
IN THE
SUPREME COURT OF ILLINOIS

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| SHARON PRICE and MICHAEL FRUTH, <i>et al.</i> , |) | On Direct Appeal from the |
| |) | Circuit Court of the |
| Plaintiffs-Appellees, |) | Third Judicial Circuit, |
| |) | Madison County, Illinois |
| v. |) | |
| |) | No. 00 L 112 |
| PHILIP MORRIS INCORPORATED, |) | |
| Defendant-Appellant. |) | Nicholas G. Byron, Judge |
| |) | Presiding |

BRIEF OF AMICI CURIAE OF AMERICAN MEDICAL ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN LUNG ASSOCIATION OF METROPOLITAN CHICAGO, AMERICAN LUNG ASSOCIATION OF ILLINOIS-IOWA, AMERICAN CANCER SOCIETY, AMERICAN CANCER SOCIETY OF ILLINOIS, AMERICAN LEGACY FOUNDATION, AMERICAN ACADEMY OF OTOLARYNGOLOGY – HEAD AND NECK SURGERY, DEREK YACH AMERICAN THORACIC SOCIETY, AND ILLINOIS STATE MEDICAL SOCIETY IN SUPPORT OF PLAINTIFFS-APPELLEES

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POINTS AND AUTHORITIES

Nature of the Case

Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/25

Illinois Uniform Deceptive Trade Practices Act, 815 ILCS § 510/25

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INTERESTS OF THE AMICI CURIAE

Amici are non-profit public health organizations and professional medical societies that for decades have confronted the devastating health and economic consequences of tobacco use. Hence, they are especially qualified to assist this court in comprehending the gravity of Philip Morris' actions in deceptively producing and promoting so-called "Light" and "Lowered Tar and Nicotine" cigarettes, as found by the circuit court, below.

They address this Court in order to place the circuit court's judgment in its broader context, emphasizing that the consequences of the fraud and deception committed by Philip Morris are not limited to the economic interests of those who purchased cigarettes in Illinois. The consequences of Defendant's actions for the physical and economic health of all citizens of Illinois are immediate and devastating, and will reverberate for decades to come.

Amicus Curiae the American Medical Association ("the AMA"), an Illinois not-for-profit corporation headquartered in Chicago, has approximately 250,000 members and is the largest professional association of physicians and medical students in the United States. AMA members practice in every state, including Illinois, and in every medical specialty. The objects of the AMA are to promote the science and art of medicine and the betterment of public health.¹

The AMA has long had an interest in the regulation of tobacco products and the tobacco industry. As an institution, it has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke, and the societal implications of tobacco usage. In June, 2003, the AMA formally endorsed the findings of National Cancer Institute *Monograph 13, Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and*

¹ The AMA appears in this brief on its own behalf as a corporate entity and also as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is an unincorporated association of the AMA and the medical societies of each state, plus the District of Columbia. It was formed to represent the viewpoint of organized medicine in the courts, consistent with AMA policies. Among other activities, the Litigation Center files *amicus curiae* briefs in cases of national importance to the medical profession.

Nicotine, a scientific paper heavily relied upon by the trial court to render its judgment in this case.

Amicus Curiae the American Lung Association, currently celebrating its 100th anniversary, has constituent offices and hundreds of thousands of volunteers in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. *Amici Curiae* American Lung Association of Metropolitan Chicago and American Lung Association of Illinois-Iowa, are constituents of the national office of the American Lung Association, and two of the oldest 501(c)(3) non-profit voluntary health organizations in Illinois.

The collective mission of the American Lung Association *Amici* is to reduce lung disease and promote lung health through research, education, and advocacy. They have long been active in research, education, and public policy advocacy on the adverse health effects of tobacco use, and have worked to assist smokers in their cessation efforts through the Illinois Tobacco Quit Line (1-866-QUIT-YES) and their Freedom from Smoking Online program (www.ffsonline.org).

Amicus Curiae the American Cancer Society is the world's largest voluntary health organization with a membership of 2.2 million including many victims of tobacco-caused cancer and their family members. The American Cancer Society has representation in every state and is dedicated to eliminating cancer as a major health problem through research, education, advocacy, and service. The organization has been a leader in research on the relationship between tobacco and cancer, and it devotes substantial resources to research, public education, and direct service to those suffering from cancer caused by tobacco.

