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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 AND ADDENDUM OF APPELLANTS

Kay Nord Hunt (I.D. No. 138289)
Ehrich L. Koch (I.D. No. 159670)
Valerie Sims (I.D. No. 30556X)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Stephen A. Sheller
SHELLER, P.C.
1528 Walnut Street
Philadelphia, PA 19102
(215) 790-7300

Martha K. Wivell (I.D. No. 0128090)
SHELLER, P.C.
P.O. Box 339
Cook, MN 55723
(218) 666-0250

Esther E. Berezofsky
WILLIAMS CUKER BEREZOFSKY
Woodland Falls Corporate Center
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002
(856) 667-0500

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

[continued on reverse]

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

William P. Studer
David P. Graham
OPPENHEIMER WOLFF & DONNELLY, LLP
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
Telephone: (612) 607-7000

Guy Miller Struve
Justin Goodyear
DAVIS POLK & WARDWELL, LLP
450 Lexington Avenue, Room 3030
New York, NY 10017-3982
Telephone: (212) 450-4192

Attorneys for Respondent
Altria Group, Inc.

George W. Soule
Nathan J. Marcusen
Jennifer K. Huelskoetter
BOWMAN & BROOKE LLP
150 South Fifth Street, Suite 3000
Minneapolis, MN 55402
Telephone: (612) 339-8682

Gregory P. Stone
Sean Eskovitz
MUNGER, TOLLES & OLSON, LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100

Mary Vasaly
MASLON EDELMAN
BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
Telephone: (612) 672-8200

Attorneys for Respondent
Philip Morris USA Inc.

[continued on next page]

Benjamin J. Velzen (I.D. No. 0388344)
LORI SWANSON,
ATTORNEY GENERAL,
STATE OF MINNESOTA
445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2130
Telephone: (651) 757-1235

Attorneys for Amicus Curiae State of Minnesota

Charles A. Bird (I.D. No. 8345)
BIRD, JACOBSEN & STEVENS, P.C.
300 Third Avenue SE, Suite 305
Rochester, MN 55904
Telephone: (507) 282-1503

Attorneys for Amicus Curiae Minnesota Association for Justice

Prentiss Cox (I.D. No. 0218844)
Attorney at Law
4633 Colfax Avenue South
Minneapolis, MN 55419
Telephone: (651) 235-1413

Attorneys for Amicus Curiae Tobacco Control Legal Consortium

Scott A. Smith (I.D. No. 174026)
NILAN JOHNSON LEWIS PA
400 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 305-7500

John H. Beisner
Jessica D. Miller
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue N.W.
Washington, DC 20005

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street N.W.
Washington, DC 20062

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

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STATEMENT OF THE ISSUES

I. ARE APPELLANT PLAINTIFF CLASS' MINN. STAT. § 8.31, SUBD. 3a CLAIMS ENTITLED TO PROCEED BECAUSE THEY DO CONFER A PUBLIC BENEFIT?

The trial court held in the negative. This issue was raised in Respondents' motion for partial summary judgment. (Add. 1).

Collins v. Minnesota School of Business, Inc., 655 N.W.2d 320 (Minn. 2003).

Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000).

State ex rel. Hatch v. Cross Country Bank, 703 N.W.2d 562 (Minn. Ct. App. 2005).

II. APPELLANT PLAINTIFF CLASS WAS NOT A PARTY TO EITHER STATE v. PHILIP MORRIS OR TO ITS SETTLEMENT AGREEMENT, WHICH AGREEMENT SPECIFICALLY STATES IT DOES NOT DETERMINE, LIMIT OR PREJUDICE THE RIGHTS OF ANY NON-PARTY. ARE APPELLANT PLAINTIFF CLASS' CLAIMS BARRED BY THAT SETTLEMENT AGREEMENT AND RESULTING CONSENT JUDGMENT?

The trial court held in the affirmative. This issue was raised in Respondents' motion for partial summary judgment and judgment on the pleadings. (Add. 1, 22).

Dykes v. Sukup Mfg. Co., ____ N.W.2d ____, 2010 WL 1904538 (Minn. 2010).

Hentschel v. Smith, 278 Minn. 86, 153 N.W.2d 199 (1967).

III. IF APPELLANT PLAINTIFF CLASS IS NOT ENTITLED TO REINSTATEMENT OF ITS STATUTORY CLAIMS, ARE THEY ENTITLED TO PROCEED ON THE UNJUST ENRICHMENT CLAIM?

The trial court held in the negative. This issue was raised in Respondents' motion for judgment on the pleadings. (Add. 22).

First Nat'l Bank of St. Paul v. Ramier, 311 N.W.2d 502 (Minn. 1981).

IV. UNDER ESTABLISHED SUPREME COURT PRECEDENT, SHOULD RESPONDENTS BE PRECLUDED FROM RE-LITIGATING ISSUES THEY LITIGATED AND LOST IN U.S. v. PHILIP MORRIS?

The trial court held in the negative. (Add. 32). This issue was raised in Appellant Plaintiff Class' motion for partial summary judgment.

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979).

Falgren v. State Bd. of Teaching, 545 N.W.2d 901 (Minn. 1996).

STATEMENT OF THE CASE AND FACTS

The trial court, the Honorable Gary Larson, granted summary judgment to Respondents/Defendants Altria Group, Inc. (Altria) and Philip Morris Companies (Philip Morris)[1] ruling as a matter of law this certified class action provides no public benefit and, therefore, Appellants/Plaintiff Class (Plaintiff Class) is not entitled to any remedy under Minn. Stat. § 8.31, subd. 3a, and dismissed its consumer protection statutory claims. (Addendum [Add.] 1). In so ruling, the trial court held even if claims are not barred on public benefit grounds, all claims are nonetheless barred by the terms of the 1998 settlement of the State of Minnesota's tobacco suit, State by Humphrey v. Philip Morris USA, Inc. (Minn. Dist. Ct. December 20, 2005) (State's case). (Add. 18).

After dismissing Plaintiff Class' statutory claims, the trial court granted Philip Morris judgment on the pleadings, dismissing Plaintiff Class' unjust enrichment claim. The dismissal was based on the conclusion "Plaintiffs had an adequate remedy of common law fraud which they had abandoned" and the dismissed statutory claims also furnished an adequate remedy. (Add. 25). It also held the unjust enrichment claim barred by the State's release. (Add. 26). Final judgment was entered. (Add. 27).

Plaintiff Class asserts not only is it entitled to reinstatement of its case, but Plaintiff Class is entitled to partial summary judgment pursuant to Minnesota's consumer protection statutes under principles of collateral estoppel based upon the judgment in U.S.

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[1] When referred to collectively, Altria and Philip Morris will be referred to as Philip Morris.

v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009). (Add. 32).

A. Plaintiff Class' Members Are Purchasers of Philip Morris Light Cigarette Product.

Philip Morris manufactures, markets and sells Marlboro Lights "low tar and nicotine" cigarettes. Philip Morris began selling and promoting Marlboro Lights in 1971. (A. 2-3, 364, 366). Since their introduction, Philip Morris has aggressively advertised the brand nationally and in Minnesota. (A. 293, 324-344). In 1974, Philip Morris spent $2,433,477 nationally on the advertisement of light cigarettes. (A. 281, 287). By 1984, its Marlboro Lights total advertising budget was $42 million. (A. 290, 293). By 1989, its combined budget for Marlboro Lights and Reds had ballooned to $107.2 million. (A. 308).

Plaintiff Class is comprised of all persons who purchased Philip Morris' Marlboro Lights cigarettes in Minnesota for personal consumption from the first date Philip Morris began selling the brand in Minnesota in 1972 through November 29, 2004, the date of the class certification order. (A. 46, 48). This case is not a smoking and health case wherein any member of Plaintiff Class seeks recovery for personal injury or wrongful death as a result of smoking "light" cigarettes.

B. This Case Is Predicated on Philip Morris' Deceit in the Advertising and Sale of Light Cigarettes to Minnesota Consumers.

The case is predicated on Philip Morris' deceit in its advertising and sale of its light cigarettes to Minnesota consumers. (A. 1). Plaintiff Class alleges Philip Morris

sells and markets Marlboro Lights cigarettes in violation of the Prevention of Minnesota Consumer Fraud Act (CFA), Minn. Stat. §§ 325F.68-.70; Unlawful Trade Practices Act (UTPA), Minn. Stat. §§ 325D.09-.16; and False Statement in Advertisement Act (FSAA), Minn. Stat. § 325F.67. (Id.) All of these statutes impose duties not to commit fraud, not to lie and not to deceive purchasers.

The CFA provides the "act, use or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement, or deceptive practice, with the intent that others rely thereon in connection with the sale of merchandise" is an unlawful practice. Minn. Stat. § 325F.69, subd. 1. Likewise, Philip Morris violated UTPA, Minn. Stat. § 325D.13, which states:

> No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise.

Again, the predicate duty is the duty not to deceive Minnesota consumers in the sale of merchandise. Likewise, FSAA, Minn. Stat. § 325F.67, prohibits a representation in advertising that is untrue, deceptive or misleading.

