at 87, 88.
\textsuperscript{39} See Medical-Care Expenditures, supra note 13, at 470.
\textsuperscript{40} Id. at 469.
\textsuperscript{41} Id. at 470.
\textsuperscript{42} See id.
\textsuperscript{43} See id.
\textsuperscript{44} See Medical-Care Expenditures, supra note 13, at 470. To rebut this argument, tobacco advocates cite numerous economic analyses suggesting that tobacco actually saves states money
III. State Lawsuits

Realizing the severe damage smoking-related illnesses are inflicting on Medicaid and the entire health care system, states have decided to take matters into their own hands. Since 1995, fifteen states, including Minnesota, Mississippi, Florida, Louisiana, West Virginia and Massachusetts have filed lawsuits against the tobacco industry in an attempt to force it to take responsibility for the financial harms associated with smoking. Unlike past suits against the tobacco industry, these suits are not class actions brought on behalf of smokers. Rather, the suits are actions brought on behalf of state taxpayers, smokers and non-smokers alike, whose dollars, the states contend, have been disproportionally spent caring for individuals whom tobacco companies have allegedly injured. The goal the states share is to recoup the hundreds of millions of dollars that the states have due to the frequent pre-mature deaths caused by smoking. Gangarosa, supra note 16, at 85 n.19 (citing Jonathan Marshall, Smokers Paying Their Own Way, S.F. CHRON., Aug. 29, 1994, at D1). Specifically, they argue that because smokers typically die young, states do not have to make as many social security or Medicare payments over the long run. They further claim that the relatively quick deaths stemming from smoking-related illnesses like heart disease and stroke free the states from expenses associated with individuals "hanging on" in nursing homes or other long-term facilities. Id.

45 See Kelder, supra note 5, at 1.
46 Id. Tobacco manufacturers originally named as defendants include: Philip Morris, Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Corporation; B.A.T. Industries P.L.C.; Lorillard Tobacco Co.; Liggett Group, Inc.; New England Wholesale Tobacco Co., Inc.; and Albert H. Notini & Sons, Inc. See Plaintiff's Complaint Mass., supra note 15, at 1. Also named as defendants were tobacco industry groups including The Council for Tobacco Research - U.S.A., Inc. and The Tobacco Institute, Inc. Id.
47 See Kelder, supra note 5, at 1.
49 Frank Phillips, State To Sue Over Costs of Smoking, BOSTON GLOBE, March 15, 1996, at 13. In March 1996, Liggett Group—the smallest of the nation's five major tobacco companies—announced that it would settle its part of both a major private class action suit brought on behalf of smokers nationwide and the states' Medicaid reimbursement suits. See Martin Shao, Mass. Moves to Ink Pact, BOSTON GLOBE, March 15, 1996, at 33, 37. Under the settlement agreement, Florida, Mississippi, Minnesota, West Virginia and Massachusetts would split $5 million up front. Id. The states then would also share a settlement equivalent to 2.5% a year of Liggett's pre-tax profit during the next twenty-five years. Id. The agreement would also serve as an invitation to other states to sue the tobacco industry and simultaneously settle with Liggett. Id. New states that sued would be eligible for proceeds from Liggett based upon a similar pre-tax profit formula. Id.
expended in caring for Medicaid recipients suffering from smoking related illnesses.\textsuperscript{50} In addition, the states seek a permanent injunction requiring the tobacco industry to disclose all of its research on smoking to the public, to fund an educational program detailing the health consequences of smoking and, finally, to fund smoking cessation programs for nicotine-dependent smokers.\textsuperscript{51}

A. General Courses of Action

Though they share the common goal of receiving compensation from the tobacco industry, the lawsuits filed by the individual states vary significantly in the specific means chosen to achieve that goal. State statutory authority has forced each of the plaintiff states to pursue only those theories of recovery offering the most promise. In Florida, for example, the Attorney General enjoys broad authority to bring suit under the state's Third Party Medicaid Liability Act, a statute specifically authorizing the state to seek reimbursement for Medicaid-generated medical expenses "independent of any rights of causes of action of the recipient[s]" themselves.\textsuperscript{52} More importantly, that statute provides that the affirmative defenses traditionally relied upon by the tobacco companies like comparative negligence and assumption of the risk are "to be abrogated to the extent necessary to ensure full recovery."\textsuperscript{53} Minnesota, bringing suit jointly with Blue Cross/Blue Shield of Minnesota, has based many of its claims on the state's Anti-Trust and Consumer Protection Laws.\textsuperscript{54} The vast major-

\textsuperscript{50} See Phillips, supra note 49, at 13.
\textsuperscript{51} See id.
\textsuperscript{52} FLA. STAT. ANN. § 409.910(6) (West 1994).
\textsuperscript{53} Id. § 409.910(1). Enacted in the summer of 1994, this statute specifically creates a new cause of action for Medicaid reimbursement. Graham Kelder, Medical Cost Reimbursement Suits Comprise Second Front in the Third Wave of Tobacco Litigation, TOBACCO ON TRIAL (Tobacco Control Resource Center, Boston, Mass.), Feb. 1995, at 13 [hereinafter Kelder II]. In short, it recognizes an injury to the states separate and distinct from the injuries to smokers themselves. Id. "On June 30, 1994, Philip Morris, along with several business groups, filed a preemptive constitutional challenge to Florida's Medicaid Third Party Liability Act." Id. at 15. The complaint "alleges that the Act removes affirmative defenses and other basic protections of the common law and virtually guarantees arbitrary and excessive liability." Id. The complaint also charges that the Act was passed as a "stealth amendment without sufficient discussion and that it violated several provisions of the Florida and United States Constitutions, including due process." Id. at 14–15.

ity of other states, like Mississippi, West Virginia, Louisiana, and Massachusetts have relied upon a plethora of common law theories in their attempt to gain monetary and injunctive relief from the tobacco industry.

B. The Common Law Suits

In their lawsuits against the tobacco industry, the states relying on common law claim a variety of violations. First, they argue that the tobacco industry breached a special duty of care that it undertook voluntarily. Specifically, the states argue that the defendant tobacco industry professed to have a "special responsibility," to those "who advance and protect the public health," to make all possible efforts to discover the truth about smoking and health. In short, the states seek to show that the tobacco industry's utter failure to use due care in performing that voluntary duty has "increased the risk of harm to the public and the cost of health care . . . ." Consequently, the states contend, it is the tobacco industry that should bear that cost.

the State of Minnesota as co-plaintiffs, seeking reimbursement for its share of tobacco-related health care costs. Id. at 13–14.

56 See id.
57 See id. at 67.
58 See id. at 3. The states offer much evidence to support this claim. Id. at 13–16. In the mid-1950's, shortly after the first study associating cigarette smoke with cancer was released, the major manufacturers agreed to create a trade association known as the Tobacco Industry Research Committee (TIRC), later known as the Council for Tobacco Research (CTR). Id. at 15. Shortly thereafter, the tobacco manufacturers made "an unambiguous pledge" to the public representing that "through TIRC, the tobacco industry would conduct and report objective and unbiased research regarding smoking and health." Id. at 16. Entitled "A Frank Statement to Cigarette Smokers," this pledge appeared in 448 newspapers nationwide. See id. at 16. Included were statements by tobacco manufacturers that:

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business . . . . We always have and always will cooperate closely with those whose task it is to safeguard the public health . . . . We are pledging aid and assistance to the research and effort into all phases of tobacco use and health . . . . This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

Id. at 22–23. According to the complaint filed by the Commonwealth of Massachusetts, TIRC not only knowingly suppressed studies linking smoking to disease and addiction, but affirmatively led the public to believe that no affirmative link between smoking and ill-health exists. See id. at 19–20. This trend of deception began early. See id. at 19. Even before it convincingly concluded in the "Frank Statement" that "there is no proof that cigarette smoking is one of the causes" of lung cancer, the tobacco industry became aware of a Lorillard chemist's study concluding that, "[j]ust enough evidence has been presented to justify the possibility . . . . that the use of tobacco contributes to cancer development in susceptible people." Id. at 17, 19. Later,
Second, the states seek to hold the tobacco industry liable under a breach of warranty theory. The states claim that the tobacco companies' affirmations and promises regarding the minimal health effects of its product constitute an express warranty upon which Medicaid recipients relied in deciding both to begin and to continue smoking. At the same time, the states claim that the tobacco industry breached its implied warranty of merchantability by exposing to the public a product that is unfit when used for its intended purposes.

