USCOA,2 No. 82

Blue Cross and Blue Shield of New Jersey, Inc., &c. et al.,
Respondents,
v.
Philip Morris USA Incorporated, et al.,
Appellants,
B.A.T. Industries P.L.C., et al.,
Defendants.

Murray R. Garnick, for appellants.
Paul J. Bschorr, for respondents.
Product Liability Advisory Council, Inc.; Eliot Spitzer, Attorney General of the State of New York; Pharmaceutical Research and Manufacturers of America, amici curiae.

CIPARICK, J.:

Plaintiff Empire Blue Cross and Blue Shield is one of several Blue Cross plans to commence this action against defendant tobacco companies alleging that defendants engaged in deceptive practices designed to mislead the public regarding the

harmful and addictive properties of cigarette smoking.[1]

The complaint, lodged in the United States District Court for the Eastern District of New York, raised various federal and state claims. By the time of trial, the remaining claims consisted of direct and subrogated actions for violations of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1962), direct and subrogated actions for engaging in deceptive business practices in violation of New York General Business Law § 349, and a subrogation claim for common-law fraud.

The jury determined that Empire had proven its section 349 claims against defendant tobacco companies (with the exception of defendant British American Tobacco Co., Ltd.), and awarded Empire $17,782,702 on its direct action and $11,829,784 on its subrogated action.[2] After the verdict, defendants moved for judgment as a matter of law (see Fed Rules Civ Pro rule 50 [b]). The District Court denied the motion, finding that Empire's injury was not too remote to allow recovery under section 349 and that victims of indirect injuries could recover

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[1] The United States District Court ordered Empire's claims to be tried first, separate from the claims of the other Blue Cross plans (see Blue Cross & Blue Shield of New Jersey, Inc. v Philip Morris, Inc., 113 F Supp 2d 345, 353 [ED NY 2000]). Thus, only Empire's claims are at issue for purposes of this appeal.

[2] The District Court subsequently awarded plaintiff attorneys fees in the amount of $37,841,054.22 (see Blue Cross and Blue Shield of New Jersey, Inc. v Philip Morris, Inc., 190 F Supp 2d 407, 429 [ED NY 2002]).

under the statute (see Blue Cross & Blue Shield of New Jersey, Inc. v Philip Morris, Inc., 178 F Supp 2d 198, 230-232 [ED NY 2001]).

The United States Court of Appeals for the Second Circuit reversed the portion of the jury award on Empire's section 349 subrogation claim, because Empire failed to identify individually injured plan members for the purpose of allowing defendants to investigate and defend the action (see Blue Cross & Blue Shield of New Jersey, Inc. v Philip Morris USA, Inc., 344 F3d 211, 217-218 [2003]). The Court further found that Empire's standing to bring an action under section 349 was not affected by the fact that it is not a consumer, and that Empire's aggregate proof on the issues of causation and damages was legally sufficient -- unless individualized proof is required by section 349. The Second Circuit found, however, that there were unresolved issues of New York law that would be determinative of the present appeal, and certified the following questions for this Court's review:

> "1. Are claims by a third party payer of health care costs seeking to recover costs of services provided to subscribers as a result of those subscribers being harmed by a defendant's or defendants' violation of N.Y. Gen. Bus. Law § 349 too remote to permit suit under that statute?
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> "2. If such an action is not too remote to permit suit, is individualized proof of harm to subscribers required when a third party payer of health care costs seeks to recover costs of services provided to subscribers as a result of those

> subscribers being harmed by a defendant's or defendants' violation of N.Y. Gen. Bus. Law § 349?"

(344 F3d at 229). We accepted certification (100 NY2d 636 [2003]) and answer the first question in the affirmative, rendering the second question academic.