Amicus Curiae the American Legacy Foundation is dedicated to building a world where young people reject tobacco and anyone can quit. The foundation was established in

March 1999 as a result of the Master Settlement Agreement (MSA) between the attorneys general in 46 states (including Illinois) and five U.S. territories and the tobacco industry. The foundation develops national programs that address the health effects of tobacco use through grants, technical assistance, youth activism, strategic partnerships, counter-marketing and grass roots marketing campaigns, and outreach to populations disproportionately affected by the toll of tobacco. The foundation, through its **truth**[®] youth anti-smoking campaign has a significant presence in Illinois, reaching over two-thirds of Illinois' teens. Studies have shown that the foundation's **truth**[®] campaign has contributed to recent historic declines in youth tobacco use.

Amicus Curiae the American Academy of Otolaryngology – Head and Neck Surgery (“Academy”) is a non-profit organization representing more than 10,000 otolaryngologist-head and neck surgeons who diagnose and treat disorders of the ears, nose, throat, and related structures of the head and neck. The medical disorders treated by the Academy's physicians and this specialty are among the most common that afflict all American, young and old (including neck cancer).

Amicus Curiae Dr. Derek Yach, Professor of Public Health, head of the Division of Global Health, Yale University, is the former Executive Director of the Noncommunicable Diseases and Mental Health cluster at the World Health Organization (“WHO”). As Executive Director, Dr. Yach was responsible for overall policy development and management for WHO of programs aimed at the prevention of major risk factors for chronic diseases (including tobacco) and the management of cancer. Dr. Yach developed WHO's Tobacco-Free Initiative and was responsible for the design and implementation of the WHO global consultative process resulting in the development of the new health policy – Health for all for the 21st Century.

Amicus Curiae the American Thoracic Society (“ATS”), founded in 1905, is an independently incorporated, non-profit, educational and scientific organization of physicians and scientists that focuses on respiratory and critical care medicine. ATS has approximately 13,500 due-paying members around the world, who help prevent and fight respiratory disease internationally through research, education, patient care, and advocacy. The long-range goal of ATS is to decrease morbidity and mortality from respiratory disorders and life-threatening acute illnesses. Although ATS members work on diverse issues, all share an interest in the health effects of tobacco-related disease.

ATS is a primary scientific body that conducts studies, publishes research, and advises physicians on the health effects of tobacco. ATS implements its mission principally through four major activities: 1) scientific journals, 2) medical statements, 3) the ATS International Conference, and 4) continuing medical education credits. ATS publishes two highly respected academic journals on lung disease called *The American Journal of Respiratory and Critical Care Medicine* (“AJRCCM”) and *The American Journal of Respiratory Cell and Molecular Biology* (“AJRCMB”). Both journals include studies of health effects caused by tobacco. AJRCCM and the AJRCMB are featured frequently in the mainstream and trade press, and the Science Citation Index ranks the journals first and second, respectively, filtered under “respiratory system.” In addition to publishing research studies, ATS also publishes medical statements that give expert opinion on how to diagnose and treat lung related diseases, such as asthma, chronic obstructive pulmonary disease, occupational lung disease, and other lung diseases that are caused by or exacerbated by tobacco.

Amicus Curiae the Illinois State Medical Society (“ISMS”) is a non-profit, professional organization comprised of over 12,000 practicing physicians, medical residents, and medical

students. ISMS membership encompasses practicing physicians from a broad range of specialties, geographic locations, and types of practice. ISMS, by virtue of being the most broadly based professional association representing Illinois physicians, has a vital interest in resolution of public health issues facing the citizens of Illinois.

NATURE OF THE CASE

Following a bench trial that lasted nearly three months, the circuit court below concluded that defendant Philip Morris had violated provisions of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/2 (“CFDBPA”), and the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS § 510/2 (“UDPTA”), in connection with the manufacture, promotion, and sale of “Light” and “Lowered Tar and Nicotine” cigarettes in the State of Illinois.

