A10-215

State of Minnesota
In Court of Appeals

Gregory Curtis, Joni Kay Hanzal, Josephine Leonard and Randy Hoskins, individually and on behalf of all others similarly situated,

Appellants,

v.

Altria Group, Inc. and Philip Morris, Inc.,

Respondents.

BRIEF *AMICUS CURIAE* OF THE TOBACCO CONTROL LEGAL CONSORTIUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

ARGUMENT

The Tobacco Control Legal Consortium ("TCLC") submits this brief as *amicus curiae* to introduce a discussion of public health concerns to this Court's consideration of whether affirming the district court would be an improper expansion of the Minnesota Supreme Court's doctrine requiring proof of "public benefit" for a private action under Minnesota UDAP laws.[1] Reasonably available private enforcement of UDAP laws furthers the public health mission of tobacco control. Affirming the trial court's dismissal of this action will impair one of the primary tools used to contain the evolving fraudulent conduct of tobacco manufacturers.

I. The Interest Of The Tobacco Control Legal Consortium In This Matter

TCLC is a national network of legal centers providing assistance to public officials and health professionals addressing legal issues related to tobacco and health, and supporting public health policies that reduce the harm caused by tobacco use. TCLC grew out of collaboration among specialized legal resource and public health centers located in six states, and is supported by national advocacy organizations, voluntary health organizations and others. TCLC prepares legal briefs as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in cases before the United States Supreme Court, the Supreme Courts of California, Delaware, Florida,

[1] This brief was prepared solely by the undersigned attorney and funded solely by *amicus* TCLC.

Kentucky, Montana, New Hampshire, South Carolina and Washington, and the United States District Court for the District of Columbia, and the United States Courts of Appeals for the Second and Fifth Circuits. TCLC's national coordinating office is located at the Public Health Law Center at William Mitchell College of Law in St. Paul, Minnesota.

This case before the Minnesota Court of Appeals is of national significance because it would represent the first time that an appellate court at any level has dismissed a lawsuit alleging violation of consumer protection laws by tobacco manufacturers based on a lack of public benefit. We strongly urge this Court not to create such a precedent.

II. Tobacco Marketing Fraud Of Light And Low-Tar Cigarettes Continues To Be Pervasive

About 17 people in Minnesota, including smokers and non-smokers exposed to tobacco smoke, will die from tobacco use on the day this appeal is heard by the Court. Campaign for Tobacco Free Kids, "The Toll of Tobacco in Minnesota" (2009) (available at http://www.tobaccofreekids.org/reports/settlements/toll.php?StateID=MN); Centers for Disease Control and Prevention, "State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004," (MMWR) 58(2) (January 2009). More deaths are caused by tobacco use than the combined morbidity from illegal drug use, alcohol use, motor vehicle injuries, suicides, HIV and murders. Centers for Disease Control and Prevention, *Health Effects of Cigarette Smoking* (2009) (available at: http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects).

In addition to causing death, smoking is associated with an astounding list of debilitating health conditions beyond the well-known consequences for human respiratory and cardiovascular systems; disorders ranging from kidney cancer to infertility to lower bone density and hip fractures. *Id.* Curbing tobacco use, especially among young people, is a top public health priority of the United States.

Determining whether this lawsuit provides a public benefit requires an understanding of tobacco manufacturers' conduct aimed at maintaining high levels of tobacco use. Tobacco manufacturers have a long history of fraud and deceit conducted with shocking disregard for public health. As Professor Micah Berman recently summarized, "Although manufacturers of other products have delayed reporting known dangers of their products, the scope and duration of the tobacco industry's campaign of deception stands alone." *Smoking Out the Impact of Tobacco-related Decisions on Public Health Law*, 75 Brooklyn L Rev 1 (2009). Unfortunately, this fraudulent conduct continues. This section reviews the history of one part of this fraud that is the subject of this lawsuit.

A. The History Of "Light" Cigarettes In The Marketing Of Tobacco

In 1953, tobacco manufacturing executives met to confront the mounting evidence that their products were killing people. The result of the meeting was publication of the now infamous "Frank Statement to Cigarette Smokers." In the Frank Statement, the tobacco manufacturers stated that they "accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business" and that they

"always have and always will cooperate closely with those whose task it is to safeguard the public health." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 39-41 (D.D.C. 2006), *aff'd in part, vacated in part and remanded*, 566 F.3d 1095 (D.C. Cir. 2009), *pet. for cert pending* ("DOJ case"). Neither of these statements were remotely true.