Underlying all of these Minnesota consumer protection statutes is a prohibition against misleading the purchasing public. The gravamen of this action is Philip Morris represented its Marlboro Lights cigarettes are "light" – having "lowered tar and nicotine" – in relation to Marlboro Red cigarettes (Philip Morris' regular Marlboro brand), while knowing those statements to be false. (A. 4, 10). Philip Morris misled Minnesota

consumers by marketing and selling "light" cigarettes as containing less tar and nicotine than its standard brand, despite knowing that actual exposure levels were the same. (Id.)

Plaintiff Class does not assert any sort of smoking-related claimed damages for personal injuries or health injuries. Rather, Plaintiff Class asserts that under Minnesota's consumer protection statutes, these purchasing consumers are entitled, pursuant to Minn. Stat. § 8.31, subd. 3a, to recover as restitution from Philip Morris the amounts paid to purchase this product sold under false pretenses.

Minn. Stat. § 325F.69, Minn. Stat. § 325D.13 and Minn. Stat. § 325F.67 are specifically referred to in Minn. Stat. § 8.31, subd. 1. Restitution, under Minnesota law, is a traditional equitable remedy which is awarded to plaintiffs to prevent unjust enrichment of the defendant and is an available remedy under Minnesota's consumer protection statutes.

C. Settlement Agreement in State of Minnesota v. Philip Morris Only Settled Claims Brought by the State of Minnesota and Blue Cross.

1. State of Minnesota brought its own claims against tobacco companies.

In 1994, the Minnesota Attorney General, on behalf of the State of Minnesota (the State), and Blue Cross and Blue Shield of Minnesota (BCBS), on its own, sued Philip Morris, Inc. asserting various claims for relief in connection with expenses the State incurred as a result of smoking-related illnesses. (A. 56, 112). The State and BCBS did not bring their action as subrogated parties to any underlying tort/statutory protection claims that the purchasers of such cigarettes may have against the cigarette industry.

Instead, the State and BCBS sued in their own right for injunctive relief (A. 100, 101, 102, 103) and to recover the money they spent to pay for health care for smoking attributable diseases (Counts 8 & 9; A. 105, 106). State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 495-498 (Minn. 1996); Gary L. Wilson & Jason L. Gillmer, "Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance Under Minnesota's Consumer Protection Statutes," 25 Wm. Mitchell Law Review 567, 573 (1999).[2]

Plaintiff Class was not a party to either State by Humphrey v. Philip Morris or to the case's Settlement Agreement. (A. 117, 127, 223). Indeed, the litigation was pursued and settled without any reference to, participation in or involvement by any individual medical or general assistance recipient injured smoker. No state citizen or resident was a party to the case.

According to paragraph 4 of the State's Second Amended Complaint (State Complaint), the "premise" of the State's case was that the tobacco industry "and not the State of Minnesota, or its citizens . . . should pay for the staggering health care cost caused by its actions in violation of the laws of the state." (A. 57-58). Cigarette sales "have resulted in increased health care costs directly attributable to cigarette smoking." (A. 106). The State's complaints sought damages to protect the public health of its citizens and also "to vindicate the State's proprietary interests in enforcing the State's

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[2] Specifically, the Attorney General acted on behalf of the State pursuant to his "authority under the common law, as well as Minn. Stat. §§ 8.01, 8.31, 325D.09-15, 325D.43-45, 325D.49-66 and 325F.67-70" to protect the "citizens and the public health." (A. 58).

rights to damages for economic injuries to the State" caused by the industry's unlawful actions including increased expenditures for Minnesota's Medicaid plan, Medical Assistance; General Assistance Medical Care; Minnesota Care and the State Employee Group Insurance program. (A. 58-61). The words "light," "low tar" or "lower tar" do not appear anywhere in the State's Amended Complaint.

As to Count Four (consumer fraud), Count Five (unlawful trade practices) and Count Six (deceptive trade practices), the State sought injunctive relief. (A. 100-104). As to Count Eight (restitution) and Count Nine (unjust enrichment), the State sought to recoup from defendants the medical costs borne by the State stemming from defendants' unlawful conduct. (A. 105-106).

2. Settlement Agreement only binds parties to that action.

On May 8, 1998, the parties to the State case entered into a Settlement Agreement and Stipulation for Entry of Consent Judgment, State by Humphrey v. Philip Morris, No. C1-94-8565 (District Court Ramsey County, May 8, 1998). (A. 127). The Settlement Agreement defined "State" or "State of Minnesota" to mean "the State of Minnesota acting by and through its Attorney General." (A. 130). It defines the "Settling Defendants" as those Defendants in this action that are signatories hereto. (Id.) In relevant part, it defines "Defendants" as including "Philip Morris, Incorporated." (Id.)

The Settlement Agreement, by its terms, bound only the State itself and not any private individuals. The Agreement purported "to settle and resolve with finality all claims of the State of Minnesota relating to the subject matter of this action which have

been or could have been asserted by the State of Minnesota." (A. 127-128). Its second paragraph recites the State of Minnesota commenced its action "asserting various claims for monetary, equitable and injunctive relief on behalf of the State of Minnesota . . . ." (A. 128). Similarly, the fourth paragraph recites "the State of Minnesota and the settling Defendants have agreed to settle this litigation . . . ." (Id.) "[T]he State of Minnesota and the settling Defendants have agreed to settle [their] lawsuit on terms set forth in the Settlement Agreement and Stipulation for Entry of Consent Judgment . . . ." (Id.) Consideration for the payments which were to be made by the Settling Defendants required "the dismissal and release of claims by the State of Minnesota" and were "to be made . . . in satisfaction of all of the State of Minnesota's claims for damages . . . ." (A. 129, 132-133).

According to the Settlement Agreement's Paragraph III(B), the State was to release and discharge

> from any and all manner of civil claims, demands, actions, suits and causes of action, damages whenever incurred, liabilities of any nature whatsoever . . . whether legal, equitable or statutory ("Claims") that the State of Minnesota . . . whether directly, indirectly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have, as follows:
>
> a. for past conduct as to any Claims relating to the subject matter of this action which have been asserted or could be asserted now or in the future in this action . . . by the State.
>
> b. for future conduct only as to monetary Claims directly or indirectly based on, arising out of or in any way related in whole or in part, to the use of or exposure to Tobacco

> Products manufactured in the ordinary course of business, including without limitation any future claims for reimbursement for health care costs allegedly associated with the use of or exposure to Tobacco Products.

(A. 138-139).

That section continues

> The State of Minnesota hereby covenants and agrees that it shall not hereafter sue or seek to establish civil liability against any person or entity covered by the release provided under Paragraph III.B based, in whole or in part, upon any of the release claims, and the State of Minnesota agrees that this covenant and agreement shall be a complete defense to any such civil action or proceeding.

(A. 139).

"State of Minnesota" is said to include the following: "any of its past, present or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official capacities, agencies, departments, commissions, and whether or not any such person or entity participates in the settlement." (A. 138-139).

Neither Plaintiff Class nor any of its members were parties to the case. Neither are they intended third-party beneficiaries of the Settlement Agreement. Neither can the Plaintiff Class or its members enforce its terms. Section V(M) entitled "Intended Beneficiaries" states:

> This action was brought by the State of Minnesota, through its Attorney General, and by Blue Cross to recover certain monies and to promote the health and welfare of the people of Minnesota. No portion of this Settlement Agreement shall provide any rights to, or be enforceable by, any person or entity that is neither a party hereto nor a person encompassed by the

> releases provided in paragraphs III.B. and C. of the Settlement Agreement.

(A. 151).

The Settlement Agreement specifically states it does not "determine, limit or prejudice the rights" of any non-party.

> Except as expressly provided in the Settlement Agreement, no portion of the Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such persons or entity. None of the rights granted or obligations assumed under the Settlement Agreement by the parties hereto may be assigned or otherwise conveyed without the express prior written consent of all of the parties hereto.

(Id.)

Thus, the parties did not purport to release any private remedy claims against any tobacco defendant held by Minnesota consumers.

Three sections of the Settlement Agreement concern the Settling Defendants advertising practices. The Settling Defendants agreed to discontinue all billboards and transit advertisements of tobacco products in the state; agreed not to pay anyone to use cigarettes in movies made in the United States; and agreed not to sell logo merchandise in the State. (A. 144-145). The Minnesota Settlement Agreement does not contain any provision regulating use of the descriptors "light" or "low tar."

The terms of the Settlement Agreement mandate that jurisdiction over any claims for breach or enforcement of the Settlement Agreement continue to reside with Ramsey County, Second Judicial District. (A. 129).

3. Consent judgment does not vest standing in any person or entity not a party to the tobacco lawsuit.

Pursuant to the parties' agreement, the Second Judicial District, Ramsey County, entered a Consent Judgment on May 8, 1998. (A. 117). The Consent Judgment "resolves all claims set forth in the State's Second Amended Complaint." (A. 124). The Ramsey County court retains jurisdiction and "[a]ny party to the Consent Judgment may apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction and enforcement of this Consent Judgment." (A. 124-125). Section IV of the Consent Judgment concerns "Effect on Third Parties" and provides the Consent Judgment is not intended to and does not vest standing in any third parties with respect to its terms nor can anyone other than the parties enforce its terms. (A. 119).

