
**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Philip Morris USA Inc., et al.,
Petitioners,

v.

Barbara Schwab, et al., individually
and on behalf of all others
similarly situated,
Respondents.

On Review from an Order Granting Class Certification
By the United States District Court for the Eastern District of New York
Docket No. 04-CV-1945
The Honorable Judge Jack B. Weinstein

**BRIEF OF *AMICI CURIAE* TOBACCO CONTROL RESOURCE
CENTER DIVISION OF THE PUBLIC HEALTH ADVOCACY
INSTITUTE, INC. AND THE TOBACCO CONTROL LEGAL
CONSORTIUM IN SUPPORT OF RESPONDENTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 26.1 the undersigned hereby certify that the Tobacco Control Legal Consortium is a program of the Tobacco Law Center, Inc., a non-profit, non-stock corporation with no parents or subsidiaries, and that the Tobacco Control Resource Center division of the Public Health Advocacy Institute, Inc. is a non-profit, non-stock corporation with no parents or subsidiaries.

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**STATEMENT PURSUANT TO FEDERAL RULE 29(C)(3)
REGARDING THE IDENTIFY AND INTERESTS OF
*AMICI CURIAE***

Each of the *amici* share a common interest of ensuring that the tobacco industry is held responsible in court for the unparalleled costs it has exacted on society. *Amici* believe that class action litigation is an essential tool to vindicate society's interests in correcting deeply ingrained misconceptions created by the tobacco industry, compensating the parts of society wronged by the tobacco industry, and deterring the tobacco industry from engaging in conduct that continues to threaten millions of Americans.

Amici previously filed a version of this brief joining the Plaintiffs in opposing the Defendants' Petition for interlocutory review and an accompanying motion to stay. *Amici* now wish to present their concerns and information to the Judges hearing the appeal.

Amicus Curiae the Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing legal technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health

organizations and others.¹ In addition, 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 recent cases before the U.S. Supreme Court, the Supreme Courts of California, Florida, Kentucky, Montana and Washington, and the trial court in the U.S. Department of Justice tobacco litigation.

Amicus Curiae the Tobacco Control Resource Center (TCRC), founded in 1979, is a division of the Public Health Advocacy Institute devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

¹ TCLC's coordinating office is located at the Tobacco Law Center, Inc., at the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Public Policy Center at Capital University Law School in Columbus, Ohio; the Tobacco Control Resource Center division of the Public Health Advocacy Institute, Inc., at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project at the Center for Social Gerontology in Ann Arbor, Michigan; and the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey. Legally, TCLC is operated as a program of the Tobacco Law Center, Inc., a non-profit corporation.

INTRODUCTION AND SUMMARY OF ARGUMENT

According to Nancy Lund, the Senior Vice President of Marketing for Philip Morris, smokers initially disliked the taste of light cigarettes, but were buying them nonetheless because they thought light cigarettes were less harmful. *See U.S. v. Philip Morris USA, Inc.*, 2006 WL 2380648 *480. This belief was not unplanned. According to Judge Gladys Kessler in the case *United States v. Philip Morris USA, Inc.*, the Defendants' misled smokers and potential smokers into believing that light cigarettes were less harmful to keep them smoking. *See U.S. v. Philip Morris USA, Inc.*, 2006 WL 2380648, *177 - WL2381449, *178; *see also* National Cancer Institute, *Smoking and Tobacco Control Monographs: Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-measured Yields of Tar and Nicotine* (2001) at 233 (concluding the Defendants intended to "reassure smokers who were worried about the health risk of smoking and were meant to prevent smokers from quitting based on those same concern" that have resulted from the dissemination of smoking and health research to the public.) Today, decades after the initial introduction of light cigarettes, the Defendant's continue to misled smokers and potential smokers into believing that light cigarettes are safer than other cigarette brands, according to Judge Kessler. *See id* at 2006 WL 2380650 *204-06.

Despite the fact that smoking causes more deaths than alcohol, AIDS/HIV, automobile accidents, illegal drugs, murders, and suicides combined, *see* Wendy Parmet, Christopher Banthin, *Public Health Protection and the Commerce Clause: Controlling Tobacco in the Internet Age*, 35(1) *New Mexico Law Review* 81, 82 (2005), the Defendants have paid judgments in just six individual smoking and health lawsuits ever.² The reason for stunning record is that individuals are largely blocked from arguing their cases in court. The Defendants “spare no cost in exhausting