From the public health point of view, the circuit court’s specific findings can only be described as stark and highly disturbing. As the court held, in response to growing awareness of the health consequences of smoking, over a period of decades Philip Morris deliberately created “a disinformation environment,” Judgment, ¶29; A. 8-9,² whereby the company “knowingly and falsely disputed scientific conclusions that established a connection between smoking and diseases.” *Id.* This “disinformation campaign” continued through the mid-1990s. *Id.*

Not content with a strategy of disinformation alone, starting in 1971, Philip Morris began marketing “Light” and “Lowered Tar and Nicotine” cigarettes in Illinois, Judgment, ¶9; A. 3, “with the intention of communicating to consumers that [these products were] less harmful or safer” than their regular counterparts. Judgment, ¶30; A. 9. Indeed, the court found, Philip

² All citations to the circuit court’s Judgment below include references to both the relevant paragraph of the Judgment and the corresponding page(s) of the Judgment, which has been reproduced in Volume I of the Appendix filed by the Defendant. References to the Appendix are denoted as “A. _.”

Morris introduced its brands of “Light” cigarettes to the market “with the intent to provide smokers who were concerned about their health with a product that could reduce the cognitive dissonance associated with smoking and thereby allow them to continue to smoke cigarettes.” Judgment, ¶31; A. 9. As a factual matter, the court found “Phillip Morris intended to deceive consumers into believing” that their “Lights” “were less harmful or safer than their counterparts.” Judgment, ¶33; A. 9-10.

“Class members universally understood the message of reduced risk from these products.” Judgment, ¶38; 10. *See also* Judgment, ¶¶39-44; A. 10-12. Relying on that “message,” they purchased the “Light” brands in increasingly large volume.

According to the circuit court, Philip Morris’ fraud and deception were not limited to its customers. Defendant actively misled government regulators and the public health community by withholding its “specific scientific and cigarette design knowledge” that revealed that “Light” and “Lowered Tar and Nicotine” cigarettes were in fact *more* harmful than regular cigarettes. Judgment, ¶¶54-55; A. 15-16. Indeed, Philip Morris shamelessly “took advantage” of the public health community’s lack of accurate information to further perpetuate its fraud and deception on consumers. Judgment, ¶55; A. 16.³

The false perception of “healthier smoking” that was carefully nurtured by Philip Morris had devastating consequences. According to the court, it led existing smokers to “delay cessation” of their smoking, and more non-smokers to initiate smoking. Judgment, ¶69; A. 20. Philip Morris undertook its actions with full knowledge that its “Light” brands did not lead to

³ The publication in October 2001 of the National Cancer Institute’s Monograph 13, “Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine,” (“Monograph 13”) confirmed the emergence of a public health community consensus that lower machine measured yields of tar and nicotine in fact did not lower the risk of disease from smoking. *See* Judgment, ¶ 79. As the circuit court found, prior to that time “the public health community was among those deceived [by Philip Morris].” Judgment, ¶ 81. The circuit court therefore correctly concluded that Philip Morris’ attempt to defend its actions based on earlier statements from the public health community in support of Light cigarettes is “morally abhorrent and factually incorrect.” *Id.*

“disease reduction.” Judgment, ¶68; A. 20. Indeed, quite to the contrary, Defendant knew that “Lights” were “actually more harmful and more hazardous” than their regular counterparts. Judgment, ¶70; A. 20-21. Finding the evidence “persuasive and disturbing,” the circuit court concluded that “Light” cigarettes were more mutagenic, Judgment, ¶¶71-74; A. 21-22, that their specific toxicity was greater than regular cigarettes – and that both facts were well known to Philip Morris. Judgment, ¶¶75-77; A. 22. The consequence of their development and deceptive marketing, therefore, was a dramatic increase in the incidence of adenocarcinomas – and the testimony to support that finding was entirely un rebutted by Philip Morris. Judgment, ¶78; A. 22-23.