Under the Consent Judgment, certain injunctive relief was issued, including permanently enjoining the Settling Defendants from "[m]aking any material misrepresentation of fact regarding the health consequences of using any tobacco product, including any tobacco additives, filters, paper or other ingredients." (A. 120). The Judgment, however, also provides "the remedies in this Consent Judgment are cumulative in addition to any other remedies the State may have at law or at equity." (A. 126). The Consent Judgment states: "Nothing herein shall be construed to prevent the State from bringing any action for conduct not released hereunder, even though that conduct may also violate this Consent Judgment." (Id.) None of the Consent Judgment's provisions concern the rights of individual Minnesota consumers.

Following the settlement and entry of the Consent Judgment, Philip Morris, Inc. and the other Settling Defendants that had manufactured and sold "light," "low tar" and "lowered tar" cigarettes before the State's case commenced continued to do so. (A. 224).

D. State of Minnesota Is Aware of and Has Supported the Light Class Litigation.

There are two light cigarette cases still pending in the Fourth Judicial District. This case, also brought in the Fourth Judicial District, was the first served and filed. The second is Dahl v. R.J. Reynolds Tobacco Co. (A. 226), which arises from the advertising, marketing and promotion of R.J. Reynolds light cigarettes. The third is Thompson v. Reynolds American, Inc. (A. 221-222), which arises from the advertising, marketing and promotion of Brown and Williamson light cigarette brands.

Minnesota's Attorney General has been well aware of the "lights" class action litigation in Minnesota. On August 29, 2005, the Attorney General filed an amicus curiae brief in Dahl v. R.J. Reynolds Tobacco Co., 742 N.W.2d 186 (Minn. Ct. App. 2007), on behalf of the interests of the State of Minnesota, opposing the assertion of federal preemption as a defense in a "light" tobacco case venued in Hennepin County. (A. 224, 226, 246). Nowhere in the State's amicus brief does the Attorney General claim to have already addressed the business practices that form the essence of Plaintiff Class' claims, nor does the brief assert that Plaintiff Class' claims were settled by its Settlement Agreement in State by Humphrey v. Philip Morris. Among the State's interests which the Attorney General articulated in the State's amicus brief in Dahl was "to insure that Appellants and the state's other citizens are not precluded, on the grounds of an alleged

and legally improper federal preemption defense, from being able to seek redress for injuries caused by the tortious conduct of others." (A. 252-253).

With respect to the Private Attorney General Statute, Minn. Stat. § 8.31, in Dahl, the Minnesota Attorney General affirmed the "light" cigarette class actions are beneficial to the Minnesota public:

> This case is a particularly appropriate one to be brought under the "private attorney general" statute. The allegations in the Complaint state that a large member of Minnesota citizens have been defrauded over a significant period of time. Presumably, the total amount of money sought in restitution is very substantial. This is precisely the type of situation which Section 8.31 should be used.

(A. 256). The Attorney General also noted: "If Section 1334 preempts the causes of action in this case, any Minnesota consumers defrauded by defendants statements as to the health benefits from "light" cigarettes will have no recourse." (A. 264).

E. Trial Court Denied Plaintiff Class' Motion for Partial Summary Judgment on Collateral Estoppel Grounds.

Plaintiff Class had sought partial summary judgment asserting that under principles of collateral estoppel and based on the judgment in U.S. v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in part, vacated in part and remanded*, 566 F.3d 1095 (D.C. Cir. 2009),[3] *pet. for cert pending* (DOJ case), Plaintiff Class is entitled to partial summary judgment. (A. 381). In 1999, the United States brought an action under RICO, 18 U.S.C. §§ 1961-1968, against Philip Morris and eight other tobacco companies,

[3] The DOJ Court's Findings of Fact and Conclusions of Law relevant here were affirmed. The DOJ district court final opinion is 1,653 pages and was therefore submitted to the trial court in this action on a disk marked Exhibit 1. (A. 383).

including Altria. As summarized by the DOJ court, to establish a RICO offense, plaintiff must prove:

> The defendant knowingly devised or intended to devise any scheme or artifice to defraud a victim of money or property, or the defendant knowingly devised or intended to devise any scheme for obtaining money or property by means of material, false or fraudulent representation, pretenses or promises, and . . . the defendant acted with a specific intent to defraud or deceive.

(Conclusion of Law § VII(a)).

A central aspect of the case against Philip Morris was Philip Morris' deceptive use of the descriptor "light" on cigarette packaging and in its advertising. After a nine month bench trial, the DOJ court entered a final judgment. The court made what it described as "voluminous findings of fact" citing "overwhelming evidence" that Philip Morris fraudulently deceived consumers. (Conclusion of Law § VII(g)(3)). The DOJ court held Philip Morris liable under both 18 U.S.C. § 1962 (c) and (d) based upon findings of fact "replete with examples" of Philip Morris "either willfully stating something they knew to be untrue or recklessly disregarding the falsity of their statements." (Conclusion of Law § VII(g)(4)(c)). Specifically relevant to this case, the DOJ court opined: "A particularly egregious example is the use of hundreds of documents demonstrating Defendants' intent to offer smokers health reassurance with light/low tar cigarettes even though defendants know that such cigarettes offer no meaningful reduction in disease risk." The DOJ court also held Altria Group, Inc. liable since the holding company participated directly in the conduct of the fraudulent enterprise. (Conclusion of Law § IX).

In response to Plaintiff Class' motion seeking collateral estoppel based on the DOJ findings, Philip Morris argued, among other things that application of collateral estoppel is inappropriate in light of past decisions in other light/low tar fraud claims. The trial court by Order dated October 14, 2009, recognized "there may be a strong argument for the application of collateral estoppel" but ultimately denied Plaintiff Class' motion on the grounds there are "several cases that are inconsistent with the trial courts judgment in DOJ" and stated it was exercising its discretion to deny Plaintiff Class' motion. (Add. 39-42).

F. Trial Court Grants Partial Summary Judgment and Judgment on the Pleadings to Philip Morris, Resulting in Final Judgment.

Thereafter, Philip Morris brought a motion for partial summary judgment, which the trial court granted. (A. 173, 219; Add. 1). The trial court ruled as a matter of law that Plaintiff Class' action presents no "public benefit" and, therefore, no private remedies are to be afforded Plaintiff Class under Minn. Stat. § 8.31, subd. 3a for Philip Morris' deceit. (Add. 13-18). The trial court ruled, based on its construction of the 1998 Consent Judgment, that this action can have no public benefit. The trial court explains:

> However, in this case the attorney general has already taken action to benefit the public by addressing the conduct at issue. The prior Attorney General suit already addressed the business practices that formed the essence of Plaintiffs' claims here and obtained the public benefit of an injunction permanently enjoining the defendants from "[m]aking any material misrepresentation of fact regarding the health consequence of using any tobacco product." (Consent Judgment at 4).

(Add. 15).

The trial court also holds there can be no public benefit as a matter of law, concluding Plaintiff Class is not seeking to change Philip Morris' conduct. (Add. 16-17). The trial court states:

> Although this is a class action, the suit seeks money for *private* individuals. Plaintiffs do not seek to cause PM USA to alter its advertising or marketing or use of the descriptors "light" or "lowered tar and nicotine." Therefore, even if Plaintiffs were successful, they would only receive monetary recover for a large number of private individuals, which is not enough to establish a private [sic] benefit.

(Add. 17; emphasis in the original). The trial court further concludes there can be no public benefit because the federal Family Smoking Prevention and Tobacco Control Act enacted on June 22, 2009 "expressly bans, nationwide, the marketing of tobacco products using descriptors such as 'light' and 'low tar.'" (Add. 17). The trial court reasoned this Act "[makes] it impossible for Plaintiffs' suit to have any public benefit that the Act has not already conferred on the public." (Add. 18).

Finally, even if Plaintiff Class' claims did provide a public benefit, the trial court rules all claims are barred by the 1998 release in the State's action. (Add. 18-20). The trial court reasons:

> To the extent Plaintiffs bring purely private claims, they fail the public benefit test. To the extent Plaintiffs' claims provide a public benefit, Plaintiffs necessarily stand in the shoes of the Attorney General and act on behalf of the State. . . . Therefore, Plaintiffs here, to the extent they assert claims as Private Attorneys General who must act for the benefit of the public, necessarily bring their claims "indirectly, representatively, [or] derivatively" on behalf of the State and fall within the bar of the Release.

(Add. 19; internal citation and quote omitted). The trial court additionally ruled "under the broad Release language, Altria is covered by the Release." (Add. 21).

After so dismissing Plaintiff Class' consumer protection statutory claims, the trial court granted Philip Morris judgment on the pleadings, dismissing Plaintiff Class' unjust enrichment claim. (Add. 22).

With this grant of judgment on the pleadings, the entire action was disposed of and final judgment was entered. Plaintiff Class has filed this appeal and Philip Morris and Altria have filed Notices of Related Appeals. (A. 164).

ARGUMENT

I. PLAINTIFF CLASS' CLAIMS AGAINST PHILIP MORRIS ARE ENTITLED TO PROCEED UNDER MINNESOTA LAW BECAUSE THEY DO CONFER A PUBLIC BENEFIT AND ARE OTHERWISE IN ACCORD WITH MINNESOTA LAW.