One important part of the tobacco manufacturers' strategy to ensure sales did not decrease due to health concerns was to deceive smokers into using a seemingly safer type of cigarette. Beginning in the 1960s, tobacco manufacturers began selling "low tar" and "low nicotine" cigarettes. These cigarettes provide no health benefit to smokers because of the compensatory behaviors used by smokers to sustain nicotine levels. *Id*. at 444-456. Over 95% of smokers compensate for the lower nicotine levels by either taking stronger puffs or smoking more cigarettes, and such compensatory behaviors are permanent. *Id.* at 438. As a result of smoker compensation, low tar and nicotine cigarettes are as dangerous, or more dangerous, than traditional cigarettes. *Id.* at 438-439, 456.

Tobacco manufacturers promoting low tar and nicotine cigarettes knew that smokers used these compensatory behaviors to maintain stable nicotine intake and thus that low tar and nicotine cigarettes provided no health benefit. *Id.* at 456-475; K. Michael Cummings, et. al., *What do Marlboro Light Smokers Know About Low-tar Cigarettes?*, Nicotine & Tobacco Research 323 (January 2004). Philip Morris's former Director of Applied Research, Dr. William Farone, testified that: "[I]n the case of Marlboro Lights, the Philip Morris test data that I have reviewed on that level of dilution for equivalent

blends indicated that the product design for their Light cigarettes was more mutagenic than the full flavor Marlboro, Marlboro Reds, and therefore predictive of more potential cancer risk. These studies were repeated multiple times over the past 20 years and continue to be repeated to this day." *U.S. v. Philip Morris*, 449 F. Supp. 2d at 456.

While tobacco manufacturers knew about smoker compensating behavior and the lack of health benefits for light cigarettes, smokers perceived light cigarettes as a healthier alternative to traditional cigarettes and thus switched to these cigarettes rather than quit smoking. *Id.* at 475-488. The tobacco manufacturers understood that light cigarettes were a means to prevent smokers from quitting cigarettes. Philip Morris, in particular, conducted extensive research on why people quit smoking and determined that smokers switch to light cigarettes rather than quit smoking. *Id.* at 488-492. A January 1979 study prepared for Philip Morris, for instance, found that:

> …smoking an ultra low tar cigarette seems to relieve some of the guilt of smoking and provide an excuse not to quit. All of these smokers expressed an awareness of a health hazard from smoking, but felt that they had alleviated some of this hazard by smoking an ultra low tar brand. They described these cigarettes as 'safer'.... With these justifications, there may be less of a compulsion to quit smoking....

Id. at 489.

Company documents and testimony show how Philip Morris exploited consumer misunderstanding about light cigarettes. *Id.* at 477-481. Judge Kessler found in the DOJ case: "According to (Philip Morris Manager of the Marlboro brand from 1969 to 1972 and later CEO James) Morgan, Philip Morris made a calculated decision to use the phrase 'lower tar and nicotine' even though its own marketing research indicated that consumers

interpreted that phrase as meaning that cigarettes not only contained comparatively less tar and nicotine, but also that they were a healthier option." *Id.* at 513-514.

Tobacco manufacturers aggressively marketed light, and later "ultra light," cigarettes because they knew of smokers' mistaken beliefs about the health benefits of light cigarettes. *Id.* at 508-529 (detailing Philip Morris's advertising of health benefits with light cigarettes). Phillip Morris poured substantial resources into convincing smokers that they could get the same cigarette taste with a light cigarette. *Id.* It advertised Merit cigarettes, for example, as a low tar cigarette for over 20 years, using slogans ranging from "New Low Tar Entry Packs Taste of Cigarettes Having 60% More Tar" in 1976 to "You *can* switch down to lower tar and still get satisfying taste" in 1994. *Id.* at 519-520.

Like smokers, government regulators also were unaware of the reality that smoker compensatory behavior meant light cigarette had no health benefit. The primary federal regulator of cigarette advertising, the Federal Trade Commission ("FTC"), relied on a machine test of smoking known as the Cambridge Filter Method ("CFM") to determine smoker intake of tar and nicotine for purposes of determining the permissibility of advertising for light cigarettes. *Id.* at 434. Not surprisingly, CFM tests showed lower tar and nicotine levels when the machine "smoked" low tar and nicotine cigarettes because CFM did not adjust for actual smoker behavior. *Id.* at 436-439. The tobacco manufacturers knew that CFM tests were worthless because they failed to account for smoker compensation behaviors. Mr. Wakeham, the Philip Morris Director of Research

and Development, concluded in his 1967 memo that the "smoking machine data appear to be erroneous and misleading." *Id.* at 462.