In reaching these stunning conclusions, the court observed that Philip Morris frequently offered no evidence to defend its actions. *See, e.g.*, Judgment, ¶¶ 63, 80; A. 19, 23, or proffered evidence that was implausible and/or unpersuasive. Judgment, ¶¶40, 45, 47-48, 53, 59, 65, 73; A. 11-15, 17, 19, 21. Indeed, Philip Morris dedicates a scant six pages of its lengthy brief before this Court to the defense of its actions on the merits. The bulk of its brief instead is addressed to class certification, damages, and a spurious assertion that Illinois’ statutory prohibitions against consumer fraud and deception have been preempted.⁴

As will be demonstrated below, the consequences of Philip Morris’ reprehensible campaign were not limited to the consumers who paid for “Light” cigarettes fully believing that they were purchasing a healthier product. Increased smoking and disease rates have had profound consequences on the health of all of the citizens of Illinois and on the economic stability of our health care delivery system.

⁴ *Amici* here join Public Citizen and its fellow *amici* in rejecting Philip Morris’ assertions with respect to preemption. Indeed, neither the United States Supreme Court nor the Federal Trade Commission have ever suggested that the FTC’s authority to regulate cigarette labeling and advertising preempts state laws against fraud and deception.

ARGUMENT

I. THE CONSEQUENCES OF PHILIP MORRIS' ACTIONS GO FAR BEYOND THE DAMAGES FOUND BELOW TO CIGARETTE CONSUMERS.

Like any product, cigarettes are sold in markets that rely on accurate information to facilitate informed consumer choice about their purchasing decisions. When consumers are deceived or defrauded as they were here they cannot make informed choices. They will instead demand more of certain products than they otherwise would if they were accurately informed of the product's characteristics and the consequences of consumption. Indeed, that is precisely what the circuit court found here. Judgment, ¶46; A. 13.

Deceptive and fraudulent advertising, therefore, not only robs wealth from consumers and transfers it to the deceiving seller, here Philip Morris, but it corrodes the effectiveness of markets, leading to a misallocation of resources and a diminution in consumer welfare. More resources – here “Light” cigarettes – are produced and consumed than would otherwise be the case, and at higher prices.

Deceptive and fraudulent advertising that impacts health is even more costly to society. Not only does it lead to a misallocation of resources, but to externalities in the form of health care costs that must be borne individually and more generally through insurance, Medicaid, and other forms of public assistance. The true dimension of Philip Morris' conduct, therefore, must be considered in the context of Illinois' public health and its public health economy.

A. The Public Health Consequences of Smoking on the Citizens of Illinois Have Been Devastating.

Tobacco-related illnesses are the leading cause of preventable death in Illinois, killing an estimated 18,500 people annually—almost 18 percent of all deaths. *See* Centers for Disease

Control and Prevention, *Smoking Data Highlights, 2004* (“CDC Smoking Data Highlights”)⁵; Centers for Disease Control and Prevention, *CDC Wonder* (“CDC Wonder”)⁶. Indeed, 44% of all respiratory disease deaths, 82% of lung cancer deaths, and 16% of cardio-vascular disease deaths in Illinois are due to smoking. See Centers for Disease Control and Prevention, *Smoking-Attributable Mortality, Morbidity and Economic Costs* (“CDC, Morbidity and Mortality Costs”)⁷. Secondhand smoke is estimated to be responsible for up to 3000 annual deaths in Illinois, and approximately 773,000 Illinois children under 18 are exposed to secondhand smoke. See National Center for Tobacco-Free Kids, *The Toll of Tobacco in Illinois* (“Toll of Tobacco”)⁸.

Deaths, alone, however, do not tell the entire story. For every person who dies of a smoking attributable disease, there are 20 people suffering from smoking related illness. See Center for Disease Control, *Cigarette Smoking-Attributable Morbidity – U.S., 2000*, MMWR Vol. 52(35) (Sept. 5, 2003) (“CDC, Morbidity 2000”)⁹.

Chronic Obstructive Pulmonary Disease (“COPD”), which includes emphysema and chronic bronchitis, is the fourth leading cause of death in the United States – and it is the only one of the top five causes of death that is increasing. Between 80 and 90% of COPD is caused by primary tobacco use—smoking. In Illinois, more than 130,000 residents suffer from emphysema, and over 500,000 from chronic bronchitis. In Cook County alone, the incidence is 55,867 and 216,129, respectively. See American Lung Association, *Estimated Prevalence and Incidence of Lung Disease By Lung Association Territory*, at 16¹⁰.