Discussion

General Business Law § 349 is a consumer protection statute designed to protect against "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (General Business Law § 349 [a]). Though originally intended to be enforced by the attorney general (see General Business Law § 349 [b]), the statute was amended in 1980 to include a private right of action (L 1980, ch 346). The amendment was intended to afford additional protection for consumers, allowing them to bring suit on their own behalf without relying on the attorney general for enforcement (see Assembly Mem in Support, Bill Jacket, L 1980, ch 346; see also Mem of Attorney General, Bill Jacket, L 1980, ch 346 [suggesting that the attorney general must focus on those cases that have a widespread effect and that the measure would allow individuals to prosecute remaining actions]). Thus, "any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions"

(General Business Law § 349 [h]).

As we have previously noted, the scope of the statute "is intentionally broad, applying 'to virtually all economic activity'" (Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 324 [2002], quoting Karlin v IVF Am., 93 NY2d 282, 290 [1999]). In order to make out a valid section 349 claim, a plaintiff must allege both a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff (see Small v Lorillard Tobacco Co., Inc., 94 NY2d 43, 55-56 [1999]; Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25-26 [1995]). The deceptive act or practice alleged here is that defendants, knowing that smoking causes cancer, misrepresented the dangers of smoking and engaged in a campaign to encourage consumers to smoke. Plaintiff further alleges that, as a consequence, medical costs increased, resulting in actual damages to plaintiff-insurers who bore such costs.

Under common law, an insurer or other third-party payer of medical expenditures may not recover derivatively for injuries suffered by its insured. Rather, the insurer's sole remedy is in equitable subrogation. "Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss" (Winkelmann v Excelsior Ins. Co., 85 NY2d 577, 581 [1995] [citations omitted]; see also

Allstate Ins. Co. v Stein, 1 NY3d 416 [2004]; Great Am. Ins. Co. v United States, 575 F2d 1031, 1033 [2d Cir 1978] ["There is not a single reported case in American jurisprudence . . . which holds that upon an insurance carrier's payment to its insured, the insurer becomes vested with a claim arising out of an implied contract of indemnity with the tortfeasor who caused the damage necessitating payment by the carrier to the insured. On the contrary, the authorities and the cases unanimously hold that the insurer's recovery is premised exclusively upon subrogation"]).

Nevertheless, plaintiff argues that, in enacting General Business Law § 349, the Legislature intended to abrogate the common-law rule and permit recovery for derivative injuries. But neither the text of the statute nor the legislative history reflect an intent by the Legislature to authorize insurers to bring their own direct (non-subrogated) actions based upon injuries to their insureds. "It is axiomatic concerning legislative enactments in derogation of common law, and especially those creating liability where none previously existed, that they are deemed to abrogate the common law only to the extent required by the clear import of the statutory language" (Morris v Snappy Car Rental, Inc., 84 NY2d 21, 28 [1994] [citations omitted]).

To be sure, the language of the statute permits recovery by any person injured "by reason of" a deceptive business practice. But we will not presume an intent to include

recovery for derivative injuries within the scope of the statute in the absence of a clear indication of such intent from the Legislature. Indeed, we have warned against "the potential for a tidal wave of litigation against businesses that was not intended by the Legislature" (Oswego, 85 NY2d at 26). Moreover, allowing plaintiff's claim would effectively eliminate subrogation actions under section 349 -- a result which nothing in the legislative history shows was ever intended.

In holding that third-party payers cannot recover derivatively under the General Business Law, we recognize that section 349 is a broad, remedial statute and that the provision creating a private right of action employs expansive language. We are also mindful that the Attorney General asks us not to adopt a inflexible rule of proximate causation that would limit the tools and remedies available to protect consumers or undermine the State's power to redress deceptive consumer practices. In concluding that derivative actions are barred, we do not agree with plaintiff that precluding recovery here will necessarily limit the scope of section 349 to only consumers, in contravention of the statute's plain language permitting recovery by any person injured "by reason of" any violation (see e.g. Securitron Magnalock Corp. v Schnabolk, 65 F3d 256, 264 [2d Cir 1995], cert denied 516 US 1114 [1996] [allowing a corporation to use section 349 to halt a competitor's deceptive consumer practices]; Mem of Attorney General, Bill Jacket, L 1980, ch 346

["a business itself will be able to use the private right of action against another business engaged in deceptive practices and thereby obtain increased legal protection"]).