In one of countless violations of their public pledges in the Frank Statement, the tobacco manufacturers did not disclose to the FTC or the public that CFM was an invalid measure of smoke intake and that smokers would compensate to obtain stable nicotine levels consistent with addiction to nicotine. *Id.* at 437-440. The tobacco manufacturers hid their knowledge that CFM was a useless measurement device when they negotiated a voluntary agreement with the FTC that ended a threatened FTC regulatory effort of low tar and nicotine cigarettes. *Id.* at 435. The negotiated agreement allowed advertising of low tar and nicotine cigarettes as long as the manufacturers disclosed CFM test data in advertisements. *Id.* Philip Morris and other manufacturers ran the above-described advertisements allowed by this agreement to convince cigarette smokers to use "light" cigarettes rather than quit.

Judge Kessler summarized her findings in the DOJ case about the light cigarette fraud as follows:

> It is clear, based on their internal research documents, reports, memoranda, and letters, that Defendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes as opposed to conventional full-flavor cigarettes. It is also clear that while Defendants knew that the FTC Method for measuring tar and nicotine accurately compared the nicotine/tar percentages of different cigarettes, they also knew that that Method was totally unreliable for measuring the actual nicotine and tar any real-life smoker would absorb because it did not take into account the phenomenon of smoker compensation. Defendants also knew that many smokers were concerned and anxious about the health effects of smoking, that a significant percentage of those smokers were

> willing to trade flavor for reassurance that their brands carried lower health risks, and that many smokers who were concerned and anxious about the health risks from smoking would rely on the health claims made for low tar cigarettes as a reason, or excuse, for not quitting smoking.
>
> Despite this knowledge, Defendants extensively -- and successfully -- marketed and promoted their low tar/light cigarettes as less harmful alternatives to full-flavor cigarettes… By engaging in this deception, Defendants dramatically increased their sales of low tar/light cigarettes, assuaged the fears of smokers about the health risks of smoking, and sustained corporate revenues in the face of mounting evidence about the health dangers of smoking.

Id. at 560-561.

The tobacco manufacturers' light cigarette fraud worked. Smokers switched to light cigarettes by the millions in the belief that they were making a choice for better health. The share of cigarettes sold with 15 mg. of tar or less, the defining point for a light cigarette, rose from 2.0% in 1967 to 92.7% by 2005. Federal Trade Commission. Cigarette Report for 2006 (2009) at Table 4A (available at http://www.ftc.gov/os/2009/08/090812cigarettereport.pdf). Millions of these smokers are now dead or weakened from their choice; a fact that the tobacco manufacturers have long understood would occur as a result of their deception.

B. Tobacco Manufacturers' Continuing Fraud And Deception

The exposure of the light cigarette fraud, as with the other areas of deception in tobacco marketing, has not stopped tobacco companies from continuing to evolve their conduct to ensure consumers are misled about the dangers of tobacco.

During the same period in which Minnesota entered into a settlement agreement with tobacco manufacturers, forty-six states jointly settled similar claims with tobacco

manufacturers when they signed the Master Settlement Agreement (MSA). The tobacco manufacturers "began to evade and at times even violate the MSA's prohibitions almost immediately after signing the agreement." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1133 (D.C. Cir. 2009), *pet. for cert pending*. In upholding Judge Kessler's finding in the DOJ case of repeated post-MSA violations, the D.C. Circuit described the example of the tobacco manufacturers' violation of their agreement to disband falsely "independent" research groups, such as the Center for Indoor Air Research (CIAR), as follows:

> Defendants assert the MSA prevents their participation in a RICO enterprise because the organizations that allowed for joint activity no longer exist, and neither the government nor the district court identified any "joint activity" between Defendants after 1998, the start of the MSA. Defendants' post-agreement activities belie these statements. For example, though the MSA required Defendants to dissolve CIAR, only two days after signing the MSA Lorillard's general counsel wrote Philip Morris, Reynolds, and Brown & Williamson asking to "discuss the status of the plan to reinstate CIAR." Shortly thereafter, Covington & Burling LLP informed the CIAR contractors "[t]he members of CIAR have decided to create a new organization to continue the work.... The members of CIAR that will be members of the new organization intend to continue to fund the research." Subsequently, in 2000, Philip Morris initiated a new research program that had the same offices, phone numbers, and board as CIAR and many of the same employees, management, researchers, peer reviewers, and grantees…CIAR is not the lone example of Defendants' organizations poised to circumvent the MSA's prohibitions against joint activities or participation in an enterprise.

Id. (citations to record omitted).