A. This Court Has De Novo Review and Owes No Deference to the Trial Court's Rulings.

This case comes before the Court on a grant of partial summary judgment and grant of judgment on the pleadings in favor of Philip Morris. On review, this Court determines, based on the summary judgment record, if there are genuine issues of material fact and whether the district court committed error in its application of Minnesota law. State by Cooper v. French, 46 N.W.2d 2, 4 (Minn. 1990). In doing so, this Court must view the evidence in a light most favorable to Plaintiff Class. Isles Wellness, Inc. v. Progressive N. Ins. Co., 703 N.W.2d 513, 516 (Minn. 2005). Likewise, this Court reviews a judgment on the pleadings de novo and can determine only whether

the Complaint sets forth a legally sufficient claim for relief. The Court must take all alleged facts as true and draw all inferences in favor of the nonmoving party. Williams v. Board of Regents of the University of Minnesota, 763 N.W.2d 646, 651 (Minn. Ct. App. 2009).

This case also involves the interpretation of Minn. Stat. § 8.31, subd. 3a, entitled "Private Remedies." Statutory construction is a question of law this Court reviews de novo. Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117, 122 (Minn. 2007). Whether a release extinguishes claims against a non-party is a question of law reviewed de novo. Graff v. Robert M. Swendra Agency, Inc., 776 N.W.2d 744, 749 (Minn. Ct. App. 2009). Likewise, the interpretation of a consent judgment is a matter of law subject to de novo review. Vanderleest v. Vanderleest, 352 N.W.2d 54, 56 (Minn. Ct. App. 1984) (interpretation of a stipulation incorporated into a judgment is a question of law); Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 371 (6th Cir. 1998).

B. Plaintiff Class' Claims Satisfy Minnesota's Public Benefit Requirement as Enunciated by Minnesota's Supreme Court.

Minn. Stat. § 8.31, subd. 3a, entitled "Private Remedies," provides a cause of action and sets out the remedies available to those injured by violation of the CFA and other Minnesota consumer protection laws. It states in pertinent part:

> Subdivision 3a. Private Remedies. 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 to 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. . . .[4]

The provision itself includes no mention of public benefit. It certainly has no requirement that such a private remedies action must include a prayer for a certain type of relief.

Although not tied to any express statutory language, the Minnesota Supreme Court in Ly v. Nystrom, 615 N.W.2d 302, 314 (Minn. 2000), held that Minn. Stat. § 8.31, subd. 3a "applies only to those claimants who demonstrate that their cause of action benefits the public." In that matter, the purchaser of a restaurant brought an action under the CFA against the seller. Thus, there was only one transaction in the matter. No advertisements were made. No representations were made to the public at large. The Supreme Court dismissed the appellant's claim because the matter involved a single buyer in a single transaction with a single seller. Neither the transaction nor the alleged misrepresentation affected the public at large. This fact was determinative. "Appellant was defrauded in a single one-on-one transaction in which fraudulent misrepresentation, while evincing reprehensible conduct, was made only to appellant." Id. at 314.[5] It was

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[4] Section 8.31 vests in the attorney general the duty to investigate and enforce violations of Minnesota's consumer protection statutes. The attorney general, as any person injured, may also bring an action for its damages under § 8.31, subd. 3a.

[5] Had the Legislature intended to limit the scope of Minn. Stat. § 8.31, subd. 3a to those causes of action that have a public benefit, it could have easily done so. It did not. See Ly, 615 N.W.2d at 315 (J. Page concurring in part, and dissenting in part). The Plaintiff Class acknowledges the Supreme Court's decision in Ly and the binding effect on this Court. The Plaintiff Class, however, does not waive any argument that can be made to the Minnesota Supreme Court with regard to the propriety of the engraftment of a public benefit onto this statute.

based upon this fact that the Supreme Court concluded a successful prosecution of the fraud claim would have no public benefit.

In so holding, the Supreme Court echoed the earlier dissent authored by Justice Simonett in Church of the Nativity of Our Lord v. Watpro, 491 N.W.2d 1, 10 (Minn. 1992) (Simonett, J, concurring and dissenting in part) that consumer protection laws are aimed at practices – a term that denotes fraud victimizing more than one plaintiff. The dissent in Watpro, 491 N.W.2d at 10 and the Court in Ly, 615 N.W.2d at 311 n.16, ultimately agreed on this purpose requiring the fraud "to have the potential to deceive and ensnare members of the consumer public other than just the plaintiff." Id.

There is only one post-Ly decision by the Minnesota Supreme Court applying the public benefit requirement – Collins v. Minnesota School of Business, Inc., 655 N.W.2d 320 (Minn. 2003). In Collins, a group of students enrolled in the Minnesota School of Business (MSB) after viewing a television advertisement about the school's sports medicine technician program and reviewing the school's literature on the program. The students brought suit under the CFA and Minn. Stat. § 8.31, alleging that a number of MSB's representations in the advertisement's informational presentations and literature were false. In discussing the requirement, the Minnesota Supreme Court elaborated on the facts the Court had found determinative in Ly:

> The defendant (in Ly) made numerous fraudulent representations concerning its restaurant business, but only made the representations directly to the plaintiff. Emphasizing that the misrepresentations were made only to one person and that the fraudulent transaction was completed on a one-on-one basis, we

> concluded that the plaintiff did not demonstrate that his claim was in the public interest.

Id. at 330.[6]

Based upon its holding in Ly, the court held the plaintiffs in Collins had satisfied the public benefit requirement and noted the determinative facts:

> When [MSB] launched its program, it made misrepresentations to the public at large by airing a television advertisement. MSB also made numerous sales and information presentations and provided students with a "career opportunities" sheet, which students interpreted as a list of jobs for which they might qualify after completing the program. All of these factors indicate that MSB presented its program to the public at large. We hold that respondents' successful prosecution of their claims benefited the public and therefore respondents are entitled to reasonable attorney fees.

Id.

The Supreme Court affirmed this Court's reversal of the trial court, which stated it had "misapplied the holding in Nystrom by ignoring the fact that MSB misrepresented the nature of its program to the public at large." Id. The Supreme Court made clear in both Ly and Collins that the public benefit requirement is satisfied where the defendant "made misrepresentations to the public at large" and engaged in transactions with a broad section of the public, as opposed to a single transaction "completed on a one-on-one basis." Id.

Plaintiff Class' claims in this matter satisfy the conditions set forth in Ly and Collins. First, unlike the one-on-one transaction at issue in Ly, Plaintiff Class' claims arise from literally millions of transactions on behalf of hundreds of thousands of

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[6] In its opinion the trial court at times quotes from this Court's decision in Collins. (Add. 12-13).

Minnesotans who bought billions of cigarettes. According to Philip Morris' Answers to Interrogatories, it sold 23,179,206,000 Marlboro Light cigarettes in Minnesota between 1974 and 2001. (A. 367-369). The named plaintiffs do not seek to benefit just themselves, but also the class, which includes hundreds of thousands of defrauded Minnesotans who bought cigarettes misrepresented in ads and on cigarette packs as "light." If recovery on behalf of a substantially smaller number of students, as was the case in Collins, is sufficient to confer a benefit upon the public, there can be no denying Plaintiff Class' action reaches the same threshold.

Second, like the defendant in Collins, Philip Morris presented its misrepresentations to the public at large in advertisements and on its packaging for 37 years. The Supreme Court in Collins held the Minnesota School of Business' airing of advertisements regarding one program to the public at large was sufficient to satisfy the second factor. Philip Morris' advertising and sales of Marlboro Lights in Minnesota dwarfs the single advertisement at issue in Collins, which supported the school's liability.

C. The Trial Court Has Improperly Engrafted New Limitations onto Minn. Stat. § 8.31, subd. 3a, Contrary to the Language and Intent of the Statute.

The trial court ruled as a matter of law that, other than the monetary relief Plaintiff Class is seeking, there was no public benefit to this case. Disregarding the nature of Philip Morris' fraud which ensnared Minnesota consumers, the trial court focused only on the relief requested by Plaintiff Class – restitution – stating "even if Plaintiffs were successful, they would only receive monetary recovery for a large number of private

individuals, which is not enough to establish a private benefit." (Add. 17). Accordingly, the district court has engrafted a new requirement onto § 8.31, subd. 3a.

No Minnesota Supreme Court decision has held the relief requested is determinative of whether the case meets Minnesota's judicially engrafted public benefit requirement. Nowhere does Minn. Stat. § 8.31, subd. 3a so state. To the contrary, Minn. Stat. § 8.31, subd. 3a broadly states "any person injured . . . may bring a civil action to recover damages . . . and receive other equitable relief as determined by the court."

A statute's "words and phrases are construed according to the rules of grammar" and according to their plain and common meaning, unless they embody some special significance." Minn. Stat. § 645.08(1). The object of statutory interpretation is "to ascertain and effectuate the intention of the Legislature." Minn. Stat. § 645.16. This Court must construe a statute as a whole and interpret it, whenever possible, to give effect to all of its provisions so that "no word, phrase or sentence should be deemed superfluous, void or insignificant." Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000). If the text is clear, "statutory construction is neither necessary nor permitted." Am. Tower L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001). If the statute is ambiguous, this Court applies canons of construction to discern legislative intent. See Minn. Stat. § 645.16. The Supreme Court, while engrafting a "public benefit" requirement onto the statute, has nonetheless continually recognized the Legislature intended for the consumer protection statutes to be broad and liberally construed. Ly, 615 N.W.2d at 308; State by Humphrey v. Philip Morris, 551 N.W.2d 490, 496 (Minn. 1996).