⁵ Available at <http://www.cdc.gov/tobacco/datahighlights/index.htm>

⁶ Available at www.wonder.cdc.gov

⁷ Available at www.cdc.gov/tobacco/sammec

⁸ Available at <http://www.tobaccofreekids.org/reports/settlements/TobaccoToll.php3?StateID=IL>

⁹ Available at http://www.cdc.gov/tobacco/research_data/adults_prev/mmwr5235a4.htm

¹⁰ Available at <http://www.lungusa.org/atf/cf/%7B7A8D42C2-FCCA-4604-8ADE-7F5D5E762256%7D/ESTIMATEDPREV03.PDF>

Of Illinois adults, 22.9 percent – over 2 million – currently smoke, each consuming an average of 70.90 packs of cigarettes in 2002. *See CDC Smoking Data Highlights, supra.* In addition, 29.2 percent, of high school students – over 160,000 -- are also current smokers in Illinois, *Id.*, and nearly 35,000 children under 18 become daily smokers every year. *See Toll of Tobacco, supra.* Children under 18 now purchase 52.2 million packs of cigarettes in Illinois each year. *Id.* If current patterns do not abate, it is predicted that nearly 1 million youth under age 18 in Illinois could become future smokers. *CDC Smoking Data Highlights, supra.* Similarly, if current patterns do not abate, nearly one-third of them are likely to die prematurely as a result of a smoking-related illness. *Id. See also Toll of Tobacco, supra.*

It is unquestionable that Philip Morris' actions have exacerbated these public health consequences of smoking. As noted above, the circuit court below found that – deceived by Philip Morris' message that "Light" cigarettes were "healthier," smokers smoked longer, they smoked more frequently, and drew harder, and non-smokers joined them. Judgment, ¶¶61, 69; A. 18, 20.

B. The Economic Consequences of Smoking on Illinois Have Been Substantial and Durable.

It is well established that cigarette smoking also has widespread economic consequences. According to the Illinois Department of Public Health, total health care expenditures related to smoking for 1998 alone were over \$3 billion. Lost productivity costs for 1999 were nearly \$4 billion. Hence, the true cost of smoking for the State's health care economy was in excess of \$7 billion – an astonishing \$579 per capita. *See Illinois Department of Public Health, Cancer in Illinois, Tobacco Burden on Illinois ("Illinois Burden Fact Sheet")*¹¹. In 2002, each pack of cigarettes sold in Illinois cost an estimated \$9.03 in direct medical expenses and lost productivity

¹¹ Available at www.idph.state.il.us/cancer/factsheets/burden.htm

attributable to smoking. *See CDC Smoking Data Highlights, supra.* In 2002, smoking attributable Medicaid costs in Illinois were \$1.63 per pack of cigarettes -- a total of \$1.22 billion.

See Toll of Tobacco, supra.

II. AS THE CIRCUIT COURT HELD, PHILIP MORRIS' FRAUDULENT AND DECEPTIVE ADVERTISING CAMPAIGN WAS PIVOTAL TO ITS STRATEGY TO PROMOTE SMOKING.

Members of the public health community have long struggled to respond effectively to the devastating health consequences of cigarette smoking and to give smokers meaningful information in the face of the well-funded efforts of the tobacco industry to continue to promote smoking. Indeed, the relative impact of industry advertising on consumer awareness cannot be ignored. As the Illinois Department of Public Health has reported, "for every \$1 that the National Cancer Institute spends on research to combat smoking, the tobacco industry spends \$98 to promote the addiction."¹²

Moreover, as reported by the Federal Trade Commission in its most recent annual survey, advertising and promotional expenditures by the six major domestic tobacco companies – which includes Philip Morris – grew to a record \$11.22 billion in 2001, "the most ever reported to the Commission." *See Federal Trade Commission, Cigarette Report for 2001*, at 1 (2003) ("FTC Cigarette Report 2001")¹³. It is estimated that \$493.7 million is currently spent each year in Illinois alone. *See Toll of Tobacco, supra.* According to the National Center for Tobacco-Free Kids, "[p]ublished research studies have found that kids are three times more sensitive to tobacco advertising than adults and are more likely to be influenced to smoke by cigarette marketing than by peer pressure, and that one third of underage experimentation with smoking is attributable to tobacco company advertising." *Id.*