Judge Kessler emphatically rejected the argument that the tobacco manufacturers are "new" companies constrained by the MSA and thus should not be subject to injunctive provisions under RICO, finding that:

> The evidence in this case clearly establishes that Defendants have not ceased engaging in unlawful activity. Even after the Complaint in this action was filed in September 1999, Defendants continued to engage in conduct that is materially indistinguishable from their previous actions, activity that continues to this day…Significantly, their conduct continues to further the objectives of the overarching scheme to defraud, which began by at least 1953.

U. S. v. Philip Morris, 449 F. Supp. 2d at 910. Judge Kessler concluded that:

> There is a reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the past. Defendants' practices have not materially changed in most of the Enterprise's activities, including…claims that light and low tar cigarettes are less hazardous than full-flavor cigarettes.

Id. at 911.

For nearly fifty years, tobacco manufacturers have evaded social responsibility and attempts at controlling their conduct. There is little reason to believe that the Minnesota settlement and the recent passage of regulations alone will stop the manufacturers' deceptive marketing of cigarettes, especially in light of Judge Kessler's findings about the manufacturers' deceit concerning their claims of changed behavior. Indeed, it has recently been suggested that tobacco manufacturers already have conditioned consumers worldwide to substitute package colors for the words "light" and "ultra light" as a means of continuing the light cigarette fraud. Duff Wilson, *Coded to Obey Law, Lights Become Marlboro Gold*, New York Times (February 19, 2010) ("According to Professor Connolly of Harvard, the tobacco industry has known for at least a decade from World Health Organization actions that words like 'light' would

eventually have to come off boxes, giving it time to prepare the other visual cues on packaging.").

III. The Importance Of Consumer Protection Litigation In Controlling The "Extreme Case" Of Tobacco Marketing Fraud

In considering the role of litigation in promoting public health, Dean Kenneth Warner and Professor Peter Jacobson of the University of Michigan School of Public Health conclude that "tobacco is an extreme case." Peter Jacobson and Kenneth Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. Health Pol. Pol'y and L. 769, 800 (1999). While casting doubt on litigation as a public health strategy in some other contexts, Warner and Jacobson conclude that "[t]he tobacco industry is highly culpable morally for the harms it has caused and deserves to be held accountable" and that "litigation is an appropriate mechanism for ensuring the tobacco industry's accountability." *Id.*

The experience of TCLC is that tobacco control requires a multi-pronged approach to create the appropriate incentives, limits on conduct and social norms that determine tobacco use. An important part of this comprehensive strategy has been lawsuits brought under state consumer protection laws.

A. The Role Of Consumer Protection Litigation In Tobacco Control

Prior to the tobacco lawsuits brought by the Minnesota Attorney General and other state attorneys general, tobacco manufacturers were seen as invincible litigators. From the disclosure of the link between smoking and cancer in the 1950s until the1980s, tobacco manufacturers successfully defended lawsuits based on common law tort claims

by arguing that the link between smoking and cancer was unproven. When the scientific evidence made this defense absurd by the 1980s, the tobacco manufacturers successfully pivoted their defense to a seemingly inconsistent position—that the risk of cancer with smoking was so widely known that smokers had assumed the risk of cancer. Robert Rabin, *A Sociolegal History of Tobacco Tort Litigation*, 44 Stanford L. Rev. 853, 855-877 (1992).

Throughout these decades of litigation with shifting legal theories, tobacco manufacturers maintained a consistent posture of uniquely aggressive litigation tactics. Writing in 1992, Professor Robert Rabin describes tobacco litigation strategy as follows:

> From the beginning, the cigarette companies …decided that they would, as a first line of defense, spare no cost in exhausting their adversaries' resources short of the courthouse door. This no-compromise strategy … is unique in the annals of tort litigation… [I]n mass tort litigation-that is, litigation involving a huge number of claims arising out of a single hazardous course of conduct or event, such as the asbestos, Dalkon Shield, and DES cases-there has always come a point when the beleaguered defense has decided that at least some of the persistently arising claims are worth settling. By contrast, over a period exceeding thirty-five years, the tobacco industry never offered to settle a single case.

Rabin, 44 Stanford L. Rev. at 857 (1992).

The failure of these suits based in common law tort claims led to a "third wave" of litigation, led by the state attorneys general lawsuits, which relied on state consumer protection, or Unfair and Deceptive Acts and Practices (UDAP), laws. The state UDAP lawsuits broke through the tobacco manufacturers' scorched-earth defense strategies. By using mass action lawsuits focused on the deceptive conduct of the tobacco

manufacturers, these suits have served the critical function of beginning to hold the tobacco manufacturers liable for their egregious conduct.