Here Plaintiff Class seeks restitution due to Philip Morris' deceit. A restitutionary award focuses on the defendant's wrongfully obtained gain. Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 944 (8th Cir. 1999). It punishes the wrongdoer by taking his ill-gotten gains, thus removing his incentive to perform such wrongful acts again. Id., citing Dan B. Dobbs, Law of Remedies § 4.1(1) at 369-71 (Ab. 2d ed. 1993). It also serves as a lesson to others to dissuade similar, future conduct. Restitution is as much a public benefit as, for example, the grant of injunctive relief. As this Court has stated, "future violators may be best deterred by seeking victim-specific monetary relief, rather than non-victims specific injunctive relief." State ex rel. Hatch v. Cross Country Bank, 703 N.W.2d 562, 569-70 (Minn. Ct. App. 2005).

Philip Morris is not entitled to keep the ill-gotten fruits of its unfair, deceptive or unlawful conduct but that is the trial court's ruling. After all, the laws against unfair business practices, and specifically § 8.31, subd. 3a, were drafted to prevent a wrongdoer from retaining the benefits of its wrongful acts. That is why, in the context of California's Unfair Trade Practices Act, the California Supreme Court held that injunctive relief is not a prerequisite to restitution. ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. of America, 931 P.2d 290 (Cal. 1997). The court reasoned that California's Legislature, in providing courts with broad equitable powers to remedy violations of the Act, did not intend to limit those powers in "an illogical, unfair and counterproductive manner." Id. at 304.

A suit for restitution enforces the laws of Minnesota and the public interest by restoring the status quo. The recovery of that which has been wrongfully acquired is in the public interest. It furthers the remedial purposes of the CFA, which is to be liberally construed. Wiegand v. Walser Auto. Groups, Inc., 683 N.W.2d 807, 812 (Minn. 2004). The purpose of Minnesota's consumer protection statute is to protect the public from unlawful business practices and to provide those harmed with a remedy. This lawsuit does exactly that and should be ordered reinstated.

D. The Trial Court Looked to Federal Cases Which Are Not in Any Respect Binding on Minnesota Courts.

In ruling that what Plaintiff Class seeks here is not a public benefit, the trial court looked largely to unpublished federal case law purportedly applying Minnesota law. (Add. 15-17). Unpublished federal case law is not in any respect binding on this Court. Northpointe Plaza v. City of Rochester, 457 N.W.2d 398, 403 (Minn. Ct. App. 1990), *aff'd* 457 N.W.2d 398 (1991). The Minnesota Supreme Court has already dictated the factors this Court should examine in Ly and Collins. No mention is made in either Collins or Ly of any requirement for any certain type of relief.

Second, only a handful of the unpublished federal decisions the trial court cites actually support, for example, an injunctive relief requirement. Each does so based upon either other unpublished cases or dismisses the claim summarily without any reference to any binding authority in support of such a holding. See Beck v. Sunrise Senior Living Mgmt., Inc., 2008 WL 3412096 (D. Minn. 2008) (A. 422), citing Zutz v. Case Corp., 2003 WL 22848943 (D. Minn. 2003) (A. 425). In both Beck and Zutz, the court held that

no public benefit inured because the recovery sought was for the "individual recovery." Beck, 2008 WL 3412096 at *2 (A. 423); see also Zutz, 2003 WL 22848943 at *4 ("Where recovery is sought for the exclusive benefit of the plaintiff, there is no public benefit.") (A. 427). Even under holdings in those cases, the court only visited the question of whether injunctive relief had been requested after determining if the benefit sought was solely for the individual plaintiffs. (Id.) In Kalmes Farms, Inc. v. J-Star Indus., Inc., 2004 WL 114976 at *6 (D. Minn. 2004) (A. 430), the federal district court dismissed a claim that did not request injunctive relief, but does not base this holding upon case law. (A. 434).

The trial court also cites to Schaaf v. Residential Funding Corp., 2006 WL 2506974 at *16 (D. Minn. 2006) (A. 437, 448-449). In Schaaf, three investors in a securities brought an action against the issuer under the CFA. The court ruled the suit lacked a public benefit because, as was the case in Ly, there was no misrepresentation made to the public. In fact, there were no allegations of actual misrepresentations made by the plaintiffs. The court cited Collins and emphasized that the misrepresentations in Collins were contained in advertisements to the public. (A. 449). In Schaaf, the defendant did not conduct any advertising. It could not be said that it made any representation to the public at large. Id.[7] The facts in Schaaf are not in line with the facts

[7] The Eighth Circuit Court of Appeals did not address the public benefit issue on appeal. Schaaf v. Residential Funding Corp., 517 F.3d 544, 553 (8th Cir. 2007), *reh'g denied.*

in this case. Each of the elements the court found lacking in Schaaf is present in this matter.

In fact, federal precedent recognizes class actions based on statutory claims are a quasi-public procedural vehicle. See Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980) (National Bank Act and state usury law; "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence to injuries unremedied by the regulatory actions of government"). See also Polgow v. Anderson, 43 F.R.D. 472, 49 (E.D.N.Y. 1968) (security law; a class action "as a way of redressing group wrongs and it is a semi-public remedy administered by lawyers in private practice").

In addition, the trial court relies on two unpublished decisions of this Court, despite the Minnesota Supreme Court's repeated admonition courts should not do so. Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 n. 3 (Minn. 2004). Scally v. Norwest Mortgage, Inc., 2003 WL 22039526 (Minn. Ct. App. 2003) (A. 451), like Ly, involved only a one-on-one transaction. In Wiegand v. Walser Auto. Group, Inc., 2006 WL 1529511 at *3 (Minn. Ct. App. 2006) (A. 458), this Court held there was no evidence the alleged misrepresentation affects a large number of people and "no class has been certified."[8] Neither unpublished case supports the trial court's ruling here.

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[8] This Court also found no public benefit due to the Attorney General's prior settlement and consent order which will be addressed later in this brief.

E. This Action Provides a Public Benefit Regardless of the Enactment of the Family Smoking Prevention and Tobacco Control Act.

The certified class consists of those persons who purchased cigarettes through November 29, 2004. (A. 46, 48). Five years after Plaintiff Class was certified, on June 22, 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387 (Family Smoking Act), into law. The trial court recognized the Family Smoking Act does not provide tobacco companies immunity from the recovery Plaintiff Class seeks in this lawsuit. But based on this new federal enactment, and without explaining its reasoning, the trial court ruled it is "impossible for Plaintiffs' suit to have any public benefit." (Add. 18)

This new Family Smoking Act does not somehow eliminate the public benefit gained by enforcement of Minnesota's consumer protection statutes in this case, as the trial court has held. It was prompted, in part, by Congress' conclusion "[t]he only way to effectively protect the public health from the dangers of unsubstantiated modified risk tobacco products is to empower the Food and Drug Administration to require that products that tobacco manufacturers [sell] or distribute[] for risk reduction be reviewed in advance of marketing, and to require that the evidence relied on to support claims be fully verified." 21 U.S.C. § 387 (Findings 41 and 43). The resulting Modified Risk Tobacco Products (MRTP) provision prohibits the introduction into interstate commerce of any "modified risk tobacco product" without prior FDA approval. 21 U.S.C. § 387k(a). The term includes a product "(ii) the label, labeling or advertising of which uses the descriptors 'light', 'mild' or 'low' or similar descriptors." Id. at § 387k(b)(1). None of

the Family Smoking Act's provisions limit the right of defrauded state purchasers from bringing suit under state consumer protection statutes.

Moreover, the Family Smoking Act has not yet taken effect and several tobacco companies have brought suit to prevent it from doing so. Tobacco companies sued in Kentucky federal court asserting the Family Smoking Act was overly restrictive and infringed free speech rights. Commonwealth Brands, Inc. v. U.S., 2009 WL 3754273 (W.D. Ky. 2009) (A. 467); Commonwealth Brands, Inc. v. U.S., 678 F. Supp. 2d 512 (W.D. Ky. 2010), as amended. The tobacco companies asserted the "governmental interest could be met through less-restrictive means such as enforcement actions against advertising that is false or misleading" as well as strengthening "fraud laws." 2009 WL 3754273 at *8. The federal district court ultimately upheld the provision that bars tobacco companies from marketing modified risk products such as "light" or "low tar" cigarettes unless the products pass FDA review. 2009 WL 3754273 at *9.

As the tobacco companies in Commonwealth acknowledge, the public interest is served by enforcement of consumer protection statutes which seek to bar consumer fraud. Plaintiff Class' lawsuit provides a public benefit which did not somehow disappear by the federal enactment five years after this lawsuit was commenced, as the trial court ruled.

Protection of the consuming public from unlawful business practices is the primary purpose of Minnesota's consumer protection statutes and requiring Philip Morris to give back what it wrongfully obtained fulfills this purpose. In essence, the trial court lost sight of the fact that while the Minnesota Supreme Court may have engrafted a "public benefit"

mandate onto Minn. Stat. § 8.31, subd. 3a, the legislative purpose of that statute is to provide Minnesota consumers with "private remedies" for "any person injured" by violation of the enumerated consumer protection statutes in Minn. Stat. § 8.31, subd. 1. The fact that Plaintiff Class seeks a "private remedy" for Philip Morris' massive consumer fraud does not somehow defeat its cause of action, as the trial court has in essence ruled.