Third, the states argue that the tobacco industry "entered into an agreement for the unlawful purpose of suppressing and concealing . . . information concerning smoking, addiction and diseases." Carried out primarily by the Tobacco Industry Research Council (TIRC, later known as CTR), this alleged conspiracy enabled each manufacturer to take the position that no link whatsoever existed between cigarette smoking and ill-health. According to the states, such a position was feasible only because the trade associations had suppressed (any) independent reports about smoking or had diminished significantly.

a 1961 confidential memorandum from a consulting research firm hired by Liggett stated that "[the] biologically active materials present in cigarette tobacco . . . are . . . cancer causing [and] cancer promoting." Id. at 22. These findings contrast sharply with the information Ligget later provided to the Surgeon General in 1963. See id. at 23. Withholding completely the findings of its consultants, Ligget instead "focused on alternative causes of disease, such as air pollution, coffee and alcohol consumption, diet, lack of exercise, and genetics." See id. at 68.

Regarding the expressed warranty, the state may point to the wealth of advertising and other public statements made on behalf of the tobacco industry denying that smoking contains any health risks whatsoever. See id. at 24–26. Published in 1970, one such statement concluded in part that, "[a]fter millions of dollars and over 20 years of research: The Question about smoking and health is still a question." See id. at 25. More recently, CTR Scientific Director Sheldon Sommers testified before Congress that: "Cigarette smoking has not been scientifically established to be a cause of chronic diseases . . . nor has it been shown to affect pregnancy outcome adversely." See id. at 26–27.

Regarding the implied warranty, the states will likely point to evidence establishing that the tobacco manufacturers "knew or should have known through information within their control that their cigarettes were defective and unreasonably dangerous if used in the manner intended . . . ." See id. at 68. For the most part, this evidence takes the form of internal memoranda circulated within individual manufacturers' hierarchy, acknowledging the dangers of smoking cigarettes. See id. at 19–22. A 1958 memorandum sent to the then-Vice President of Research at Philip Morris, for example, conceded that, "the evidence . . . is building that heavy cigarette smoking contributes to lung cancer . . . ." See id. at 20. Similarly, in 1961, Philip Morris's Research and Development Division authored a company report in which one section was subtitled, "Reduction of Carcinogens in Smoke." See id.

See id. at 9.

See id. at 69-70.
their influence on the public. Consequently, the states claim that government regulators were misled and deceived regarding smoking's true dangers, thereby preventing proper assessment of the hazards presented by cigarette use.

Fourth, the states claim that they deserve reimbursement based upon theories of restitution and unjust enrichment. Specifically, the states argue that the tobacco industry "assumed and owe[s] a duty to pay for the harm caused by their wrongful conduct," but "have repeatedly refused to do so." According to the states, this breach of responsibility has forced the states to "expend substantial sums of money to pay for the harm caused by the wrongful conduct of defendants." At the same time, the tobacco industry has "reaped substantial profits" from cigarette sales stemming from its allegedly wrongful conduct. The tobacco industry, the states contend, "in . . . equity and fairness" ought to have borne these costs.

This contention, along with the others the states have advanced, represent the sole means by which the states seek to recoup the millions they have spent in treating smoking-related illnesses. The states request relief in the form of "compensation . . . for past and future damages, including but not limited to health care expenditures, caused by the defendants' actions . . . ." Arguably distinct from that suffered by the smokers themselves, the harm the states have suffered is purely financial. Such direct harm at the hands of the tobacco

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63 See Plaintiff's Complaint at 61, Florida v. The American Tobacco Company, (No. 95-1466AO) (Fla. Cir. Ct., Palm Beach County, 1995) [hereinafter Plaintiff's Complaint Fla.].

64 See id. To a great extent, the state will rely on recently revealed internal documents to demonstrate that the joint industry research undertaken by TIRC/CTR was not objective, but instead "designed . . . to promote" favorable research and, at the same time, suppress or attack any negative results. See Plaintiff's Complaint Mass., supra note 15, at 29. One former employee of TIRC referred to it as "just a lobbying thing," while a leading tobacco industry official labelled the organization "the best and cheapest insurance the tobacco industry can buy." See id. at 31. In one instance, a scientist contracted by CTR to conduct research was "directed away from research that might add to the evidence against smoking." See id. at 32. Another mechanism employed by CTR to suppress adverse research results involved having lawyers present during studies so that the attorney/client privilege would protect against disclosure. See id. at 33.


66 Id.

67 Id. at 72.

68 Id.

69 See id. at 66-74.


71 See id. at 2, 3.
industry, the states argue, justifies legal action that is likewise distinct from action taken by smokers. Whether courts should allow this distinction constitutes the thrust of this Comment.

IV. SUBROGATION: THE STICKY ISSUE

The states’ ability to litigate successfully the tobacco industry’s alleged wrongs depends on a variety of factors. First and foremost, however, the states must establish the legitimacy of the very type of action they have chosen to bring. Their decision to sue on behalf of taxpayers rather than on behalf of the smokers themselves presents courts with a novel, and thus difficult question. Does federal and state Medicaid legislation authorize the states to leap-frog the smokers and sue independently for the financial harms that they have suffered?

Courts’ resolution of this issue very likely will have a profound impact on the suits’ outcomes. If courts find that the Medicaid legislation warrants an independent action, the states will get the opportunity to prove their respective theories of recovery. If courts find such an action beyond the legislation’s scope, however, the states will suffer a damaging, if not fatal, blow to their cause. In the latter scenario, courts likely would not terminate the suit entirely, but instead would limit the states to proceeding under the legal principle of “subrogation.” Citing courts’ past characterization of the Medicaid program and principles of statutory construction, the tobacco industry argues that Medicaid legislation expressly limits the states to “subrogated” claims. In response, the states offer their own principles of statutory construction as well as an analogy to other medical care legislation. In doing so, the states seek to demonstrate that they are not limited to subrogated claims, but instead are entitled under Medicaid legislation to bring an independent recovery action.

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72 See id.
74 Subrogation is “the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the debt or claim, and its rights, remedies or securities.” Black’s Law Dictionary 1427 (6th ed. 1990).
75 Defendants’ Brief Minn., supra note 10, at 12.
77 See id. at 14.
79 See Plaintiff’s Brief Miss., supra note 12, at ¶ 49–51.
A. Subrogation Overview

Subrogation offers the suing party the rare opportunity to step into the shoes of another in seeking recovery from a wrongdoer.\(^{80}\) Generally speaking, subrogation is an equitable principle designed to allow an intervener to recover payments from the wrongdoer the intervener made to, or on behalf of, an injured party for a harm caused by the wrongdoer.\(^{81}\) Subrogation permits the general transfer of rights to the intervener from the party declining to pursue legal action.\(^{82}\) Designed to compel the ultimate payment by the party who "in all good conscience ought to pay,"\(^{83}\) subrogation is broad enough to include almost any instance where equity dictates repayment, but at the same time is sufficiently narrow to prohibit recovery where intervening parties have acted as mere volunteers.\(^{84}\)

To achieve its overarching goal of fairness, subrogation bestows upon the intervening party (the subrogee) burdens and privileges typically associated with stepping into the shoes of the injured party (the subrogor).\(^{85}\) Regarding the privileges, the subrogee is entitled to enforce any right that the subrogor would have enjoyed had the subrogor decided to bring suit.\(^{86}\) This entitlement exists because, for

\(^{80}\) See Couch, supra note 8, § 61:114. To gain a better understanding of the concept of subrogation, consider the following, all too common scenario:

Driver "D" speeds through an intersection and hits another car, injuring its driver "P." Instead of bringing suit directly against D, P chooses to simply collect from his own insurer "T." Having expended significant funds for an action in which it played no part whatsoever, T logically seeks reimbursement from D (or D's own insurance company) the party whose wrongdoing lead indirectly to T's loss.

T's ability to receive repayment of the funds it expended stems directly from the principle of subrogation. In most instances like this one, the credit which T hopes to receive for its actions generally enjoys neither privilege nor security—meaning that T exposes himself to the risk of never receiving repayment. See Saul Litvinoff, Subrogation, 50 La. L. Rev. 1140, 1146 (1990). For that reason alone, T acquires through subrogation the cause of action that originally belonged to the harmed party P whom T originally paid. See id. As a result, T is assured of reimbursement from D in a way considerably more effective than any personal action that may arise from its simple act of performing for the benefit of another party. See id.


\(^{82}\) Henry Sheldon, The Law Of Subrogation 2 (1893).