Plaintiff, in arguing that proximate cause is not required under General Business Law § 349 and that plaintiff should as a result prevail, confuses the concept of indirect injury with causation. An injury is indirect or derivative when the loss arises solely as a result of injuries sustained by another party. Although Empire actually paid the costs incurred by its subscribers, its claims are nonetheless indirect because the losses it experienced arose wholly as a result of smoking related illnesses suffered by those subscribers.

The cases cited by plaintiff are not to the contrary. For example, in Catania v 124 In-To-Go Corp. (287 AD2d 476, 477 [2d Dept 2001], lv dismissed 97 NY2d 699 [2002]), the plaintiff -- permitted to sue a tavern owner under the Dram Shop Act -- was the party directly injured in an assault by an intoxicated person (see General Obligations Law § 11-101). But no third party was allowed to sue derivatively to recover moneys expended to treat that injury.

Of course, it is beyond dispute that section 349 (h) permits an actually (non-derivatively) injured party to sue a tortfeasor. We hold simply that what is required is that the party actually injured be the one to bring suit. Empire was not directly injured in this sense.

What plaintiff characterizes as an issue of causation is better viewed as a question of standing. Properly framed, the issue is not whether the deceptive practice is a sufficient cause of the plaintiff's injury, but what types of injuries are cognizable under the statute. Plaintiff's injuries are not. We therefore hold that a third-party payer has no standing to bring an action under General Business Law § 349 because its claims are too remote.[3] In so holding, we do not leave plaintiff without remedy. As an insurer, Empire's traditional common-law remedy to recover excess amounts paid on behalf of an insured, arising from the misconduct of a third party, is an action in equitable subrogation.

We further reject Empire's argument that in view of the collateral source rule of CPLR 4545 (c), the effect of our decision is to immunize the tobacco companies from liability. The rule was enacted in 1984 in order to prevent duplicate recoveries for, among other things, costs of medical care (see

[3] We are thus in agreement with A.O. Fox Mem. Hosp. v Am. Tobacco Co., Inc. (302 AD2d 413, 424 [2d Dept 2003]) and Eastern States Health & Welfare Fund v Philip Morris, Inc. (188 Misc 2d 638, 646-647 [Sup Ct, NY County 2000]), which held that the plaintiffs' claims for deceptive trade practices were too remote to allow recovery because they were derivative of the harm to their patients/members. This outcome is also in accord with several other courts that recognize a remoteness bar to recovery under their state consumer protection statutes (see e.g. Ganim v Smith & Wesson Corp., 780 A2d 98, 133-134 [Conn 2001]; Oregon Laborers-Employers Health & Welfare Trust Fund v Philip Morris, Inc., 185 F3d 957, 968 [9th Cir 1999]; compare Group Health Plan, Inc. v Philip Morris, Inc. 621 NW2d 2, 9-10 [Minn 2001]).

Fisher v Qualico Contracting Corp., 98 NY2d 534, 538-539 [2002]). This statute does not alter Empire's traditional remedy because "a defendant still may be held responsible in subrogation" (Fisher, 98 NY2d at 540). Although a subrogation action may be difficult for plaintiffs to prove -- as they would be required to establish the elements of each subscriber's claim -- it is the only remedy available to them. Insurers cannot sidestep their traditional remedy of subrogation and sue directly for derivative injuries using a statute that creates a cause of action for a person directly injured.

Accordingly, the first certified question should be answered in the affirmative and the second certified question not answered upon the ground that it has been rendered academic.

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Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.17 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question no. 1 answered in the affirmative and certified question no. 2 not answered upon the ground that it has been rendered academic. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Smith, Rosenblatt, Graffeo, Read and Smith concur.

Decided October 19, 2004