Here, the Plaintiff Class' private interests coincide with the public interest in enforcement of Minnesota's consumer protection statutes. For decades, Philip Morris made its "light" misrepresentations to the public at large. Prosecution of Plaintiff Class' claims therefore benefits the public, as the Supreme Court held in Collins, 655 N.W.2d at 330. Class actions such as this make it economically feasible to sue when individual claims are too small to justify the expense of litigation. Obtaining restitution against unfair or unlawful practices protects the public and restores money or property taken by means of unfair practices. This action has a public benefit and should be allowed to proceed.

F. The Resolution of the State's Tobacco Lawsuit Does Not, as a Matter of Law, Extinguish the Public Benefit of This Lawsuit.

The trial court also ruled there can be no public benefit from this lawsuit as a matter of law based on the resolution in 1998 of State by Humphrey v. Philip Morris. In making its ruling, the trial court ignored the fact, as the Minnesota Attorney General affirmed in its amicus brief in Dahl, the "light" cigarette class actions are beneficial to the Minnesota public:

> This case is a particularly appropriate one to be brought under the "private attorney general" statute. The allegations in the Complaint state that a large number of Minnesota citizens have been defrauded over a significant period of time. Presumably, the total amount of money sought in restitution is very substantial. This is precisely the type of situation in which section 8.31 should be used.

(A. 256). Since the Minnesota Attorney General itself has recognized the "public benefit" of this lawsuit, the trial court has no basis to rule as a matter of law to the contrary.

As the Minnesota Supreme Court explained in Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2, 8 (Minn. 2001), which was issued after Ly, "[i]t is Minn. Stat. § 8.31, subd. 3a that authorizes private actions for violation of these substantive statutes. In describing who may bring an action, subdivision 3a does so in the broadest terms, stating that 'any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action to recover damages.'" Id. (emphasis in the original). Citing to its earlier decision in State by Humphrey v. Philip Morris, 551 N.W.2d at 495, the Minnesota Supreme Court reiterated that "these statutes are generally very broadly construed to enhance consumer protection" and that these statutes authorize "a private cause of action for any party injured directly or indirectly by a violation of the statute."

The Minnesota Supreme Court in Group Health turned to the legislative history of the private remedy statute, § 8.31, subd. 3a, which that Court found "emphasizes this expansion of enforcement opportunities." It then quoted Senator Winston Borden, the

author of the bill that included § 8.31, subd. 3a. Senator Borden stated the purpose of § 8.31, subd. 3a was to "allow the individual person to bring a civil action for the damages he sustained." 621 N.W.2d at 10, citing Hearing on S.F. 819, S. Comm. Labor & Commerce, 68th Minn. Leg. March 8, 1973 (audiotape). Turning to the specific language of § 8.31, subd. 3a, the Supreme Court further explained: "Like the wording of the statute, the description of its goal is broad: to enable individuals injured by the prohibited conduct to sue for damages and in doing so complement the limited enforcement resources of the Attorney General." Id.

That is exactly what this lawsuit seeks to accomplish. This Court must take as fact that Philip Morris deceived Minnesota's consumers by the sale of its light cigarettes before, during and after the resolution of the State's lawsuit. So, while it is true the Consent Judgment enjoins defendants from "making any material misrepresentation of fact regarding the health consequences of using any tobacco product," the Court can reach no other conclusion than that the State's action and the resulting Consent Judgment did not cause the statutory violations alleged in this action to cease. (A. 224). The State's action certainly did not eliminate the need for this action to proceed and this Court has recognized violations of Minnesota's consumer protection statutes are best deterred by victim-specific monetary relief. Since the violations at issue here were undeterred by the 1998 tobacco settlement, Plaintiff Class' action obviously provides a public benefit. The trial court ignored those undisputed facts.

In Minnesota, the Attorney General can bring an action of its own, in the name of and on behalf of the State, against persons alleged to have engaged in conduct proscribed. See Minn. Stat. §§ 8.01, 8.06 and 8.31.[9] In State by Humphrey v. Philip Morris, the State sought restitution for its own claims and not with the purpose of obtaining restitution for consumer victims of defendants' fraud. The State in that lawsuit was not stepping in to represent the interests of particular citizens. See Cross Country Bank, 703 N.W.2d at 569-70. Equally clear, private consumers can maintain actions, in their own names, for certain remedies against those same persons alleged to have engaged in conduct proscribed under § 8.31, subd. 3a.

As interpreted by the Minnesota Supreme Court, when a plaintiff seeks a "private remedy" under Minn. Stat. § 8.31, subd. 3a, the party serves a dual role. A plaintiff must have a sufficient personal stake in the dispute – "any person injured" – to render a resolution appropriate. And the litigation must serve an interest broader than that of an isolated one-on-one individual transaction – i.e., misrepresentations made to the public. By seeking to hold Philip Morris responsible for its fraud and obtain that which Philip Morris wrongfully obtained from thousands of Minnesota consumers, Plaintiff Class is providing a public benefit. As previously stated, this Court has recognized, "future

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[9] The federal court in Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997), held that when a state expends millions of dollars each year to provide medical care for its citizens and Medicaid, it has standing to seek to recover those costs, as the results of its citizens' use of tobacco under its quasi-sovereign interests found at common law. It proceeds as a direct action and not through assignment/subrogation.

violations may be best deterred by seeking victim-specific monetary relief, rather than non-victim-specific injunctive relief." Cross Country Bank, 703 N.W.2d at 570.

The trial court ruled that there could be no public benefit here based on this Court's unpublished decision in Wiegand, 2006 WL 1529511 (A. 458), as well as a federal district court unpublished decision in Simonson v. Ameriquest Mortgage Co., 2006 WL 3463000 (D. Minn. 2006) (A. 462). Neither case supports dismissal here.

In Wiegand, plaintiff alleged one of defendant Walser's salespeople deceived him by falsely representing he was required to purchase a service contract and credit insurance policy in order to obtain financing. Before plaintiff filed his complaint, the Attorney General and Walser entered into a settlement agreement and consent order.

As this Court explained, "[t]he consent order served as a mechanism to resolve past complaints and to develop requirements for future marketing at [Walser's] dealerships." Id. at *1. (A. 459). Specifically, the consent order provided a remedy for Minnesota consumers previously affected by Walser's misrepresentations. Paragraph 21 of the consent order required Walser to attempt to resolve "all consumer complaints" and provided consumers with an option to have their complaints arbitrated. So under the terms of that consent order, consumers did have a private remedy and could use the arbitration proceeding to seek damages and be awarded damages were they so entitled. Id. Under these circumstances, this Court held that Plaintiffs' individual action did not benefit the public. Here, unlike Wiegand, the State's action explicitly does not provide a private remedy of any sort for Plaintiff Class.

The trial court also turns to an unpublished federal district court decision in Simonson, 2006 WL 3463000 (A. 462). Plaintiff asked the court to declare the mortgage between plaintiff and Ameriquest Mortgage Company was invalid. In that single one-on-one transaction case, plaintiff also sought injunctive relief and damages based on breach of contract, consumer fraud and unjust enrichment. The federal district court rejected plaintiff's claims under Minnesota's Consumer Fraud Act, recognizing plaintiff's claims were like the situation in Ly – plaintiff was defrauded in a single one-on-one transaction. Arguing against this result, plaintiff asserted that the injunction she sought would benefit the public and she referred "generally to other court actions, and to a settlement agreement that Ameriquest and various state attorneys general entered into regarding Ameriquest's allegedly unscrupulous lending practices." Id. at *4. (A. 465). Concluding plaintiff's lawsuit could confer only a negligible additional public benefit, the federal district court ruled that plaintiff could not employ the private attorney general statute to assert her claim. Id.

More recently, the federal district court in In re Nat'l Arbitration Forum Trade Practices Litig., 2010 WL 605710 (D. Minn.) (A. 479), ruled there is a public benefit where a plaintiff seeks monetary relief despite entry of a cease and desist order. Judge Magnuson explained:

> That consent decree merely required NAF to cease and desist its consumer arbitration operations. Thus, plaintiffs' continued pursuit of monetary damages for the class against NAF has a public benefit.

(A. 488).

Whatever State by Humphrey v. Philip Morris may have accomplished, there can be no dispute it did not end Philip Morris' deceit in the sale of its "light" cigarettes. It certainly did not provide restitution for Minnesota consumers who were ensnared in Philip Morris' deceit and purchased Philip Morris' light products. Plaintiff Class is entitled to take back from Philip Morris its ill-gotten gains. As Plaintiff Class asserted to the trial court, to so dismiss this action is to deprive Plaintiff Class of its rights under Article I, Section 8 of Minnesota's Constitution.

G. Based on the Unambiguous Terms of the State's Tobacco Settlement Release, This Case Is Not Barred.

The trial court additionally ruled that even if Plaintiff Class provides a public benefit, it cannot recover as a matter of law on its consumer protection claims or its common law unjust enrichment claim based on the Release and Consent Judgment entered in the State's tobacco case. The trial court so rules even though the settlement release specifically states it does not "bind any non-party or determine, limit or prejudice the rights of any such persons or entity." (A. 127, 151). The Consent Judgment states it only resolves all claims set forth in the State's Second Amended Complaint and even as to the State, the remedies are "cumulative" and nothing prevents even the State from "bringing any action for conduct not released hereunder, even though the conduct may also violate the Consent Judgment." (A. 126). The Consent Judgment declares it "is not intended to and does not vest standing in any third party with respect to the terms thereof or create for any person other than the parties hereto a right to enforce the terms hereof." (A. 119). Plaintiff Class' members were not parties to the State's suit.

