



Product Liability and Class Action Law Alert

A Litigation Department Publication

March 2014

This Product Liability and Class Action Law Alert is intended to provide general information for clients or interested individuals and should not be relied upon as legal advice. Please consult an attorney for specific advice regarding your particular situation.

Joyce D. Edelman

614-227-2083

jedelman@porterwright.com

Caroline H. Gentry

937-449-6748

cgentry@porterwright.com

Jason T. Gerken

614-227-2058

jgerken@porterwright.com

Ohio federal court denies class certification in light cigarettes suit

On Feb. 28, 2014, the United States District Court for the Northern District of Ohio issued an Order denying class certification in *Phillips v. Philip Morris Cos.*, No. 5:10CV1741, 2014 U.S. Dist. LEXIS 25980. The decision is a significant win for companies and provides at least two key takeaways for companies faced with class action suits.

The facts

The plaintiff was an Ohio woman who brought various claims under Ohio statutory and common law. She alleged that defendant Philip Morris, maker of Marlboro Lights, violated the law by advertising and selling “Light,” “Low Tar” or “Lowered Tar & Nicotine” cigarettes when such cigarettes had as much tar and nicotine as Phillip Morris’s regular line of cigarettes. The plaintiff alleged that one factor at play was a phenomenon called “compensating,” whereby smokers of light cigarettes subconsciously increase the puff volume or frequency, smoke more cigarettes or smoke each cigarette longer in order to increase their tar and nicotine intake. The plaintiff argued that Philip Morris was aware of this phenomenon but deliberately withheld this information from the public.

Interestingly, the plaintiff did not seek damages for personal injuries that might have resulted from smoking Philip Morris’s light cigarettes. Instead, she sought to recover the purchase price of the cigarettes, believing that she did not receive the benefit of her bargain. She brought suit on behalf of all purchasers of Marlboro Lights in Ohio from the date the cigarettes first entered the stream of commerce up to Sep. 23, 2003. Judge Lioi of the Northern District of Ohio considered her motion for class certification.

The court’s analysis

Initially, the court rejected the plaintiff’s reliance on a 2003 Ohio trial court decision certifying a similar class, because that decision later was overturned and the action voluntarily dismissed. Further, that court applied the requirements of the Ohio Rules of Civil Procedure, rather than the Federal Rules, which govern class certifications of claims brought in federal court — even claims arising under state law.

The court acknowledged the prior litigation in this area, noting that the “majority of the courts to have decided the issue — including every federal court that has been asked to consider certification under [Rule 23] — has rejected class

Please see our other publications at <http://www.porterwright.com/pubs>.

certification.” The court applied the requirements of Rule 23(a), finding three of the four — numerosity, commonality and adequacy of representation — easily met. As for the typicality requirement, Philip Morris reserved its arguments, and the Court noted that “other courts in light cigarettes litigation have found typicality lacking,” because “it was possible that potential class members had purchased the light cigarettes for reasons unrelated to their promise of lower tar and nicotine, and that these consumers realized the benefit that they sought.” Nevertheless, the court assumed it was met and proceeded to the requirements of Rule 23(b)(3).

The meat of the opinion, and the focus of Philip Morris’s arguments, was directed to the predominance and superiority requirements of Rule 23(b)(3). The court found that the class was overly broad based on expert testimony that the degree of compensation by light cigarette smokers was highly variable, suggesting to the court that “a significant percentage of the putative class may have received the benefit of the bargain.” The court also noted that the reliance and proximate cause elements of the common law fraud and breach of warranty claims would require individualized proof, because “the undisputed record establishes that smokers did not necessarily rely on [Philip Morris’s] representations of lower tar and nicotine in making their purchases.”

The plaintiff attempted to save class certification by relying on the [Sixth Circuit’s Whirlpool decision](#)⁴, where the court affirmed the certification of a class of consumers despite individual issues relating to damages, reserving the issue of individual damages for later proof. The court, however, distinguished *Whirlpool*, finding that this case involved “no inherent design defect that rendered the product less valuable” and that “[t]herefore, there was no common injury upon the sale of the product.” In other words, “[t]he potential to realize an injury from the product in this case depends upon the manner in which each consumer used the product and the unique characteristics of each consumer, while the court in *Whirlpool* specifically observed that variations in laundry habits from consumer to consumer did not alter or affect the mold problem.”

Therefore, the court denied the plaintiff’s motion for class certification, and the plaintiff will proceed in the litigation as the sole plaintiff.

Takeaways

There are at least two important takeaways from the *Phillips* case that are applicable even outside the light cigarette litigation context.

First, as the court emphasized, “[t]he [Rule 23(b)(3)] predominance requirement is far more exacting than the Rule 23(a) analysis.” **Thus, even where a putative class satisfies the commonality and typicality factors of Rule 23(a), the predominance requirement of Rule 23(b)(3) is a substantial hurdle, requiring the plaintiff “to show that she and the absent class members have suffered the same injury.”**

Second, the case is instructive in that the court did not permit the plaintiff to “backdoor” class certification by utilizing the Sixth Circuit’s *Whirlpool* decision. The court, as required to do by the Supreme Court, undertook a “rigorous analysis” of the class certification requirements in Rule 23(a) and (b). In finding that the plaintiff failed to satisfy the Rule 23 factors, the court seemingly **confined the application of the *Whirlpool* holding to those cases presenting an “inherent design defect that rendered the product less valuable, regardless of who purchased it.” Only then will there be a “common injury upon the sale of the product” that may not undermine the requirements of Rule 23.**

For more information, please contact [Joyce Edelman](#), [Caroline Gentry](#), [Jason Gerken](#), or any member of Porter Wright’s [Class Action practice group](#).

⁴Four days prior to the issuance of this Order in *Phillips*, the Supreme Court of the United States denied certiorari in *Whirlpool. Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 2014 U.S. LEXIS 1484.