\(^{83}\) Smith, supra note 81, at 160 (citing 73 Am. Jur. 2d Subrogation § 1 (1974 & Supp. 1984)).

\(^{84}\) Sheldon, supra note 82, at 2–3. Specifically, subrogation applies to reimburse only those who have been compellled to pay the debt of another person. Instances where individuals acted for the sole purpose of assisting another, or of making a gift to another do not entitle those individuals to reimbursement. Litvinoff, supra note 80, at 1145.

\(^{85}\) Couch, supra note 8, § 61:114.

\(^{86}\) Id.
legal purposes, the subrogee and the subrogor succeeding him or her constitute "one and the same."

Just as a subrogee is entitled to the beneficial rights possessed by the subrogor, equity likewise dictates that the subrogee be burdened with the detriments accompanying the subrogor's claim. Thus, where the subrogor faces a limitation of liability that diminishes or precludes recovery from a wrongdoer, the subrogee also would face the same limitation in bringing the suit. This principle was first put forth by the United States Supreme Court in *St. Louis Iron Mountain and Southern Railway Company v. Commercial Union Insurance Co.* In that case, an insurance company sought to recover funds from a railroad company after a fire destroyed bales of cotton belonging to an individual covered by the insurance company. Though the Court found the defendant railroad company negligent in not furnishing adequate transportation to the insured individual, the railroad's lack of control over the cotton at the time of the fire freed it from liability to the insured individual. In holding that the insurance company was acting as subrogee, and therefore had no claim against the railroad, the Court reasoned that "the insurer can take nothing by subrogation but the rights of the assured; and if the [assured] has no right of action, none passes to the insurer."

This reasoning could have a profound effect on the states' suits against the tobacco industry. In short, courts finding that Medicaid

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87 SHELDON, supra note 8, at 3. Thus, in the aforementioned example, T would be able to argue the same theories of liability (negligence, battery) as P would have, despite the fact that T had no direct knowledge of or involvement in the incident. T's relative isolation from the actual events surrounding D's potential liability presents no barrier once P subrogates his claim to T, for equity dictates that true substitution of rights must include all the benefits that accompany that right.

88 COUCH, supra note 8, § 61:116.

89 See id.

90 139 U.S. 223, 235 (1891).

91 Id. at 224.

92 See id. at 238.

93 Id. at 235. A better illustration of this principle may lie in a variation of the aforementioned hypothetical scenario involving T, P and D. If, in a hypothetical suit filed directly by P against D, D could establish that P was not wearing his much-needed eyeglasses at the time of the collision, the court would most likely find P contributorily negligent in the incident and thus, reduce (if not completely eliminate) his recovery. For that very reason, T's actual subrogated claim against D under the same factual circumstances would yield a similar recovery simply because, as a rule, a subrogated claim can reap no more than that which a direct action would have reaped. COUCH, supra note 8, § 61:116. Though T had indirectly suffered harm at the hands of the wrongdoer D, his decision to stand in P's shoes forces him to endure the tenuous position those shoes.
legislation restricts the states to subrogated claims made on behalf of smokers would allow the tobacco industry to employ the assumption of risk defense—a defense that has proven very successful in the private sphere.\textsuperscript{94} If, on the other hand, courts find that Medicaid legislation authorizes the states to seek reimbursement outside of subrogation, these defenses would be inapplicable. As both the tobacco industry and the states realize, courts’ interpretation regarding subrogation could very likely dictate the outcome of these suits.

B. Tobacco Industry Arguments

1. States as Private Insurers

In the eyes of the tobacco industry, common sense mandates that a jury never hear the states’ potentially damaging claims. Though the surrounding circumstances are significantly more complex than those involving the aforementioned fender-bender,\textsuperscript{95} the structure of the states’ lawsuits against the tobacco industry is analogous. According to tobacco industry advocates, the states are pursuing nothing more than a “giant subrogation case,” where they are essentially acting as private health insurers via the Medicaid program.\textsuperscript{96} Using this apparent similarity and the enforcement provisions of federal and state Medicaid legislation,\textsuperscript{97} the tobacco industry seeks to prove not only that courts should, but also must, deem the states’ suits subrogated.\textsuperscript{98}

The tobacco industry first argues that the states’ “insurer-insured” relationship with Medicaid recipients immediately places this case within the realm of subrogation.\textsuperscript{99} In doing so, the industry first cites to multiple cases in which courts indirectly have equated a state’s Medicaid program to the typical private sector health insurance policy.\textsuperscript{100} One such case the tobacco industry cites is Witherspoon v. St.

\textsuperscript{95} See Hypothetical, supra note 80.
\textsuperscript{96} See Defendants’ Brief In Support of Defendants’ Motion for Judgment on the Pleadings at 5 n.2, Mike Moore, Attorney General, ex. rel. State of Mississippi v. The American Tobacco Company, et al. (No.94–1429) (Miss. Ch. Ct., Jackson County, 1994) [hereinafter Defendants’ Brief Miss.].
\textsuperscript{98} Defendants’ Brief Miss., supra note 96, at 6.
\textsuperscript{99} See id. at 12.
\textsuperscript{100} See id. (citing Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 712 (2d Cir. 1993); Witherspoon v. St. Paul Fire & Marine Ins. Co., 548 P.2d 302, 309 (Wash. 1976)).
Paul Fire & Marine Insurance Co.\textsuperscript{101} There, the Supreme Court of Washington was forced to decide whether Medicare benefits qualified for certain exclusions under an individual’s private health insurance policy.\textsuperscript{102} In doing so, as tobacco advocates point out, the court concluded that “[t]he size and scope of the federal government’s Medicare and Medicaid programs have made it the largest health insurer in the United States.”\textsuperscript{103} Another more recent case upon which the tobacco industry relies is Travelers Insurance Company v. Cuomo.\textsuperscript{104} In that case, the United States Court of Appeals for the Second Circuit held that federal legislation preempted an attempt by the state of New York to impose surcharges on hospital rates to certain payors.\textsuperscript{105} Tobacco industry advocates emphasize that in describing the preempted state legislation, the court noted that “insurance carriers . . . other than the Blues, an HMO, or government insurance such as Medicaid” were required to pay the higher fees.\textsuperscript{106} Though certainly not the opinion’s major focus, this court’s equating of the Medicaid program to private health insurance policies, the tobacco industry contends, demonstrates that “[c]ourts have recognized that, in providing Medicaid benefits to qualified residents, the State acts as a health insurer.”\textsuperscript{107}

Seizing upon this apparent likeness, the tobacco industry likely will argue that since Medicaid and the private insurance company are indistinguishable entities, the losses they suffer should likewise be treated indistinguishably.\textsuperscript{108} Thus, according to the tobacco industry, the general rule limiting insurers to subrogated claims against third-party tortfeasors also should apply to the state Medicaid program in its attempted recovery.\textsuperscript{109}

To establish such a rule, the tobacco industry points to several cases for the proposition that subrogation offers the sole avenue of recovery for a private insurer against a third-party tortfeasor.\textsuperscript{110} In Great

\textsuperscript{101} See id. (citing Witherspoon, 548 P.2d at 309).
\textsuperscript{102} See id. (citing Witherspoon, 548 P.2d at 303-04).
\textsuperscript{103} Id. (quoting American Medical Ass’n v. Weinberger, 395 F. Supp 515, 518 (N.D. Ill. 1975)).
\textsuperscript{104} Defendants’ Brief Miss., supra note 96, at 12 (citing Travelers, 14 F.3d at 709).
\textsuperscript{105} See Travelers, 14 F.3d at 711.
\textsuperscript{106} Defendants’ Brief Miss., supra note 96, at 12 (quoting Travelers, 14 F.3d at 712) (emphasis added).
\textsuperscript{107} Defendants’ Brief Miss., supra note 96, at 12.
\textsuperscript{108} See id.
\textsuperscript{109} See Defendants’ Brief Minn., supra note 10, at 12.
\textsuperscript{110} See Defendants’ Brief Miss., supra note 96, at 13 (citing Great American Ins. Co. v. United States, 575 F.2d 1081, 1033-34 (2d Cir. 1978); Williams v. Globe Indem. Co., 507 F.2d 837, 840
American Insurance Co. v. United States, for example, the United States Court of Appeals for the Second Circuit held that an insurance company that paid a claim for damages caused by the negligence of United States marshals was limited to a subrogation action against the United States.\(^{111}\) In that case, the insurer unsuccessfully attempted to file suit after the insured’s two-year statute of limitations had expired.\(^{112}\) Explaining that such late filing precluded the insurer from gaining any sort of recovery from the United States, the court stated that “the authorities and the cases unanimously hold that the insurer’s recovery is premised exclusively upon subrogation.”\(^{113}\)