A settlement agreement is a contract. State by Humphrey v. Philip Morris USA, Inc., 713 N.W.2d 350, 355 (Minn. 2006) (construing the settlement release at issue in this case). A settlement requires an offer and acceptance for its formation, and is subject to all of the other rules of contractual interpretation and enforcement. Beach v. Anderson, 417 N.W.2d 709, 711 (Minn. Ct. App. 1988). "Under long-standing contract-law principles, a nonparty to a contract generally will not be bound by a contract." Cross Country Bank, 703 N.W.2d at 569. Since settlement agreements are merely private contracts, one cannot prejudice the rights of non-parties. Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 558 (Minn. 1977) (settlement scrutinized to prohibit "prejudice [to] the rights of the non-agreeing parties" and to "insure that the adversary process is not so subverted as to deny a fair trial."). And "settlements ordinarily occasion no issue preclusion (sometimes called collateral estoppel) unless it is clear . . . that the parties intended their agreement to have such an effect." Arizona v. California, 530 U.S. 392, 414 (2000).

The court reviews the language of the contract to determine the parties' intent. Dykes v. Sukup Mfg. Co., ____ N.W.2d ____, 2010 WL 1904538 at *3 (Minn. 2010). The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract. Employers Liab. Assur. Corp. v. Morse, 261 Minn. 259, 111 N.W.2d 620, 624 (1961). The construction of a written contract is a question of law unless there is ambiguity. Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997). The

court is not to go beyond the language of an unambiguous contract in interpreting the document. Telex Corp. v. Data Products Corp., 271 Minn. 288, 135 N.W.2d 681, 686-87 (1965). Unambiguous language is given its plain and ordinary meaning. Philip Morris USA, 713 N.W.2d at 355. Unambiguous words in a contract are not to be read in isolation, but rather "in accordance with the obvious purpose of the contract . . . as a whole." Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 324 (Minn. 2003) (quotation omitted). There is a presumption the parties intended the language used to have effect. "[W]e will attempt to avoid an interpretation of the contract that would render a provision meaningless." Chergosky v. Crosstown Bell, Inc., 463 N.W.2d 522, 526 (Minn. 1990); Martin v. Setter, 184 Minn. 457, 237 N.W. 219, 221-22 (1931) ("The written contract represents the truth and the whole truth of the contractual obligations of A and B in whatever way" and the written agreement cannot be varied by parol evidence).

Here the trial court improperly looked beyond the four corners of the release in determining the release precludes Plaintiff Class' claims. The Settlement Agreement precludes only the claims specifically referred to, those brought by the State of Minnesota and listed in the release, not the claims of persons not parties in the case nor claims not listed in the release. To interpret the release otherwise renders meaningless the provision which explicitly states that it does not "bind any non-party or determine, limit or prejudice the rights of any such persons or entity." (A. 151).

A consent judgment, likewise, is based solely on the agreement and consent of the parties. Hollenkamp v. Peters, 410 N.W.2d 427, 429 (Minn. Ct. App. 1987). While a consent decree is accorded the weight of a final judgment, it "is to be construed . . . basically as a contract." U.S. v. ITT Cont'l Banking Co., 420 U.S. 223, 238 (1975). Someone who is not a party to a settlement agreement is not bound by that agreement nor bound by the stipulated judgment based on that agreement.

A consent decree binds the signatories, but cannot be used as a shield against all future suits by non-parties seeking to challenge conduct that may or may not be governed by the decree. Austin v. Alabama Check Cashers Ass'n, 936 So. 2d 1014, 1040-41 (Ala. 2005), citing Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

The Minnesota Supreme Court has held when parties to a lawsuit settle and enter into a consent judgment, an intention to bind others is never to be inferred from the circumstances. "[A] consent judgment implies no determination by the court of any issues in the case." Hentschel v. Smith, 278 Minn. 86, 153 N.W.2d 199, 205 (1967). Consent judgments also do not support issue preclusion (collateral estoppel). Hollenkamp, 410 N.W.2d at 432. The rationale behind this general rule is issues underlying a consent judgment are not actually litigated. Id. Moreover, such a judgment is not to be given preclusive effect if to do so violates important public policy. Hentschel, 153 N.W.2d at 203; see also G.A.W., III v. D.M.W., 596 N.W.2d 284, 287 (Minn. Ct. App. 1999), *rev. denied.*

Plaintiff Class was not a party to that Settlement Agreement and resulting Judgment. Based on the unambiguous language of the Settlement Agreement that it did not "bind any non-party or determine, limit or prejudice the rights" of such non-party, Plaintiff Class' action is entitled to proceed. (A. 151).

Despite the unequivocal language in the Settlement Agreement in the State's case that it did not bind non-parties, the trial court held this lawsuit could not go forward. Even if a consent decree purports to affect the rights of third parties, those parties are not bound unless their interests were adequately represented by a party to the decree. In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492 (11th Cir. 1987), *aff'd* 490 U.S. 755 (1989). The opportunity to be heard is an essential requirement of due process of law in all judicial proceedings. Windsor v. McVeigh, 93 U.S. 274, 277 (1876). The question here is does government action preclude a citizen's suit under § 8.31, subd. 3a, where the citizen's interests asserted here were not adequately represented in the government's lawsuit. Other courts have ruled that such actions are entitled to proceed.

In Victa v. Merle Norman Cosmetics, Inc., 24 Cal. Rptr. 2d 117 (Cal. Ct. App. 1993), the question presented was whether an injunctive consent judgment in a federal age discrimination and employment case brought by the EEOC operates to bar the complaining employee's original action for damages under California law. The court concluded there was insufficient privity to bar the latter action. Id. at 126. The court's basis for the conclusion was that an individual's subsequent suit for restitutionary relief may be brought after other, more general injunctive relief has been issued in favor of a

public entity plaintiff, because the individual was not fully represented on a particular claim by the public entity, which was seeking broad relief.

Likewise, in In re Exxon Valdez, 270 F.3d 1215, 1227-1228 (9th Cir. 2001), the Ninth Circuit addressed whether the consent decree entered into after the State of Alaska and the United States sued Exxon under the provisions of the Clean Water Act precluded a punitive damage award in a subsequent suit to redress private economic loss. The Ninth Circuit looked to the consent decree and recognized "though the government signatories released all government claims, the consent decree provides explicitly that 'nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a party to this Agreement.'" Id. at 1227. Exxon's argument was the government released plaintiffs' private claims, even though the plaintiffs did not consent to any such release, because the governments were acting as parens patrie for the private claimants. The Ninth Circuit, however, held the parties must have intended to preserve private claims by their language expressly excluding them from the settlement.

The estoppel effect of a settlement agreement and a consent judgment cannot be extended beyond the scope of the agreements and cannot be used for purposes different than contemplated by the parties. Here, Plaintiff Class was not a party to the State's prior lawsuit, nor is there support for the proposition that Plaintiff Class was somehow in privity with the Attorney General. A party is not in privity unless it had "controlling participation and active self-interest" in the prior litigation. Crossman v. Lockwood, 713 N.W.2d 58, 62 (Minn. Ct. App. 2006). Privity is not established by the mere fact persons

may be interested in the same question or in proving or disproving the same set of facts. Even if the party and non-party have parallel legal interests, that alone is not sufficient to establish privity; both identity of interest and adequate representation are necessary. Id.

By the terms of its settlement, it is clear the State was enforcing its own legal claims and seeking redress for its own injuries, not that of an individual citizen or consumer class. Anchor Glass Container Corp. v. Buschmeier, 426 F.3d 872, 879 (7th Cir. 2005) ("Privity connotes 'those so connected in law with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right.'") The State made clear it intended to preserve private § 8.31, subd. 3a remedies by language in the Settlement Agreement by expressly excluding non-parties from the settlement. See Dykes, ____ N.W.2d ____, 2010 WL 1904538 at *3-4; Knudsen v. Transport Leasing/Contract, Inc., 672 N.W.2d 221, 223-24 (Minn. Ct. App. 2003), *rev. denied* (court cannot add provisions).

Here, the trial court dismissed Plaintiff Class' lawsuit on the pretense that the settlement of the State tobacco suit somehow implies the interests of the citizens have been adequately represented, their rights protected and their injuries redressed. There is no support under the law or facts for such a ruling. And the very fact Philip Morris continued its fraud after the settlement shows the State tobacco lawsuit did not end Philip Morris' deceit.

The trial court also ignored that under the provisions of the Release and the Consent Judgment, if a party thereto seeks enforcement, it is to do so in Ramsey County. That is why in Philip Morris USA, 713 N.W.2d at 354, the settling tobacco companies, seeking to prevent the imposition of the health impact fee on their product, filed their motions in Ramsey County District Court under the caption of the 1994 tobacco case. Had Philip Morris truly believed Plaintiff Class' action was in violation of the terms of the Release and Consent Judgment, its obligation was to so assert in Ramsey County and it had eight years to do so. It did not. Hennepin County District Court did not have jurisdiction to dismiss Plaintiff Class' case based on the construction and claimed enforcement of the Release and Consent Judgment urged by Philip Morris.[10]

H. Plaintiff Class' Claim for Unjust Enrichment Is Not Barred.

After dismissing Plaintiff Class' statutory claims, the trial court then granted Philip Morris judgment on the pleadings, dismissing Plaintiff Class' unjust enrichment claim. If this Court does not reinstate Plaintiff Class' statutory claims and affirms them as barred and of no public benefit, it must reinstate Plaintiff Class' unjust enrichment claims.