¹² Available at <http://www.idph.state.il.us/TobaccoWebSite/idt.htm>

¹³ Available at <http://www.ftc.gov/os/2003/06/2001cigreport.pdf>

The civil action brought by Plaintiffs here focuses on perhaps the most subtle and pervasive aspect of this onslaught of advertising in the form of package labeling: deception—the intentional marketing of a “Light” brand with full knowledge that consumers assumed that it was a more “healthy” cigarette, even though Philip Morris well knew that “Light” meant anything but “healthier.” The most popular of the products at issue in the case before this Court—Marlboro Lights – is, in fact, the best selling cigarette brand in the United States.

A. The Fraudulent Marketing of Cigarettes as Lower Delivery and Lower Risk Products is an Urgent Public Health Issue.

Amici urge this Court to be mindful of the real world consequences of Philip Morris’ fraud on the Illinois consuming public. As Monograph 13 states in its Introduction:

The absence of meaningful differences in smoke exposure, when different brands of cigarettes are smoked, and the resultant absence of meaningful differences and risk make the marketing of these cigarettes as lower delivery and lower risk products deceptive for the smoker. The reality that many smokers chose these products as an alternative to cessation – a change that would produce real reductions in disease risks – *makes this deception an urgent public health issue.*

Monograph 13, at 1 (internal citations omitted)(emphasis added). *See also* Federal Trade Commission, *FTC Consumer Alert: Up in Smoke: The Truth About Tar and Nicotine Ratings* (May 2000)¹⁴.

The implications of Philip Morris’ fraud on public health are therefore enormous. “Many smokers switch to lower yield cigarettes out of concern for their health, believing these cigarettes to be less risky or to be a step toward quitting.” Monograph 13, at 10. Philip Morris, with knowledge that Lights smokers do not reduce their risk of exposure to tar (and consequently do not reduce their disease risk), deceived smokers into believing that they were doing something better for their health by switching to “Lights” brands. At the trial of this case, experts for the Plaintiffs, themselves distinguished members of the public health community, testified that had

¹⁴ Available at <http://www.ftc.gov/bcp/online//pubs/alerts/smokealrt.htm>

smokers not viewed “Lights” as an alternative to quitting, they may have stopped smoking and actually reduced their risk of disease. *See* Testimony of Dr. Thun, R04027 (“the false perception that one is avoiding risk may cause some smokers to delay cessation”); Testimony of Dr. Burns, R04319-20) (testifying that if smokers had not been provided alternatives to quitting, such as Marlboro Lights and Cambridge Lights, they may have quit, actually reducing their disease risk). The Circuit Court specifically credited this evidence in reaching its conclusions. *See* Judgment, ¶¶67-70, 78; A. 20-21, 22-23 (discussing testimony of Dr. Thun).

Consistent with the testimony in this case, the public health community has concluded that “[s]everal tactics were employed by the tobacco industry that misled consumers to perceive low-tar delivery products as safe or safer and as a viable alternative to quitting.” Monograph 13, at 231. *See also Id.* at 233 (“Advertisements of filtered and low-tar cigarettes were intended to reassure smokers (who were concerned about the health risks of smoking) and were meant to prevent smokers from quitting based on those same concerns.”).

The circuit court found that “Marlboro Lights and Cambridge Lights were health reassurance cigarettes in that they expressly and impliedly conveyed the notion of a positive health attribute through the representations of ‘Lights’ (with respect to Marlboro Lights and Cambridge Lights) and the representation of ‘Lowered Tar and Nicotine’ (with respect to Marlboro Lights).” Judgment, ¶35; A. 10. The devastating reality is that the market share of cigarettes sold with a tar yield of 15 mg. or less has increased from a mere 2% in 1967 to nearly 90% today. *See FTC Cigarette Report 2001*, at Table 4. Thus, Philip Morris’ “Lights” fraud has substantially contributed to the public health crisis of smoking.