Because of the inherent similarity between this private insurer and Medicaid, the tobacco industry argues that the same rule should apply in the states’ cases.\(^{114}\) In its view, the fact that an insurer may be publicly, not privately, operated is a distinction insufficient to justify infringing upon the defendant’s ability to defend any claim.\(^{115}\)

2. Statutory Grants of Authority

The tobacco industry also argues that applicable statutory schemes at both the federal and state level expressly limit the states’ recovery from third-party tortfeasors to subrogation actions.\(^{116}\) Addressing first the federal Medicaid statute and its accompanying regulations,\(^{117}\) the tobacco industry claims that “[f]ederal law specifically requires Medicaid recipients to assign to the state any rights to payment from third parties for medical care.”\(^{118}\) It further argues that “states are required to enforce and implement their rights as assignees or subro-

\(^{111}\) See Great American, 575 F.2d at 1033.
\(^{112}\) See id.
\(^{113}\) See Defendants’ Brief Miss., supra note 96, at 13 (quoting Great American, 575 F.2d at 1033). The tobacco manufacturers also point to other cases in support of the same proposition. Williams, 507 F.2d at 840 (holding that “an insurer’s rights against alleged tortfeasor are solely derivative rights of subrogation”); National Union, 658 F. Supp. at 780 (stating that “an insurer’s only right [against an alleged tortfeasor] is derivative as the subrogee of its insured”); Silva, 416 A.2d at 668 (stating that an “insured’s only method of recovery against alleged tortfeasor arises if at all, on the basis of its subrogation to the rights that its insured would have had against [the tortfeasor]”).
\(^{114}\) Defendants’ Brief Miss., supra note 96, at 14.
\(^{115}\) See id.
\(^{116}\) See id. at 3.
\(^{118}\) See Defendants’ Brief Miss., supra note 96, at 3.
of the Medicaid recipients." Medicaid authors' repeated mention of these assignment/subrogation rights, coupled with their subsequent failure to name any other acceptable methods of recovery, indicate to the tobacco industry that a state's independent action was neither contemplated nor permissible.

The exclusive mention of subrogation in statutory language is a weapon that the tobacco industry employs at the state level as well. In Minnesota, where the subrogation issue has already come before a state trial court, the tobacco industry cites the language of a state Medicaid statute for the proposition that any claim that the appropriate state agency may have against a third-party tortfeasor must be brought via subrogation. Similarly, tobacco advocates in Missis-
sippi claim that a state statute specifying the procedure to be used in seeking reimbursement of Medicaid costs “expressly subrogates the Division of Medicaid (the Division) to the rights of the Medicaid recipient and authorizes the Division as subrogee to bring suit against the alleged tortfeasor.”

To bolster its claim that this statutory language limits the state to subrogated claims, the tobacco industry also cites to cases espousing certain principles of statutory construction. One such case is National Railroad Passenger Corp. v. National Association of Railroad Passengers. There, as tobacco advocates point out, the United States Supreme Court cited the ancient maxim, “expressio unius est exclusio alterius” to announce its opposition to the expansion of remedies beyond those stated in the applicable legislation. The Court was forced to decide whether the remedies created in § 307(a) of the Amtrak Act comprised the exclusive means to enforce the duties and obligations imposed by the Act. Taking the maxim literally as, “the expression of one is the exclusion of the other,” the Court concluded that “[a] frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to

124 The Mississippi Medicaid statute provides that:
If medical assistance is provided to a recipient under this article for injuries, disease or sickness caused under circumstances creating a cause of action in favor of the recipient against any person, firm or corporation, then the division shall be entitled to recover the proceeds that may result from the exercise or any rights of recovery which the recipient may have. The recipient shall execute and deliver instruments and papers to do whatever is necessary to secure such rights and shall do nothing after said medical assistance is provided to prejudice the subrogation rights of the division.


125 See Defendants’ Brief Miss., supra note 96, at 3, 4. Though not mentioned by the tobacco industry, the Massachusetts Medicaid statute provides, inter alia, that, “[t]he commonwealth shall be subrogated to a claimant’s entire cause of action or right to proceed against any third party . . . .” MASS. GEN. L. ch.118E, § 22. The statute further specifies that if a claimant does not commence his or her own action against the third-party tortfeasor within nine months of this incident, “[t]he state] . . . may . . . commence a civil action or other proceeding on behalf of the commonwealth to establish the liability of any third party.” Id.


128 Id.


130 See National R.R., 414 U.S. at 458.
subsume other remedies."131 The tobacco industry is quick to apply this principle to current Medicaid legislation.132 Given this "settled rule of construction," tobacco advocates argue that it is "inconceivable" that the state legislature, in enacting a statute mentioning subrogation exclusively, could have intended to endorse any other method of recovery.133

C. State Arguments

To counter the tobacco industry’s pro-subrogation arguments, the states take every opportunity to disassociate themselves from the harmed smokers, and instead characterize their suits as ones between the state and the tobacco industry exclusively.134 Specifically, the states claim to “seek redress for the cigarette industry’s breach of independent duties which flowed directly from the state as a health care purchaser.”135 In such an action, “the duty flows directly to the State . . . not to the smokers.”136 Though a seemingly simple proposition, persuading a court to adopt such an esoteric principle inevitably involves rebutting arguments that Medicaid’s statutory framework and past treatment by the courts mandate the subrogation label. To respond to these tobacco industry assertions, the states muster their own arsenal of arguments.

1. Statutory Construction

The states first argue that applicable Medicaid legislation does not limit recovery to subrogation actions, but instead offers subrogation as an alternative to independent recovery.137 In making this argument, the states first assert the axiom that “[i]t is the right of the plain­tiffs—not defendants—to choose the manner in which they will seek to enforce their legal rights.”138 The United States Supreme Court adopted this rule in the 1912 case The Fair v. Kohler Die Co..139

131 Id. Tobacco advocates also cite Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 720 (1967) (stating that: “[w]hen a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied.”).
132 See Defendants’ Brief Minn., supra note 10, at 16.
133 Id.
134 Plaintiff’s Brief Minn., supra note 78, at 2.
135 Id. at 11.
136 Id.
137 See Plaintiffs’ Brief Miss., supra note 12, at ¶ 12.
138 See Plaintiffs’ Brief Minn., supra note 78, at 9.
139 228 U.S. 22, 25 (1912).
the Court faced the question of whether the lower federal court had jurisdiction to hear the plaintiff's claim that the defendant had infringed upon the plaintiff's patent rights.\textsuperscript{140} Despite finding proper jurisdiction existed because the plaintiffs had pled federal statutory violations exclusively, the Court admitted that "[o]f course the party who brings the suit is master to decide what law he will rely upon. . . ."\textsuperscript{141} In the eyes of the states, such a passing admission only reinforces the notion that when faced with a choice of remedies, a plaintiff should be free to choose which to pursue.

Tailoring this general principle to the facts of their case against the tobacco industry, the states further argue that "[e]ven the presence of a statutory cause of action generally will not preclude the plaintiff from choosing [the manner in which] to proceed . . . ."\textsuperscript{142} To support this, the state of Minnesota points to Davis & Michel v. Great Northern Railway Co.\textsuperscript{143} There, the Supreme Court of Minnesota determined that an attorney seeking reimbursement for his services may do so in any way he chooses, despite the presence of a state statute delineating his rights to such reimbursement.\textsuperscript{144} In holding that the attorney could choose to recover through either independent action or the original suit, the court reasoned that "a complaining party may resort to any judicial remedy for the enforcement of his rights, legal or equitable, which is adequate and appropriate to the relief sought."\textsuperscript{145} Citing this finding as support, the states conclude that "[u]nless there is clear statutory language making the statutory remedy exclusive, it is uniquely the plaintiff's privilege to elect which remedy to enforce."\textsuperscript{146} To the states, a cause of action provided by a statute is cumulative to, not in place of, any available common law actions.\textsuperscript{147}

Under this principle, the states argue that, despite Medicaid's statutory language, states retain the right to proceed under the common law as well.\textsuperscript{148} "Although the Medicaid Law did further codify the