² On October 29, 2004, R.J. Reynolds Tobacco Company, due to its obligation to indemnify Brown & Williamson Tobacco Company, paid a plaintiff approximately \$1.2 million. *Eastman v. Brown & Williamson Tobacco Co., et al.*, No. 975968 (6th Cir. Ct. Fla., verdict given Apr. 3, 2003). Philip Morris, Inc. was also found to be liable in *Eastman*. *See id.* In August 2003, Reynolds Tobacco Company paid \$195,602.87 to the family of a deceased plaintiff. *Kenyon v. R.J. Reynolds Tobacco Co.*, No. 00-5401 (13th Cir. Ct. Fla., verdict given Dec. 12, 2001). On February 8, 2001, Brown & Williamson Tobacco Company paid a plaintiff \$1.09 million six years after litigation was commenced. *Carter v. Brown & Williamson Tobacco Co.*, No: 95-00934 CA (4th Cir. Ct. Fla., verdict given Aug. 1996). On February 16, 2005, Reynolds Tobacco Company, due to its obligation to indemnify Brown & Williamson Tobacco Company, paid \$9.1 million to a plaintiff after eight years of litigation. *Boerner v. Brown & Williamson Tobacco Co.*, No. LR-C_98-427 (U.S. Eastern Dist., Western Div., Ark., verdict given May 23, 2003). On March 20, 2006, approximately one year after the California Supreme Court denied further review, the U.S. Supreme Court refused to consider appeals from Philip Morris and the plaintiff on a damage award of \$55.5 million. *Boeken v. Philip Morris, Inc.*, No. BC226593 (Super. Ct., County of Los Angeles, Cal., verdict given June 6, 2001). In March 2005, Philip Morris paid \$10.5 million to a plaintiff seven years after the lawsuit was initiated. *Henley v. Philip Morris, Inc.*, No. 995172 (Super. Ct., County of San Francisco, Cal., verdict given Feb. 1999).

their adversaries' resources short of the courtroom door." Robert L. Rabin, *A Sociological History of the Tobacco Tort Litigation*, 44 Stan. L. Rev. 853, 857 (1992). The Defendants intimidate plaintiffs and punish them financially and ultimately deny them the chance to recover any compensation.

Certification of the class is the only way to afford the Plaintiffs in this case a real opportunity to make the Defendants answer for their wrongdoing. *See Schwab, et al. v. Philip Morris USA, Inc.*, No. 04CV1945 (JWB) (E.D.N.Y. Mem. and Order Sept. 25, 2006) at 218. If allowed to proceed as a class action, this trial will afford the millions of smokers who believed the Defendants' promotion of light cigarettes an opportunity to be heard. Decertifying the class would preserve the Defendants' remarkable and undeserved record of rarely having to face its victims in court.

ARGUMENT

I. DECERTIFICATION OF THE CLASS WILL LARGELY PREVENT FURTHER EXAMINATION OF THE LIGHT CIGARETTE FRAUD

Examples of the Defendants' exploitation of the litigation process abound in the industry's formerly secret internal documents. The documents reveal a strategy designed to intimidate witnesses, tie up individual plaintiffs in seemingly endless pretrial maneuvers, hide evidence from plaintiffs, and more. The Defendants' strategy is designed and executed so as to prevent the fair evaluation of individual lawsuits against the Defendants.

The moment a complaint is filed the strategy commences with an investigation of the plaintiff, according to an internal memorandum entitled "Training Materials for Counsel in Smoking & Health Litigation." *See Training Materials for Counsel in Smoking & Health Litigation – Volume VII*, Bates: 282010965-282011274 at 282011028 (1982) *available at* <http://tobacco documents.org/ness/38753.html>. The manual instructs that private investigators be retained to search "civil and criminal court records, property records, occupational license records, voter registration records, birth, death and marriage certificates." *Id.* The investigators "begin constructing a 'family tree' for the afflicted smoker which eventually will identify all relatives, their dates of birth and death, and most importantly, the

cause of death where available.” *Id.* Interviews target not only relatives, but also “‘remote’ subjects . . . (e.g. high school friends, former co-workers, etc.)” *Id.*

The plan continues throughout pretrial litigation. According to former counsel for R.J. Reynolds Tobacco Company, “[t]he taking of extensive admission-oriented depositions will . . . impress upon the plaintiffs, their lawyers, and their experts the seriousness of the commitment they must make in bringing these cases.” Jones, Day, Reavis & Pogue, *Smoking and Health Litigation – Tactical Proposals*, Bates: 680712261-680712337 at 680712279 (Aug. 10, 1985) available at <http://tobaccodocuments.org/tplp/680712261-2337.html>. Another document recommends that the defense “[i]ntimidate plaintiff’s experts who will not be effectively able to counteract the precise nature of our testimony.” Mackintosh, B.A., *Draft Report Prepared by RJR Outside Legal Counsel*, Bates: 507916450-507916480 at 507916453-54 (Jan, 20, 1987) available at http://tobaccodocuments.org/bliley_rjr/507916450-6480.html.

In the personal injury case *Galbraith v. R.J. Reynolds Tobacco Company*, see No. 144417 (Super. Ct. Santa Barbara, Cal. 1985), some aspects of the scorched earth litigation plan are particularly well-documented. See William E. Townsley & Dale K. Hanks, *The Trial Court’s*

Responsibility to Make Cigarette Disease Litigation Affordable and Fair, 25

Cal. W. L. Rev. 275 (1989). According to the plaintiff's attorney, R.J.

Reynolds initially demanded documents from the plaintiff such as

“Christmas cards, family diaries, phone logs, and lists of attendees at the family's weddings and birthdays.” *Id.* at 297. After obtaining this

documentary evidence, R.J. Reynolds “began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States.”