It is contrary to the public policy of this state for an entity to act in a way that is injurious to the health and safety of Illinois citizens. *Metz v. Department of Professional Regulation*, 773

N.E.2d 1234 (Ill. Ct. App. 2002); *Chicago Steele Wool & Dye Fabricators Co. v. ADT Security Systems*, 763 N.E.2d 839 (Ill. Ct. App. 2002). The evidence presented at trial clearly demonstrates a course of conduct by Philip Morris that is in violation of that public policy. Indeed, the trial court found that Philip Morris' course of conduct with respect to the representations "lowered tar and nicotine" and "lights" not only offended public policy, but was "immoral, unethical, oppressive and unscrupulous," and "caused substantial injury to the Class members in this case." Judgment, ¶147; A. 41-42.

B. The Circuit Court's Findings are Supported by a Growing Nationwide and Worldwide Consensus of Health Authorities.

As the circuit court found, "many of the experts who offered opinions on behalf of the Plaintiffs in this case are leaders in their scientific fields, and national leaders of the public health community." Judgment, ¶5; A. 2. Based on this expert testimony -- and Philip Morris' own documents -- the trial court found that "[c]ompensatory smoking behavior...including but not limited to inhaling deeper, more frequent puffs, larger puffs and holding the smoke in the lungs for a longer period of time...result in there being no difference for an individual smoker between the tar and nicotine delivery from a Marlboro Lights cigarette as compared to a regular Marlboro cigarette (the same being true of Cambridge Lights cigarettes and regular Cambridge cigarettes)." Judgment, ¶61; A. 18. The circuit court further found that "Marlboro Lights and Cambridge Lights are just as harmful as regular Marlboro and regular Cambridge for all Class members in this case." Judgment, ¶66; A. 19-20. Indeed, the court found that Light cigarettes are *more* harmful than their regular counterparts. Judgment, at ¶70; A. 20-21.

The conclusions reached by the plaintiffs' experts and the circuit court regarding the absence of any risk reduction from smoking Lights, and the misleading nature of that term, are now widely accepted in the public health community. A recently published study that reviewed

epidemiological data collected during the American Cancer Society's Cancer Prevention Study II concluded that "[t]here was no difference in risk among men who smoked brands rated as very low tar or low tar compared to those who smoked medium tar brands." Harris, Thun, et al., *Cigarette Tar Yields In Relation to Mortality from Lung Cancer in the Cancer Prevention Study II Prospective Cohort, 1982-8*, BRITISH MED. J. 328:72, 2004. Even more recently, the 2004 Surgeon General's Report on Smoking and Health concluded that "[a]lthough characteristics of cigarettes have changed during the last 50 years and yields of tar and nicotine have declined substantially, as assessed by the Federal Trade Commission's test protocol, the risk of lung cancer in smokers has not declined." U. S. Department of Health and Human Services, *The Health Consequences of Smoking, 2004*, at 324 ¹⁵.

The Canadian Government has recently banned the use of the terms "light" and "low tar" in Canadian cigarette advertising, concluding "that terms such as 'light' and 'mild' in tobacco marketing in Canada are both false and misleading" and that "[s]ubstantial proportions of Canadian smokers are being deceived in that they believe these products deliver less tar and nicotine and are less harmful to smokers' health. Allusions to milder taste, as well as actual taste differences, compound this deception." Pls. Ex. 59. The European Union also recently adopted a ban of such descriptors after concluding that "certain texts, such as 'low-tar,' 'light,' 'ultra-light,' 'mild' . . . may mislead the consumer into the belief that such products are less harmful . . ." Pls. Ex. 61. Shortly after trial, the 192 member states of the World Health Organization in May 2003, completed negotiation of the world's first public health treaty, the Framework Convention on Tobacco Control, which includes a provision requiring parties to the treaty to enact legislation banning the use of any descriptor "that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These

¹⁵ Available at <http://www.hhs.gov/surgeongeneral/library/smokingconsequences/>

may include terms such as ‘low tar,’ ‘light,’ ‘ultra-light,’ or ‘mild[.]’” To date, 168 countries, including the United States, have signed the treaty, and 23 have ratified it¹⁶.

Thus, the findings of the circuit court in this case are consistent with a growing world-wide consensus: descriptors on cigarettes that convey a message of reduced risk are deceptive and misleading.