\textsuperscript{140} See id. at 24.
\textsuperscript{141} Id. at 25. Several federal courts have reiterated this principle: Brough v. United Steelworkers of Am., AFL-CIO, 437 F.2d 748, 749 (1st Cir. 1971) (explaining "[i]t is also irrelevant that plaintiff may, in fact, have no valid state cause of action, but at best only a federal one; he is free to select the suit he will bring."); Vargas v. Barcelo, 435 F.2d 843, 844 (1st Cir. 1970) (stating "[w]e don't know why a plaintiff may not bring what suit he wants to.").
\textsuperscript{142} Plaintiff's Brief Minn., supra note 78, at 10.
\textsuperscript{143} See id. at 12 (citing 151 N.W. 128, 129 (Minn. 1915)).
\textsuperscript{144} See Davis & Michel v. Great N. Ry. Co., 151 N.W. 128, 129 (Minn. 1915).
\textsuperscript{145} Id.
\textsuperscript{146} Plaintiff's Brief Minn., supra note 78, at 10.
\textsuperscript{147} Plaintiff's Brief Miss., supra note 12, at ¶ 12.
\textsuperscript{148} Id.
State's rights to be subrogated, [that right] is in addition to, and not in derogation of, the State's statutory and common law remedies."149 Disagreeing with the tobacco industry's principle of statutory construction, the states instead claim that "statutes in derogation of sovereignty should be strictly construed in favor of the State."150 Believing that state power can be "narrowed or destroyed" only by "specific provisions," the states argue that the ambiguity found in Medicaid legislation precludes any interpretation limiting their recovery to subrogation.151

As further support for their own interpretation, the states propose that "it is universally accepted" that statutes "should be given a favorable construction to the end that their manifest humanitarian and beneficent purpose may be effectuated to the fullest extent compatible with their terms."152 Given such a purpose, the states contend the Medicaid statute should be construed liberally so as to provide the states with extensive remedies.153 In light of this apparent mandate, the states argue that courts can only read Medicaid's statutory language to include an independent reimbursement action as a means of recovery.154

2. The Medical Care Recovery Act

The states next argue that even if independent recovery rights under state Medicaid statutes are ambiguous on their face, examination of related federal legislation quickly resolves any such ambiguity.155 Enacted to allow the federal government to recover from third-party wrongdoers the value of medical care which is provided to injured persons, The Medical Care Recovery Act (MCRA),156 provides, in part:

In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor [sic], the United States shall have

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149 Id.
150 Id. at ¶ 45.
151 Id. (citing City of Jackson v. Mississippi State Bldg. Comm'n, 350 So. 2d 63, 64 (Miss. 1977)).
152 Plaintiff's Brief Miss., supra note 12, at ¶ 46 (quoting 73 Am. Jur. 2d Statutes § 282 (1974)).
153 See id.
154 See id.
155 See id. at ¶ 131.
a right to recover from said person the reasonable value of the care and treatment so furnished...\textsuperscript{157}

More importantly, the statute states that "[t]he United States may, to enforce such a right, ... institute and prosecute legal proceedings against the third person ... either alone (in its own name ...) ... or in conjunction with the injured or diseased person."\textsuperscript{158}

The states argue that in applying the MCRA's language, at least one court has found an independent right of recovery for the government.\textsuperscript{159} In \textit{United States v. Housing Authority of the City of Bremerton}, for example, the United States Court of Appeals for the Ninth Circuit held that an injured infant's negligent parents did not defeat the United States's independent recovery against a third-party wrongdoer.\textsuperscript{160} Because "the United States has been guilty of no wrongdoing," the court found that "the government has an independent right to recovery; it is not merely a subrogee."\textsuperscript{161}

For the states, this federal independent right of recovery, coupled with the fact that the states are required under federal law to seek reimbursement generally,\textsuperscript{162} supports the conclusion that the states themselves also must possess such an independent right.\textsuperscript{163} As the states are quick to point out, at least one court has implicitly followed this sort of statutory interpretation in a strikingly similar case.\textsuperscript{164} \textsuperscript{157} \textit{Id.} § 2651(a).

\textsuperscript{158} \textit{Id.} In enacting the MCRA, Congress cited the "several millions of dollars in costs each year" the government expends in caring for "certain classes of eligible persons who are injured as the result of negligent or wrongful acts of third persons." S. REP. No. 1945, 87th Cong., 2d Sess. 2639 (1962), reprinted in 1962 U.S.C.C.A.N. 2637, 2639. Noting the "magnitude of potential recoveries" if government recovery were permitted, Congress concluded that the MCRA's enactment would have a strong "relation" to the "fiscal policy" of the United States. \textit{Id.} at 2643.

\textsuperscript{159} Plaintiff's Brief Miss., supra note 12, at ¶ 133 (citing United States v. Housing Auth. of the City of Bremerton, 415 F.2d 239, 243 (9th Cir. 1969)).

\textsuperscript{160} See Bremerton, 415 F.2d at 243.

\textsuperscript{161} See \textit{id.} (stating contributory negligence is not a bar to recovery by the United States government). Responding to the third party's claim that the parents' negligence ought to preclude the government's recovery, the United States Court of Appeals for the Ninth Circuit stated, "[t]his argument assumes that the United States is subrogated to the parents' claim so that it is subject to all defenses against the parents." \textit{Id.} Though the court conceded that an injured party's negligence may affect the government's recovery, the typical policy against the parents' recovery—that of "profit[ing] in spite of their own wrongdoing"—did not apply. \textit{Id.} Because the United States had committed no wrongful act, the court concluded that "the policy that excludes recovery by parents is inapplicable to the United States." \textit{Id.}

\textsuperscript{162} 42 C.F.R. § 433.139(d)(2). Under 42 C.F.R. § 433.139(d)(2), "if the agency learns of a liable third party . . . the agency must seek recovery of . . . reimbursement . . . ." \textit{Id.}

\textsuperscript{163} See \textit{Plaintiff's Brief Miss.}, supra note 12, at ¶ 51.

\textsuperscript{164} See \textit{id.} at ¶ 49–50 (citing Hedgebeth v. Medford, 378 A.2d 226, 228 (N.J. 1977)).
Hedgebeth v. Medford, the New Jersey Supreme Court held that when a state exercises its right of subrogation under the state Medicaid program, it still must pay its pro rata share of the recipient’s counsel fees. More interesting to the states, perhaps, are the statements the court makes in formulating its final determination. In interpreting the state legislation enabling the state to seek reimbursement via subrogation, the court noted, “the State has two avenues by which it may seek reimbursement for Medicaid payments: it may either institute an action directly against the tortfeasor who is liable for the medical expenses or seek recovery by way of the Medicaid recipient through a right of subrogation.” To the states, such a matter-of-fact recognition of an independent reimbursement action only demonstrates that it holds a position among the states’ possible avenues of recovery. If states had no such remedy, the states would be deprived of a means of recovery that “it is only logical” they enjoy.

D. Conclusion: Affirmative Defenses Inapplicable

Citing these similarities to federal legislation and principles of statutory construction, the states make the general claim that their actions do not invoke subrogation, but instead exercise the right to seek recovery independently from the tobacco industry under common law principles. Consequently, the states contend, the tobacco industry is precluded from asserting any affirmative defenses such as assumption of risk or contributory negligence, which have been applicable in suits brought by smokers. Reasoning that “a plaintiff should not be made to account for the alleged fault of a third party in a manner which would benefit the wrongdoer,” the states claim that, “[i]t is well established as a general rule that a defendant may not..."
impute defenses from one person to another . . . ." As such, the states claim that they ought to be free to pursue their substantive claims against the tobacco industry without the interference of affirmative defenses.

V. THE CASE FOR INDEPENDENT GOVERNMENT RECOVERY

Considering the arguments presented by both the tobacco industry and the states, a court deciding this issue likely would find that Medicaid legislation does authorize the states to pursue independent recovery actions.

First, contrary to tobacco industry claims, past cases have not only distinguished Medicaid from the typical private insurance policy, but also have deemed statutory language generally incapable of conveying the true meaning of a statute ambiguous on its face. Second, the legislative history surrounding Medicaid statutes strongly suggests that Congress sought to allow the states to pursue all possible avenues of recovery against third-party tortfeasors. Third, the government's ability to pursue independent actions under the MCRA—the statute perhaps most analogous to Medicaid—likewise advances the proposition that such actions are permissible under Medicaid. Finally, the overwhelming need both to preserve Medicaid's traditional role as payor of last resort and to ensure the program's financial survival demands that the states have the authority to employ any reasonable means to recoup funds from third parties.