Id. “[A]nyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived” were deposed. *Id.* The depositions “would last for hours, and very little, if any relevant or admissible evidence would be obtained.” *Id.* Galbraith's wife was deposed for ten days; his mother for several days. *Id.*

Internal documents also reveal that the Defendants have hidden and destroyed incriminating documents as a means to win litigation. *See U.S. v. Philip Morris USA, Inc.*, 2006 WL 2380650, *85-127. A former director of research for Philip Morris stated: “Ok to phone & telex these documents will be destroyed . . . if important letters or documents have to be sent please send to home – I will act on them and destroy.” Osdene, Thomas, [untitled handwritten note] (No date) *available at* <http://tobaccodocuments.org/>

landman/183546.html. A note to a senior brand manager at R.J. Reynolds stated: “Ned – As we discussed . . . this is what I’m going to destroy . . . under our current scrutiny, a wise move to rid ourselves of developmental work!!” Morrissey, Mark. “[Re: Destruction of Documents].” Bates: 507647971-507647975 at 507647971 (Nov. 1, 1991) available at <http://tobaccodocuments.org/youth/AmRJR19911101.Lt.html>. A 1970 memorandum between BAT attorneys states: “You might, perhaps, suggest that files in BAT and Louisville be gone through (the latter, presumably, have already received attention) so that any offending documents are removed therefrom” Davies, T. E., *Note for Mr. Langford - Smoking and Health*, Bates: 202315515-202315516 (Nov. 01, 1970) available at <http://tobaccodocuments.org/ness/41332.html>.

Such actions are not relegated to history. In discovery during the U.S. Government’s racketeering case against the Defendants, Judge Gladys Kessler sanctioned Philip Morris for destroying emails during litigation, writing:

What is particularly troubling is that Philip Morris specifically identified at least eleven employees who failed to follow the appropriate procedures, and that those eleven employees hold some of the highest, most responsible positions in the company. These individuals include officers and supervisors who worked on scientific, marketing, corporate, and

public affairs issues that are of central relevance to this lawsuit.

United States v. Philip Morris USA, Inc., No. 99-2496 (Memorandum and Opinion D.D.C. July 21, 2004) at 2.

II. UPHOLDING CLASS CERTIFICATION WILL AFFORD A FAIR AND BALANCED EXAMINATION OF THE LIGHT CIGAERETTE FRAUD AND RESULTING DAMAGES

In the words of former counsel for R.J. Reynolds Tobacco Company, “[t]o paraphrase General Patton, the way we won these cases was not by spending all of Reynolds’ money, but by making that other son of a bitch spend all his.” Jordan, Mike, *Memorandum from to S&H Attorneys*, (Apr. 28, 1988), *available at* http://www.kazanlaw.com/verdicts/images/exb_d_sob.gif. Judge Richard Posner proposes that courts should be allowed to use their discretion and organize trials to address this type of conduct. *See Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003). Judge Posner recommends that courts, when reviewing certain due process concerns raised by a defense, should consider the defense’s pre-litigation and litigation conduct when that conduct “make[s] it difficult for the plaintiffs to find a lawyer willing to handle their case.” *Id.* In *Mathias*, as in individual tobacco cases, the malfeasance was well-documented, the damages were relatively small, and yet the defense

mounted an aggressive campaign to dissuade the plaintiff from prosecuting his case both before a complaint was filed and during litigation. Although *Mathias* focused on increasing punitive damages to deter such conduct, *see id.* at 676, Judge Posner's logic applies equally well to the appropriateness of class certification.

In this case, few can doubt that the light cigarette fraud has many victims. Yet, as in *Mathias*, each of the class members faces the prospect of asserting his or her claims in an untenable litigation environment. The Defendants' scorched earth litigation strategy would make litigation oppressive, if class members were made to proceed individually. The Defendants would make litigation too expensive for class members to find attorneys to represent them individually. *See Patricia Bellew Gray, Legal Warfare: Tobacco Firms Defend Smokers Liability Suits with Heavy Artillery*, Wall Street J., April 29, 1987 at 25. Claims by individual class members would never be heard and courts would not have the chance to confirm what the entire public health community believes: that light cigarettes represent one of the greatest frauds in the history of our public's health.

Judge Weinstein has presented a sound trial plan for examining the promotion of light cigarettes, accurately determining damages, and correctly

allocating those damages to the class members who were misled. *See Schwab, et al. v. Philip Morris USA, Inc.*, No. 04CV1945 (JWB) (E.D.N.Y. Mem. and Order Sept. 25, 2006). The trial plan affords a full and fair opportunity for all of the concerns of both sides to be heard. If Judge Weinstein's certification of the class is reversed, no one will be afforded a fair opportunity and the Defendants' will yet again escape judicial scrutiny.

CONCLUSION

For the foregoing reasons, this Court should affirm the class certification order by Judge Weinstein.

Date: January 26, 2007

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I, Richard A. Daynard, counsel of record for *amici curiae*, do hereby certify that I have this 26th day of January 2007 served two copies of the foregoing Brief upon the below-listed counsels of record, by first class mail, postage prepaid.

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