An important result of this third wave of UDAP litigation has been the disclosure of critical data about tobacco manufacturer conduct that the companies had previously been able to conceal. The wealth of information available about the various fraudulent schemes of the tobacco manufacturers is mostly the result of UDAP litigation. Roger Magnusson, *Mapping the Scope And Opportunities For Public Health Law In Liberal Democracies*, 35 Journal of Law, Medicine and Ethics 571, 577 (2007) (concluding that the state attorneys general UDAP litigation "led to the release of vast quantities of internal industry documents which have 'revolutionized tobacco control research and advocacy' by demonstrating the sheer scale of tobacco industry misconduct.") (citation omitted); Richard D. Hunt, M.D., et. al., *Open Doorway to Truth: Legacy of the Minnesota Tobacco Trial*, Mayo Clinic Proceedings (2009) (available at: http://www.mayoclinicproceedings.com/content/84/5/446.full).

These lawsuits also exposed the tobacco companies' history of hiding and destroying documents and research. As Judge Kessler concluded about the tobacco manufacturer's conduct: "they suppressed, concealed and terminated scientific research; they destroyed documents including scientific reports and studies; and they repeatedly and intentionally improperly asserted the attorney-client and work product privileges over many thousands of documents (not just pages) to thwart disclosure to plaintiffs in

smoking and health related litigation and to federal regulatory agencies." *U.S. v. Phillip Morris,* 449 F. Supp. 2d at 839 (parenthetical in original).

B. Private Consumer Protection Litigation Is An Important Component Of Comprehensive Public Health Strategies For Tobacco Control

Preventing death and the adverse health consequences from tobacco use requires multiple methods for discouraging individuals from using tobacco. The public health community has created advertising, improved access to cessation programs, attempted to restrict smoking in public spaces, targeted the channels by which youth become addicted to smoking, and employed a variety of other methods to save lives by decreasing tobacco use. Private UDAP lawsuits are another important tool in this array of strategies aimed at the public health goal of controlling tobacco use.

Private UDAP suits seeking monetary remedies fill a role absent from the public UDAP actions—compensating victims of the fraud perpetrated by the tobacco manufacturers. Individual smokers in Minnesota have recovered nothing from the widespread and long-term tobacco manufacturer fraud. Recovery of money by defrauded individuals would serve to highlight for current and past smokers the reality of the fraud that led to their payment—that tobacco manufacturers promoted light cigarettes without disclosing their knowledge that it had none of the health benefits presumed by smokers.

Such recoveries also would serve the salutary effect of imposing costs on the wrongdoer, thus making manufacturers aware that fraud has a cost and deterring future fraudulent conduct. As to the light cigarette fraud, the tobacco manufacturers were not

even subject to disgorgement of profits in the DOJ case. *See United States v. Phillip Morris USA, Inc.* 396 F.3d 1190 (D.C.Cir.), *cert. denied,* 546 U.S. 960 (2005) (holding that disgorgement is not available as a civil RICO remedy). The tobacco manufacturers learned over decades of atypically aggressive defense tactics that they could avoid the costs of their conduct. Private UDAP suits help to reverse that business cost calculation and create disincentives for future deceptive conduct by tobacco manufacturers.

Private UDAP suits also complement and extend the positive impact of public UDAP enforcement actions. They can serve the same function of making public information about the conduct of the tobacco manufacturers. It is important to remember that the deadly consequences of tobacco use are felt throughout the world, and information discovered in these suits can be disseminated internationally to assist in educating leaders and consumers about the reality of tobacco consumption. Private suits generate publicity about the harmful impact of tobacco use and the false beliefs that help maintain that use, thereby reinforcing important public messages about the causes and impact of tobacco use.

Private lawsuits based on tobacco manufacturer violation of UDAP laws are one useful component in a comprehensive set of measures aimed at controlling the deadly effects of tobacco use.

IV. Certified Class Actions Properly Alleging Consumer Fraud Violations By Tobacco Manufacturers Provide A Public Benefit

Minnesota has three primary UDAP laws, including the Consumer Fraud Act ("CFA"), Minn. Stat. §§ 325F.68-.70 (2008), the False Statement in Advertising Act,

Minn. Stat. § 325F.67 (2008), and Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-.48 (2008). A national report has described Minnesota UDAP law as "weak" in access to the courts by private parties. Carolyn Carter, *Consumer Protection in the States: A 50 State Report on Unfair and Deceptive Acts and Practices Statutes* (N.C.L.C. 2009). The report concludes that: "[s]ome Minnesota courts impose a barrier so high that no consumer is ever likely to meet it." *Id.* at 22. If this Court upholds the dismissal of this certified class action against tobacco manufacturers based on lack of public benefit, Minnesota courts will be on the verge of reading out of existence the Minnesota Legislature's grant of a private right of action for violation of Minnesota UDAP laws.