A. Court-Imposed Restrictions

1. The State as a Private Health Insurer

Contrary to the tobacco industry's assertions that Medicaid is merely a private insurance policy, at least one court has distinguished public assistance programs like Medicaid from those offered by private insurers. Even more startling is the fact that the tobacco

172 Id.
173 See id. at 17.
174 See supra notes 108-12 and accompanying text.
175 See supra notes 132-36 and accompanying text.
176 See supra note 127 and accompanying text.
177 See supra notes 156-68 and accompanying text.
industry cites this very court to support its own opposing position.179 In Witherspoon v. St. Paul Fire and Marine Insurance Co., the Supreme Court of Washington held that some Medicare benefits paid to a recipient were not "insurance," and thus did not qualify for exclusion under the recipient's private health insurance policy.180 Though, as the tobacco industry is quick to point out, it did deem the government "the largest health insurer in the United States,"181 the court also presented a detailed discussion of why a section of Medicare strikingly similar to Medicaid does not qualify as insurance.182 Citing both the recipient's automatic qualification for the program upon reaching the age of sixty-five, and the program's financing via means other than recipient payments, the court found Part A of the Medicare program represents "disbursements made in furtherance of the social welfare objectives of the Federal government."183 As such, Part A Medicare was a far cry from the typical private health insurance policy.184

Though probably not intended, the criteria employed by the court likewise distinguishes Medicaid from the private health insurance policy. Like Part A of the Medicare program, Medicaid automatically covers a well-defined group of individuals labeled "categorically needy."185 The government does not have the option of whether or not to offer Medicaid assistance to a qualified individual.186 As long as that individual meets certain financial, age, state residency, and United States citizenship requirements, Medicaid coverage cannot be denied.187 At the same time, the source of Medicaid's funding likens it to Medicare's Part A in that neither program depends upon funds received directly from recipients for financial survival.188 Though they may implement a nominal "cost-sharing" provision in their Medicaid plans, states expressly are prohibited from imposing an "enrollment fee, premium, or similar charge on individuals who are categorically

179 See id.
180 See id.
181 See id. at 310 (quoting American Medical Ass'n v. Weinberger, 395 F. Supp. 525, 528 (N.D. Ill. 1975)).
182 See id. at 305.
183 See Witherspoon, 548 P.2d at 305.
184 See id. In contrast, the court also found that Part B of Medicare, an additional, more comprehensive program financed through monthly premiums paid by recipients, "has a contract aspect not present in Part A" and thus is more like a private insurance policy. Id.
185 See Medicaid Eligibility-Services, supra note 23, at ¶ 14,251.
186 Id.
187 Id. at ¶ 14,311.
188 See id. at ¶ 14,010.
needy. Most telling is the fact that Medicaid's goal of "provid[ing] the nation's most vulnerable groups . . . with access to health services," most certainly fits under Part A's mission of furthering the government's social welfare objectives. Indeed, Medicaid's striking similarity to Part A Medicare in both its overall purpose and specific mechanics only supports the conclusion that the court would find it, as it did with Part A, distinguishable from private insurance. Consequently, the court need not limit Medicaid recovery to subrogation actions. For although courts traditionally have limited private insurers' actions against third-party tortfeasors to subrogation actions, the fundamental differences between Medicaid and private insurers—as highlighted by the Witherspoon court—make any court-imposed limitation on Medicaid recovery unlikely on these grounds.

2. Principles of Statutory Construction

Just as courts' past treatment of Medicaid frees it from the subrogation restriction, judicially created principles of statutory construction do not necessarily limit Medicaid recovery to subrogation actions. To illustrate, consider the Massachusetts Medicaid reimbursement provision, which provides that, "[t]he commonwealth shall be subrogated to a claimant's entire cause of action or right to proceed against any third party . . . ." Citing the United States Supreme Court's opinion in National Railroad Passenger Corp. v. National Association of Railroad Passengers, the tobacco industry claims that the exclusive mention of subrogation in the Massachusetts Medicaid statute necessarily prohibits the state from employing any other means of recovery.

189 See id. at ¶ 14,731. In contrast, Medicare's Part B—a program the Witherspoon court assimilated to a private health insurance policy—relies almost exclusively on monthly premiums collected from the recipients themselves. See Medicaid Eligibility-Services, supra note 23, at ¶ 3,010.

190 See De Lew, supra note 24, at 263.


192 See id. The other case the tobacco industry relies upon, Travelers, likewise supports this conclusion. See Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 712 (2d Cir. 1993). Though the United States Court of Appeals for the Second Circuit did, in passing, label Medicaid as "government insurance," its focus lay with a statute prohibiting unnecessary fees or charges on any "approved health benefits plan." Id. Because of this inclusive phrasing, the statute necessarily applied to both Medicaid and private insurance. Id. The fact that the court mentions the two separately demonstrates its interpretation that the two are distinguishable.


Much like its assertions regarding the government's role as a health insurer, the tobacco industry's supporting case here tends to endorse not its own position regarding subrogation, but that of the states.\footnote{See National R.R., 414 U.S. at 458 (stating legislative history and intent of legislation trump statutory construction).} In National Railroad, the United States Supreme Court faced the issue of whether the Amtrak Act's explicit authorization of state-brought suits precluded private individuals from suing to enforce the obligations imposed by the Act.\footnote{See id. at 457.} Holding that the Act did preclude such private suits, the Court initially cited "expressio unius est exclusio alterius" for the proposition that courts ought not expand remedies beyond those stated in applicable legislation.\footnote{Id. at 458.} In its final reasoning, however, the Court placed little importance on this maxim.\footnote{See id.} Stating that "[e]ven the most basic principles of statutory construction must yield to clear contrary evidence of legislative intent," the Court engaged in a detailed examination of the Act's other provisions and general legislative history.\footnote{See id. at 458--61.} Though this examination did produce a result consistent with the maxim, the Court stated emphatically that where a statute's language is unclear, finding its true meaning may depend on "evident legislative intent."\footnote{See National R.R., 414 U.S. at 458.}

The factual similarities between National Railroad and the states' cases against the tobacco industry suggest that a court may be equally cautious in interpreting a state's Medicaid statute.\footnote{See id. at 457.} For, in essence, the two cases present the same question: whether a statute's explicit mention of one means of recovery against a wrongdoer prohibits the employment of alternative means. As in National Railroad, a court will likely treat any conclusion drawn from the ancient maxim not as dispositive, but as only an initial clue as to what the Medicaid statute's true meaning may be.\footnote{See id. at 458.} To be certain, the judicially created maxim does not mandate that subrogation be the state's sole means of recovery under Medicaid.\footnote{See National R.R., 414 U.S. at 458.} Rather, it merely offers a starting point for a more comprehensive analysis.\footnote{See id.}
B. Legislative Intent


a. Section 1396(a)(25)(A)

The National Railroad Court instructs that the absence of clear statutory language mandates that such a comprehensive analysis begin with an examination of legislative history.\(^{205}\) The states’ authority to recover from third-party tortfeasors is less than clear in Federal Medicaid legislation.\(^{206}\) Section 1396 provides only that “the State or local agency . . . will take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan.”\(^{207}\) In doing so, the state must “provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients, in accordance with § 1396k of this section.”\(^{208}\) Section 1396k states that to qualify for Medicaid, an individual must first “assign the State any rights . . . to support . . . and to payment for medical care from any third party.”\(^{209}\) Though clearly empowering the state to seek reimbursement from third parties via assignment or subrogation, the Act is silent regarding the state’s ability to recover in an independent action.\(^{210}\)

Closer examination of the Act’s legislative background, however, reveals that § 1396 was by no means inserted to limit the state’s possible avenues of recovery.\(^{211}\) Rather, its general aim was to ensure that third parties fully compensate the state for injuries to Medicaid recipients.\(^{212}\) A 1967 United States Senate Report outlined § 1396’s purpose as “mak[ing] certain that the State and federal governments will receive proper reimbursement for medical assistance paid to an eligible person . . . .”\(^{213}\) To ensure the states fulfill their role, the Report later commands that “if . . . legal liability of a third party is established later, the States or local agency must seek reimbursement

\(^{205}\) See National R.R., 414 U.S. at 458.


\(^{207}\) Id.

\(^{208}\) Id. § 1396(a)(45).

\(^{209}\) Id. § 1396k(a)(1)(A).

\(^{210}\) See id. § 1396(a).


\(^{212}\) See id.