Further, the trial court found that “Philip Morris had specific scientific and cigarette design knowledge that the public health community did not possess related to Lights cigarettes generally as well as Marlboro Lights and Cambridge Lights cigarettes specifically.” Judgment, ¶55; A. 16. The public health community has now reached a similar conclusion. As explained in the Preface to Monograph 13, access to previously secret files of the tobacco industry has revealed the scope of industry efforts to endanger the public health through false advertising, and increased the public health community’s awareness to the fraud of “light” cigarettes:

For the first time, the authors who prepared the various chapters have had extensive access to the information gleaned from the internal documents of the tobacco companies....Included are marketing strategies that express the growing concern among the various tobacco companies of the potential loss of new recruits. This concern over the potential loss of market was due to the evolving public opinion that smoking is harmful to health and that it is related to many of the illnesses that smokers experience over the course of their lives.

Access to internal industry papers allowed monograph authors to cite a number of tobacco company documents that show a long-term trend altering the tar and nicotine content of cigarettes by various chemical and mechanical procedures. The documents further reveal the industry’s efforts to produce cigarettes that could be marketed as acceptable to health-conscious consumers. Ultimately, these low-tar/low-nicotine cigarettes were part of the industry’s plan to maintain and expand its consumer base.

Monograph 13, Preface at i-ii.

¹⁶ See http://www.who.int/tobacco/areas/framework/signing_ceremony/countrylist/en/

CONCLUSION

The Judgment of the circuit court below is entirely consistent with the current understanding of the public health community in this country as well as governmental bodies around the world. For decades, Philip Morris employed deceptive marketing practices in order to convince smokers that "Light" cigarettes were less harmful. From a public health standpoint, the detrimental consequences of Philip Morris' conduct have been enormous. Its brazen conduct has substantially injured the health and safety of millions of Illinois citizens, cost the state's citizens billions of dollars, and offends the public policy of this State.

For the forgoing reasons, *Amici* urge this Court to affirm the Judgment of the circuit court.

July 12, 2004

Respectfully submitted,

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IN THE
SUPREME COURT OF ILLINOIS

| | | |
|---|---|---------------------------|
| SHARON PRICE and MICHAEL FRUTH, individually |) | On Appeal from |
| and on Behalf of All Others Similarly Situated, |) | the Circuit Court for the |
| |) | Third Judicial Circuit |
| Plaintiffs-Appellees, |) | Madison County |
| |) | Cause No. 00-L-112 |
| vs. |) | |
| |) | |
| PHILIP MORRIS INCORPORATED, |) | The Honorable |
| |) | Nicholas G. Byron |
| Defendant-Appellant. |) | Judge, Presiding |

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused 20 copies of the foregoing Brief of *Amici Curiae* in Support of Plaintiffs-Appellees to be mailed to the Clerk of the Court on July 12, 2004, by depositing said copies, postage prepaid in a U. S. Post Office mailbox, with postage fully prepaid, to:

Juleann Hornyak
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Illinois Supreme Court
Supreme Court Building
Springfield, Illinois 62706

In addition, the undersigned hereby certifies that three copies of the foregoing Brief of *Amici Curiae* in Support of Plaintiffs-Appellees were served on counsel of record by causing same to be sent via overnight courier for next-day delivery on this 12th day of July, 2004, addressed to:

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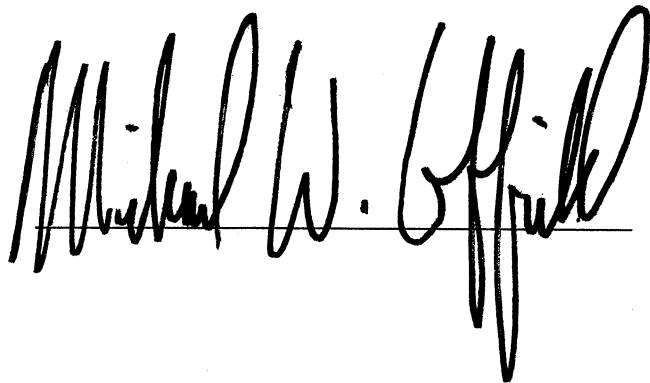
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A handwritten signature in black ink, reading "Michael W. Gifford", written over a horizontal line. The signature is cursive and stylized.