A. This Court Should Not Expand The Public Benefit Limit Doctrine To Include A Second Requirement Based On The Remedies Sought By Plaintiffs

The U.S. Court of Appeals for the D.C. Circuit characterized as "an odd argument" the tobacco manufacturers' position that the injunctive provisions of the MSA should limit remedies in a RICO suit. *U.S. v. Philip Morris USA, Inc.*, 566 F.3d at 1132. The trial court holding in this case is similarly counter-intuitive. The trial court concluded that a certified class alleging an extraordinary decades-long fraud that killed millions of smokers cannot prove "public benefit" from a UDAP suit as a matter of law because of a prior public action settled before the doctrine was created and from which individual consumers received no monetary compensation. The trial court reached this result by improperly expanding the public benefit limit on UDAP suits created by the Minnesota Supreme Court.

1. Precluding This Certified Class Action Is Possible Only If This Court Expands The Public Benefit Limit Created By The Minnesota Supreme Court

In 2000, the Minnesota Supreme Court created the public benefit limit on suits asserting UDAP claims under the Private Attorney General statute, Minn. Stat. § 8.31. *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000). In *Collins v. Minn. Sch. of Bus., Inc.*, the Minnesota Supreme Court reiterated what was apparent in *Ly*-- that the touchstone of the public benefit limit is broad dissemination of representations by the defendant-- and reversed the lower courts for improperly focusing on the injury suffered by plaintiffs rather than whether the representations were made to "the public at large." 655 N.W.2d 320, 330 (Minn. 2003)

It is hard to imagine a UDAP suit that is more consistent with this broad dissemination requirement than this certified class action alleging fraud in light cigarette marketing. The tobacco manufacturers perpetrated a scheme that included massive advertising and promotion expense that they knew would lead smokers to continue smoking based on mistaken beliefs about the health effects of light cigarettes. As described above, this scheme took shape over decades. It included withholding critical information from government regulators that the tobacco manufacturers knew were using invalid scientific data. It resulted in shifting the smoking purchases of millions of Americans from traditional cigarettes to an equally or even more dangerous product based on misleading information.

If the public benefit limit in *Ly* is based on the broad dissemination requirement, the *Curtis* class action is an easy case. Instead, this certified class action was dismissed by the court reading another requirement into the public benefit limit doctrine. The court erected a second, independent hurdle for private plaintiffs based on the nature of relief they seek for UDAP violations. The trial court here followed some other courts, especially lower federal courts, in requiring the *Curtis* class to prove that the remedy it seeks also meets an undefined "public benefit" standard. *See* Prentiss Cox, Editor, *Consumer Fraud and Deceptive Trade Regulation in Minnesota* § 4.1C3(b) (MinnCLE 2009) (listing and grouping cases dismissing private UDAP actions under the public benefit limit based on remedy). This Court should not only refuse to create this additional requirement in the public benefit limit doctrine, but also should clarify for trial courts, and the federal appellate courts, the importance of strict adherence to the doctrine as it has been created by the Minnesota Supreme Court.

Interpretative caution is especially warranted in this context because the public benefit limit is not grounded in express statutory language. The private attorney general statute, Minn. Stat. § 8.31, subdiv. 3a (2008), states: "In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court." It does not provide for a public benefit limit on suit. Nor did the Court in *Ly* identify any particular ambiguous language

in the statute that it was interpreting when it created the public benefit limit doctrine restricting private UDAP actions. Accordingly, trial courts, this Court and federal courts have a special duty to faithfully and conservatively follow the Minnesota Supreme Court's articulation of how a limit on suit absent from the statutory language itself was read into the law by the Minnesota Supreme Court.

Such caution also is appropriate because the result of upholding a second barrier to suit under the public benefit limit doctrine will mean the near elimination of private actions claiming UDAP violations. The Minnesota Supreme Court decisions in *Ly* and *Collins* created a framework for evaluating private actions under the CFA that, as a practical matter, imposes severe restrictions on suits by individuals but is more amenable to mass actions alleging fraud and deception. The lower courts and the Eighth Circuit have interpreted the public benefit limit as almost a *per se* exclusion of suits by individual consumers alleging statutory consumer fraud claims. Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws*, 33 William Mitchell Law Review 163, 182-185 (2006). The routine dismissal of UDAP suits by individuals, though harsh, is consistent with and flows directly from an interpretation of the "broad dissemination" requirement.