\(^{213}\) Id.
from such party." Such a strict, sudden command to collect from third-party tortfeasors, where no such provision previously existed, illustrates that the resulting provision was Congress's desperate attempt to relieve itself of the Medicaid program's financial burden. As such, it is unlikely that in enacting § 1396 Congress intended to place any sort of limitation on the attainment of that relief. It is more likely that § 1396 sought to guarantee that the states pursue all possible avenues to recover from third-party tortfeasors.

b. Section 1396k(a)(1)(A)

The legislative history surrounding another key provision of the Act likewise supports this conclusion that § 1396 sought to broaden, not restrict, states' recovery. Under § 1396k(a)(1)(A), states must require Medicaid applicants to assign to the states any rights they may have against third parties. First added to the Social Security Act in 1977, this provision forces states to obtain recipients' consent to pursue subrogation actions where possible. When viewed in the context of the surrounding provisions, it becomes clear that Congress intended not to limit states' possible methods of recovery, but merely to ensure that the Medicaid recipient fully supports any subrogation action states may choose to pursue. Provisions immediately following the Act support this conclusion. Section 1396k(a)(1)(B), for example, orders states to require recipients to "cooperate with the State" in establishing the paternity of third persons. Similarly, § 1396k(a)(1)(C) provides that states must order recipients "to cooperate with the State in identifying and providing information to assist the State in pursuing, any third party who may be liable ...."

These provisions demonstrate that § 1396(k)'s focus regarding third-party recovery actions lies not with states' restrictions, but rather with recipients' duties. Read in this context, § 1396k(a)(1)(A)'s aim can hardly be characterized as delineating the

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214 Id. at 185.
216 See S. REP. NO. 744, at 185.
218 See Medicaid Eligibility-Services, supra note 23, at ¶ 14,749.
219 See id. at ¶ 14,749.30.
221 See id.
222 Id. § 1396k(a)(1)(B).
223 Id. § 1396k(a)(1)(C).
224 See id. § 1396k(a)(1)(A)–(C).
exclusive means by which states may recoup from wrongdoers. Rather, as § 1396’s introductory provision points out, it seeks to assist “in the collection of medical support payments and other payments.”

As Congress most likely realized in crafting § 1396k(a)(1)(A), such assistance occurs when states have more, rather than fewer, means by which to recover from third-party tortfeasors.

Along with ensuring recipient cooperation in third-party recoveries Congress, in enacting § 1396k, also sought to curb the growing abuse of Medicaid within the health care community. Enacted as part of the Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977, § 1396k sought to stop a practice by which physicians reassigned their Medicare and Medicaid receivables for a percentage of their face value, submitted claims, and then received inflated payments from the government. Labeling this practice “factoring,” Congress enacted § 1396k to guarantee that Medicaid alone (and not health care providers) would receive whatever rights the recipient may have against third parties. This exclusive right, Congress believed, would stop the activities which “cheat the taxpayers who must ultimately bear the financial burden of misuse of funds in any government-sponsored program.” Though somewhat “politically” worded, such a proclamation illustrates that in granting the government subrogation rights, Congress sought not to limit states’ enforcement powers, but instead to “strengthen the capability of the government to detect, prosecute, and punish fraudulent activities under the . . . Medicaid program . . . .”

225 See 42 U.S.C. § 1396k(a).
226 See id. § 1396k(a)(1)(A). To further aid states in collecting funds from third parties, Congress slightly amended § 1396 as part of its Deficit Reduction Act of 1984. Prior to 1984, § 1396 (a)(1)(A) provided that states were permitted to require assignment by potential recipients. S. Rep. No. 169, 98th Cong., 2d Sess. 87 (1984), reprinted in 1984 U.S.C.C.A.N. 697, 1417. The 1984 amendments modified the assignment provision, providing that “§ 1396 would mandate that states require such assignment.” In doing so, Congress cited the 14.5% increase in Medicaid benefit payments from 1984 to 1985. Id. at 87. Placed alongside sections of the bill extending the reduction in federal matching payments to the states, this provision demonstrates Congress’s desire to decrease federal spending on Medicaid, and instead increase its funding via sources outside the government. Id.
228 See id. at 48.
230 See id. at 44.
231 See id. at 1. Courts applying § 1396k have already recognized its goal of preventing health
C. Medical Care Recovery Act

1. Striking Similarities to Medicaid Legislation

Along with statutory construction principles and legislative history, analogous statutory provisions may prove to be helpful tools in determining the true meaning of the Medicaid legislation. Specifically, courts' treatment of independent government recovery attempts stemming from other statutory authority may shed some light on whether such recovery is appropriate under Medicaid. Of this other authority, perhaps none is more analogous than the MCRA.232 Enacted in 1962, the MCRA is virtually indistinguishable from § 1396 in both its purpose and statutory language.233 This similarity, considered in light of the courts' consistent endorsement of the federal government's independent recovery right under the MCRA, demonstrates that a similar endorsement is likewise appropriate under Medicaid.234

To support such a conclusion, a court first might note that the two statutes share the same underlying purpose. The MCRA creates a right on the part of the government to recover in cases where the United States “is authorized or required by law to furnish hospital, medical, surgical or dental care and treatment ... to a person who is injured ... under circumstances creating tort liability upon some third person ...”235 In enacting the MCRA, it appears that Congress was driven by the same fiscal concerns that spurred the inclusion of § 1396 into the Social Security Act.236 Specifically, Congress cited the “several millions of dollars in costs each year” the government expends in caring for “certain classes of eligible persons who are injured as the result of negligent or wrongful acts of third persons.”237 Noting
the "magnitude of potential recoveries" if government recovery were permitted, Congress concluded that the MCRA's enactment would have a strong "relation" to the "fiscal policy" of the United States. In fact, the MCRA's reimbursement provision contains language nearly identical to Massachusetts's Medicaid recovery provision. Section 2651(a) provides, in relevant part, "the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person." Where the injured/diseased individual has not commenced his or her own action within six months of treatment, the government may "institute and prosecute legal proceedings against the third person who is liable for the injury." Such limited circumstances under which the government may act, coupled with this exclusive mention of subrogation as a means of enforcement, make the MCRA a mirror-image of the legislation enacted pursuant to § 1396.

2. MCRA's Independent Right of Recovery

Given the two statutes' similarities in both purpose and construction, courts' treatment of one logically should have some effect on the

Oil of California. Id. (citing 332 U.S. 301, 304 (1947)). In Standard Oil, the Supreme Court ruled that the federal government could not recover the costs of hospitalization and soldier's pay it expended as the result of the injury to a soldier hit by a truck negligently driven by a third person. See Standard Oil, 332 U.S. at 304.

See S. REP. NO. 1945, at 2640, 2643.


Compare 42 U.S.C. § 2651(a) with MASS. GEN. L. ch. 118E § 22 (1993). The Massachusetts Medicaid statute provides, in relevant part, that, "[t]he commonwealth shall be subrogated to a claimant's entire cause of action or right to proceed against any third party." MASS. GEN. L. ch. 118E, § 22 (emphasis added). It later specifies that if a claimant does not commence his own action against a third-party tortfeasor within nine months of the incident, "[t]he division . . . may . . . commence a civil action or other proceeding on behalf of the commonwealth to establish the liability of any third party . . . ." Id.

42 U.S.C. § 2651(a).

Id. § 2651(b).

See id.; MASS. GEN. L. ch.118E, § 22.
potential treatment of the other. Regarding the MCRA, courts consistently have found that the statute's language grants the government an independent right to seek reimbursement from third-party tortfeasors—even in cases where the third party was not the lone wrongdoer.\textsuperscript{244} In \textit{United States v. Housing Authority of the City of Bremerton}, the United States Court of Appeals for the Ninth Circuit held that the government could recover medical expenses from a third party which the government spent on the injured infant, despite the contributory negligence of the infant's parents.\textsuperscript{245} Responding to the claim that the parents' negligence ought to preclude government recovery, the court stated, "[t]his argument assumes that the United States is subrogated to the parents' claim so that it is subject to all the defenses against the parents."\textsuperscript{246} The court continued, "the government has an independent right to recovery; it is not merely a subrogee."\textsuperscript{247} Though the court conceded that an injured party's negligence may affect the government's recovery, the typical policy against the parents' recovery, that of "profit[ting] in spite of their own wrongdoing," simply does not apply.\textsuperscript{248} Because "the United States has been guilty of no wrongdoing," the court concluded that "the policy that excludes recovery by the parents is inapplicable to the United States."\textsuperscript{249} Thus, despite the negligence of those intimately associated with the injured party, the court did not waiver in its interpretation of the MCRA.\textsuperscript{250} Such a conclusion demonstrates not only the court's recognition of the government's financial losses as distinct from the physical injuries of the individual, but also its willingness to look beyond supposedly exclusive language to find a means to recoup those losses.