Class actions and joinder cases, however, generally have fared considerably better under the public benefit limit. Most class action cases litigated after *Ly* have proceeded without challenge under the public benefit restriction on suit. Joinder cases, such as *Collins*, also have not been routinely dismissed under the public benefit limit. Adding a

second, alternative requirement to the public benefit limit doctrine will drastically shrink even this limited pool of cases deemed permissible under a statute that, on its face, seems to allow suits by any person injured by an UDAP violation. This result clearly was not contemplated when the Legislature passed the private attorney general statute in 1973.

2. Expanding The Public Benefit Doctrine Improperly Contravenes The Common Law Of Claim Preclusion

Interpretative caution, and close adherence to the *Ly* decision reasoning, is not an apt description of the lower court decision in this case. Expanding the public benefit limit to preclude suits based on prior action by the Minnesota Attorney General directly contradicts an important element of the Supreme Court's rationale in *Ly* for creating the doctrine.

A critical part of the reasoning in *Ly* was that "the legislature could not have intended to sweep every private dispute based on fraud, and falling within the CFA, into a statute where attorney fees and additional costs and expenses would be awarded, because to do so would substantially alter a fundamental principle of law deeply ingrained in our common law jurisprudence-that each party bears his own attorney fees in the absence of a statutory or contractual exception." *Ly*, 615 N.W.2d at 314. The Supreme Court emphasized that "if a statute abrogates the common law, the abrogation must be by express wording or necessary implication." *Id.* This rationale was consistent with an earlier portion of the opinion expressing concern that failure of the Court to create a limit on suit not apparent in the statutory language would mean "'every artful counsel could dress up his dog bite case" as a CFA violation. *Id*. at 312.

Precluding suit in this case under the public benefit test is inconsistent with the result mandated by the common law of claim preclusion. Claim preclusion (or res judicata) requires that the claim at issue involve "the same parties or their privies." *Hauschlidt v. Beckingham*, 686 N.E.2d 829, 840 (Minn. 2004). The trial court decision attempts to use the public benefit limit to leap over the common law requirement of privity for defendants asserting claim preclusion. It does so by equating its interpretation of "public benefit" with privity. If upheld, the result will be that any action by the Minnesota Attorney General will preclude a private UDAP action on the same matter, even if (as is the case here) private citizens received nothing from the public action in the form of damages or restitution. This is gross misreading of the *Ly* case.

The private attorney general statute provides that "any person injured by a violation of" the UDAP laws may bring an action to recover, among other relief, attorney's fees. Minn. Stat. § 8.31, subdiv. 3a (2008). The Court in *Ly* partly framed the question before it as whether this specific statutory authorization was sufficient to reverse the common law presumption against attorney fee recovery. It determined that the statutory grant of authority was not clear enough to change the common law outcome unless the plaintiff also establishes that the conduct at issue was broadly disseminated and hence a public benefit. *Ly*, 615 N.W.2d at 314. The Court was struggling with the reach of a statute where the intent of the legislature as expressed in the language of the statute conflicts substantially with a common law outcome.

The trial court in this case, and similar lower court opinions, never engage with this interpretative conflict. Instead, the trial court plucked the public benefit idea from the *Ly* decision without any reference to the statutory language *Ly* was interpreting and without any regard for the context in which the Court in *Ly* reached a result not readily apparent in the language of that statute. It takes the interpretative principle in *Ly* designed to limit a statute's effect in reversing a closely related common law outcome and uses that principle to overturn a different common law doctrine that is not remotely implicated by the language or purpose of the statute. In doing so, the trial court turned a shield erected to prevent a statute from too greatly disrupting a common law doctrine into a sword that completely overturns a separate common law doctrine not implicated by the statute. The trial court opinion accomplishes this result without an analysis of the interplay between the statute and common law discussed at length in *Ly*.

This use of the public benefit limit is especially inappropriate in this case. The Minnesota settlement was negotiated by former Attorney General Humphrey in 1998 before the *Ly* case was decided in 2000. Attorney General Humphrey could have no way of knowing that his settlement would be read as precluding private UDAP actions against the tobacco manufacturers based on a doctrine that hadn't yet been created and is not present in the express language of the statute. An Attorney General should at least have the opportunity to make a decision that a settlement under UDAP law is appropriately in the public interest with full knowledge that his or her choice will mean individual consumers will have their UDAP claims precluded based on that settlement.