\textsuperscript{244} See United States v. Housing Auth. of the City of Bremerton, 415 F.2d 239, 243 (9th Cir. 1969).
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} See id.
\textsuperscript{249} See Bremerton, 415 F.2d at 243. The United States District Court for the Eastern District of Arkansas in Cox v. Maddux, reached a similar conclusion. See 255 F. Supp. 517, 524 (E.D. Ark. 1966). There, the court found that the government could recover medical expenses from a negligent driver for the injuries he caused to the passenger of another vehicle. See id. Specifically, the court held that the government's right to recover for the injuries sustained by a passenger was "not affected," even by the negligence of the driver. See id.
\textsuperscript{250} See Bremerton, 415 F.2d at 243.
3. Making the Analogy: Hedgebeth v. Medford

This endorsement of the government’s right to recover independently under the MCRA suggests that such a right likewise ought to exist in the Medicaid setting. Actually, the New Jersey Supreme Court in Hedgebeth v. Medford has already determined that such an endorsement does just that. Though its holding focused on a different issue, the court found that New Jersey Medicaid legislation authorized the state to either “institute an action directly against the tortfeasor . . . or seek recovery by way of the Medicaid recipient through a right of subrogation.” In doing so, the court relied largely on Medicaid’s similarity to the MCRA, stating that the ambiguous language of New Jersey’s statute “must be read in pari materia with the . . . independent right of recovery specified” in the MCRA. The court’s heavy reliance upon the MCRA in reaching its conclusion demonstrates that simply by comparing Medicaid legislation to the MCRA, an independent right of recovery is an option for the state. The court’s further conclusion that the Medicaid statute included subrogation as merely “a precautionary measure by the Legislature to clearly define these two routes of recovery by the State,” demonstrates that independent recovery is such an obvious option that it does not even warrant explicit mention in the statute. Indeed, as the Hedgebeth court itself recognized, treatment of the MCRA’s independent recovery rights necessarily plays a vital role in determining the extent of those rights under Medicaid.

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251 See id.; Cox, 255 F. Supp. at 524.
253 Strikingly similar to the Massachusetts legislation, the New Jersey statute provides that “in any case where such a legal liability is found, the department . . . shall be subrogated to the rights of the individual for whom medical assistance was made available.” N.J. REV. STAT. § 30:4D-7(j) (1988).
254 See Hedgebeth, 378 A.2d at 228.
255 Meaning “Of the same material; on the same subject; as, laws pari materia must be construed with reference to each other.” BLACK'S LAW DICTIONARY 1115 (6th ed. 1990).
256 See Hedgebeth, 378 A.2d at 228. The New Jersey Supreme Court also cites state legislative history to support its interpretation of the New Jersey statute. See id. Specifically, the court states that although “the legislative history of our own statute contains no reference to this independent right of recovery . . . the concern for costs of the program . . . suggests an unmistakable intent to afford the state every opportunity to recoup its payments from third parties.” Id.
257 See id.
258 See id.
D. Policy Considerations

Finally, public policy dictates that states have the authority to pursue independent reimbursement actions under the Medicaid statute. The driving policy considerations, however, may not be the ones that initially come to mind in the tobacco liability setting. The true policy goals supporting independent recovery do not involve punishing the supposedly “evil” tobacco manufacturers for the harms they already have caused, but instead involve preserving the Medicaid program for the harms it continues to remedy.

To garner support for its attempt to recover independently from the tobacco industry, the states have thus far sought to characterize the industry’s behavior as worthy of severe punishment. Having deemed cigarettes the “poisonous product peddled by tobacco giants through allegedly deceptive means,” the states continually point to smoking’s tremendous impact on human health and the tobacco industry’s subsequent windfall at the expense of the states. In seeking to generate public contempt for this windfall, states have in effect resorted to mere emotion—hoping that somehow a court’s hatred for the tobacco industry will persuade it to overlook supposedly clear statutory language and thus allow an independent reimbursement action.

Though an effective tool, remedying this unjust windfall may not provide sufficient impetus for creating statutory precedent having such far-reaching, long-lasting effects. The real impetus instead may be preserving the Medicaid program and its intended role in American health care. “The ultimate goal of Medicaid,” the Supreme Judicial Court of Massachusetts recently wrote, “is that the program be the payer of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program.” The overwhelming need to further this goal, the court concluded, is what spurred the federal government to require states to take “all reasonable measures” in ascertaining the legal liability of third-party tortfeasors. To be certain, one such measure

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260 See Kelder, supra note 5, at 1.
261 See id.
262 See Plaintiff’s Complaint Mass., supra note 15, at 7–9, 72.
263 Shweiri, 622 N.E.2d at 614 (citing S. REP. No. 146, 99th Congress, 2d. Sess. 312 (1986)).
264 Id. (quoting 42 U.S.C. § 1396 (a)(25)(A)).
guaranteed to further Medicaid's "last resort" goal is that of independent reimbursement actions. Authorizing states to file suits independent of the right of indigent citizens would provide another layer of protection between skyrocketing health care costs and the Medicaid program. In contrast, prohibiting such suits would force Medicaid to continue paying for harms for which another party may be legally responsible. Though certainly favorable to those parties, such unwarranted payments undoubtedly offend the premise upon which the entire Medicaid program was founded.

More importantly, violating this intended role of Medicaid as "payor of last resort" may endanger the program's very existence. The burden Medicaid has borne in helping those whose health needs are greater than the general population has left it in a tenuous financial position, to say the least. \(^{265}\) Increases in both types of illnesses covered and numbers of participating individuals has caused a rapid spending growth that simply has outpaced that of federal, state and local revenues. \(^{266}\) Consequently, these governments have had to spend disproportionate amounts of their annual budgets simply to keep the program operating. \(^{267}\) Despite such valiant efforts to sustain Medicaid, the breaking point is near. To alleviate the unreasonable burden on the government, every possible avenue of financial support must be made available. One such avenue is the state's independent reimbursement action against third-party tortfeasors. In short, independent action would provide the state with a means of recovering for losses suffered apart from those suffered by Medicaid recipients. Though seemingly trivial, funds received from parties like the tobacco industry may collectively make the difference in preserving the program that has played so vital a role in American health care.

VI. Conclusion

Medicaid's ability to provide health care to millions of Americans who otherwise would receive none depends largely on its ability to remain financially independent. Contrary to the assertions made by the tobacco industry, § 1396 of the Social Security Act was structured with this in mind. Though the Act fails to mention explicitly the states' ability to seek reimbursement independently from third-party tort-

\(^{265}\) See Rowland, supra note 21, at 271.

\(^{266}\) See De Lew, supra note 24, at 263.

\(^{267}\) See id.
feasors, legislative history surrounding the Act illustrates Congress’s profound interest in expanding, not limiting, the states’ avenues of financial recovery. Recognizing this interest in a strikingly similar setting, courts already have deemed that the statute most analogous to § 1396, the MCRA, implicitly allows the government to seek independent recovery. Considering this ringing endorsement in light of Medicaid’s precarious financial position, the states’ ability to pursue independent reimbursement actions becomes not only one which sound legal analysis mandates, but also one upon which American health care depends.268

268 At the time of this Comment’s publication, at least one court has decided the subrogation issue in tobacco litigation. On September 17, 1996, a Florida trial court ordered that the state of Florida may pursue an independent cause of action against the tobacco industry to recover lost Medicaid funds only in limited circumstances. Florida v. American Tobacco Co., No. CL-95-1466 (Fla. Cir. Ct. Sept. 17, 1996) (order granting, in part, defendants’ motion to dismiss; order denying, in part, defendants’ motion to dismiss and order to parties to conduct further mediation). Specifically, the Florida Circuit Court for Palm Beach County ruled that independent recovery is appropriate regarding only those financial harms the state suffered since its enactment of the Third Party Medicaid Liability Act of 1994. Id. at 2. As for harms suffered prior to the 1994 legislation, the court concluded that “there can be absolutely no question” that no independent cause of action exists for the state. Id. Instead, the court continued, “the State may pursue subrogation, assignment and/or lien regarding any and all damages occurring prior to the 1994 amendments.” Id. at 3.

In addition, the following states/localities had, at the time of this Comment’s publication, filed independent recovery actions against the tobacco industry: Arizona, Connecticut, Florida, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, Oklahoma, Texas, Utah, Washington, West Virginia, and San Francisco, California.