B. Even If This Court Expands The Public Benefit Doctrine, It Should Use A Multi-Factor Approach And Find Public Benefit In This Certified Class Action

If this Court finds it proper to expand the *Ly* decision and read into the law more requirements for meeting the public benefit limit beyond broad dissemination, it should do so with a carefully considered multi-factor test. Lower court decisions, including the district court here, have not analyzed either the private attorney general statute or the *Ly* decision in any depth before imposing additional hurdles for private litigants seeking to vindicate rights under the CFA. Expanding the public benefit limit requires constructing a proper framework for a more preclusive doctrine. Under almost any carefully considered test, the *Curtis* class action should be allowed to proceed.

Of the small minority of states to create by judicial decision a public benefit limit on private UDP suits, courts in the State of Washington have the most developed doctrine. The Washington Supreme Court imposed a "public interest" limit on private UDAP suits in 1976, developed a three-part test in 1980 to assist lower courts in interpreting the doctrine, and then developed a different multi-factor test in 1986. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 536-538 (Wash. 1986). The Washington test for consumer transactions such as those at issue in the *Curtis* case is as follows:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers

> affected or likely to be affected by it?... [N]ot one of these factors is dispositive, nor is it necessary that all be present. The factors … represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.

Id. at 537-538.

The *Curtis* class clearly would meet this multi-factor balancing test. Element five is irrelevant, and the first three factors weigh heavily in favor of finding public benefit. The tobacco manufacturers engaged in a pattern or generalized course of conduct over decades. The conduct was directed at public agencies in addition to consumers. The tobacco manufacturers ran advertisements, designed packaging, participated in public proceedings and engaged in a range of other repeated violations of Minnesota's UDAP laws in their creation and promotion of light cigarettes.

The fourth element would allow the trial court to consider the facts that it found particularly important, but it would likely weigh in favor of allowing the class action to proceed. The injunctive restrictions in the Minnesota settlement and recently enacted federal legislation are aimed at controlling this problem. But the trial court would have to make a finding on the likelihood that these measures eliminate the "real and substantial potential" of repetitive conduct in light of the tobacco manufacturers' history of blatantly violating or circumventing such restrictions. In any case, the trial court should be asked to weigh this factor against all the other relevant factors of the test that decidedly favor allowing the class action to proceed.

Other factors that the court might want to consider in constructing a test could include the following: centrality of the consumer protection claim to the conduct at issue

in the case; intentionality or recklessness of defendant's conduct; egregiousness of the alleged statutory violation; inequality of knowledge or bargaining power between the parties; extent of harm to the public; whether the attorney's fee award will encourage other counsel to assume representation in similar consumer protection cases; whether the damage award or other relief obtained by the plaintiff(s) remedies the conduct or provides a disincentive to the defendant or similarly situated entities to engage in such conduct; or whether the plaintiff's suit is otherwise of benefit to the public.

The light cigarette fraud was purposefully carried out by the tobacco manufacturers in a series of actions over numerous years. The egregiousness of this fraud is self-evident and the inequality of bargaining power (and knowledge) between the tobacco manufacturers and their customers was immense. Again, any of the potential factors listed above weigh heavily in favor of allowing this class action to proceed.

Perhaps the only way to dismiss the *Curtis* class action as lacking public benefit is to take the approach favored by the trial court here and in similar lower court opinions. This approach involves using an expansive rather than cautious reading of Supreme Court precedent in the following three steps or omissions: (1) create a requirement other than broad dissemination for the public benefit limit doctrine; (2) fail to analyze whether that new requirement is consistent with all of the specific rationales for the creation of the public benefit limit articulated in *Ly* and *Collins*, especially as to consistency with common law outcomes; and (3) determine that failure to meet this new requirement operates as a complete bar to suit as a matter of law rather than as one factor to analyze in

determining public benefit. Each of these actions is necessary to reach the counter-intuitive result here—that a deliberate and deadly pattern of fraudulent conduct does not give rise to a private right of action as established by the Legislature in the private attorney general statute.

Conclusion

Tobacco manufacturers have engaged in one of the longest-running, aggressively conducted and successful frauds in American history. One tool that is critical for controlling the fraudulent conduct of tobacco manufacturers is private lawsuits under state UDAP laws. The Tobacco Control Legal Consortium urges this Court to overturn the trial court's ruling and clarify that the public benefit limit on private attorney general suits for violations of Minnesota UDAP law is not a doctrine that allows trial courts to create an unending series of obstacles that appear nowhere in the language of the statute.

Date: May 26, 2010 By: _____

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Rule 132.01, subdivisions 1 and 3(c) of the Minnesota Rules of Civil Appellate Procedure. The brief was prepared using Microsoft Word 2007. The brief has 6,878 words and was produced with a proportional font. The brief complies with the typeface requirements of Rule 132.01.

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