In order to establish a claim for unjust enrichment, plaintiff must show defendant knowingly received something of value to which it was not entitled, and the circumstances are such that it would be unjust for that party to retain the benefit.

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[10] Although the issue of subject matter jurisdiction was not raised in the district court, subject matter jurisdiction cannot be waived. Marzitelli v. City of Little Canada, 582 N.W.2d 904, 907 (Minn. 1998); State v. Davis, 773 N.W.2d 66, 68 (Minn. 2009).

ServiceMaster of St. Cloud v. GAB Bus. Services, Inc., 544 N.W.2d 302, 306 (Minn. 1996). Recovery for unjust enrichment does not require a showing of fraud or mistake. Rather, unjust enrichment requires only that a party benefit in an illegal or unlawful manner, or the party's morally wrong behavior led to that party's enrichment at the expense of another. First Nat'l Bank of St. Paul v. Ramier, 311 N.W.2d 502, 504 (Minn. 1981); Klass v. Twin City Fed. Sav. & Loan Ass'n, 291 Minn. 68, 190 N.W.2d 493, 494-95 (1971) (affirming trial court's finding of unjust enrichment without a showing of fraud, mistake or illegal or unlawful conduct and noting the issue in unjust enrichment is whether defendants have a moral obligation to pay for the harm or ought to do so "in equity in good conscience").

Equity jurisdiction should not be precluded by a legal remedy unless the latter is clear and certain. The remedy at law, in order to be considered adequate, must be obtainable as of right. The mere existence of a possible remedy at law is not sufficient to warrant the denial of equitable relief. U.S. ex rel. Zissler v. Regents of the Univ. of Minnesota, 992 F. Supp. 1097 (D. Minn. 1998); Griess v. Griess, 608 N.W.2d 217 (Neb. 2000).

In this case at bar, the trial court ruled Plaintiff Class has no statutory remedy, essentially ruling it had no standing to bring such a claim because its claims provide no public benefit. No Minnesota case holds that consumer protection statutes are exclusive. Moreover, no Minnesota court has held that dismissal of these statutory actions on no

public benefit grounds means that an unjust enrichment cause of action must be dismissed as well.

The trial court's reliance on Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc., 493 N.W.2d 137 (Minn. Ct. App. 1992), is misplaced. In Southtown, plaintiffs chose not to enforce their mechanic's liens. The court concluded "[b]ecause they had a statutory remedy and chose not to enforce it, they cannot make out an equitable claim for unjust enrichment." Id. at 140. ServiceMaster of St. Cloud, 544 N.W.2d 302, is also inapposite. The ServiceMaster plaintiff, a home repair contractor, similarly declined to pursue a statutory mechanic's lien and constitutional lien remedies. He thus could not recover under equitable theories.

The trial court essentially ruled that Plaintiff Class has no standing under § 8.31, subd. 3a because its action is not a public benefit. In other words, Plaintiff Class has no adequate remedy at law. Plaintiff Class did not ignore its statutory rights, as did the Southtown and ServiceMaster plaintiffs. Nor did Plaintiffs' claim at law fail for failure of proof, as in In re Silicone Implant Insurance Coverage Litig., 652 N.W.2d 46 (Minn. Ct. App. 2002). Rather, Plaintiff Class here cannot proceed at law because the trial court determined the applicable statutes simply do not apply; that is, Plaintiff Class cannot protect its rights under statutory law and thus has no remedy at law and Plaintiff Class' claims are barred by the Attorney General's settlement.

Plaintiff Class is also being penalized for the voluntary dismissal of its common law fraud count which, because of its individual reliance requirement, would not be

pursued on a class-wide basis. The mere existence of a possible remedy at law is not sufficient to warrant denial of equitable relief on the pleadings. Interstate Cigar Co. v. U.S., 928 F.2d 221, 223 (7th Cir. 1991). "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances." Id., quoting Gormley v. Clark, 134 U.S. 338, 349 (1890). Here jurisdiction in equity should attach.

II. UNDER ESTABLISHED SUPREME COURT PRECEDENT, PHILIP MORRIS SHOULD BE PRECLUDED FROM RE-LITIGATING ISSUES THEY PREVIOUSLY LITIGATED AND LOST IN THE DOJ ACTION, AND, THEREFORE, PLAINTIFF CLASS IS ENTITLED TO SUMMARY JUDGMENT.

Final judgment in U.S. v. Philip Morris, 449 F. Supp. 2d 1, includes detailed findings of fact establishing Philip Morris knowingly and falsely designed, marketed and promoted "light" cigarettes as less harmful than regular cigarettes in order to induce their purchase, to keep smokers from quitting, and to sustain their corporate revenues. Plaintiff Class asserts the findings in that case collaterally estop Philip Morris from re-litigating those factual determinations in the case at bar and entitle Plaintiff Class to the grant of partial summary judgment.

Collateral estoppel, also known as issue preclusion, prohibits a party from re-litigating issues that have been previously adjudicated. Hauser v. Mealey, 263 N.W.2d 803, 806 (Minn. 1978). Whether the doctrine of collateral estoppel applies is a mixed question of law and fact and is reviewed de novo. Falgren v. State Bd. of Teaching, 545 N.W.2d 901, 905 (Minn. 1996). Where the doctrine of collateral estoppel precludes

re-litigation of an issue, there is no issue of material fact and summary judgment is proper. Ryan v. Progressive Cas. Ins. Co., 414 N.W.2d 470, 472 (Minn. Ct. App. 1987), *rev. denied.* This Court reviews the district court's decision on whether or not to apply the doctrine for an abuse of discretion. In re Trusts Created by Hormel, 504 N.W.2d 505, 509 (Minn. Ct. App. 1993), *rev. denied.* The trial court abuses its discretion if the court's decision is against logic and the facts of record or misapplies the law. Schallinger v. Schallinger, 699 N.W.2d 15, 23 (Minn. Ct. App. 2005), *rev. denied.*

Collateral estoppel may be invoked when (1) an issue is identical to one previously adjudicated; (2) there was a final decision on the merits; (3) the estopped party was a party to or in privity with a party in the prior adjudication; and (4) the estopped party had a full opportunity to be heard on the issue. State v. Lemmer, 736 N.W.2d 650, 659 (Minn. 2007).

Minnesota courts have approved the use of offensive collateral estoppel following the United States Supreme Court decision in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979); see Falgren v. State, 545 N.W.2d at 906. In Parklane, the United States Supreme Court recognized the doctrine of issue preclusion (collateral estoppel) may be used offensively to prevent "a defendant from re-litigating issues which a defendant previously litigated and lost against another plaintiff."

The facts of Parklane are similar to the facts here. There, the plaintiff filed a class action alleging the defendant had issued a false proxy statement in connection with a merger. Before the case was tried, the Securities Exchange Commission (SEC) filed a

separate suit against the same defendant, also alleging the proxy statement was false and misleading. The court in the SEC case entered a declaratory judgment that the proxy statement was materially false and misleading.

After the SEC ruling, the Parklane plaintiff moved for partial summary judgment, asserting the defendant was barred from re-litigating the issues resolved against him in the SEC action. The United States Supreme Court agreed.

Philip Morris should be prevented from re-arguing that they did not make false representations or did not deceive the American public, including Plaintiff Class, as to "light" cigarettes. As in Parklane, these issues have been "resolved" against Philip Morris.

In the DOJ case, the United States alleged Philip Morris committed fraud in violation of 18 U.S.C. § 1962 by deceiving consumers through use of brand descriptors such as "light" and "low tar," that Philip Morris intended that consumers rely on its fraud and that Philip Morris profited from its fraud.[11] The DOJ court expressly found Philip Morris' use of these descriptors, as well as its advertising and marketing to consumers, satisfied all of the elements of fraud and Philip Morris was liable under the RICO statutes. The trial court in the DOJ action found as fact:

- Philip Morris falsely marketed and promoted low tar/"light" cigarettes as less harmful than full flavor (regular) cigarettes in order to keep people smoking and sustain corporate revenues. (Section V(E), Findings 2023-2028).

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[11] See Affidavit Exhibit 1, Findings 2023-2158, 2173-2200, 2230-2261, 2295-2312, 2346-2363, 2365-2368, 2377-2483, Conclusions of Law VII(A) and VII(B)(4).

- Philip Morris internally recognized low tar cigarettes are not less harmful than full flavor cigarettes. (Section V(E)(2)(a), Findings 2146-2158).

- Despite their internal knowledge, Philip Morris' marketing and public statements about low tar cigarettes continued to suggest they are less harmful than full flavor cigarettes. (Section V(E)(5)(a), Findings 2401-2404, 2410-2411, 2445-2447).

The DOJ court concluded Philip Morris committed fraud not just by a preponderance of the evidence but instead by "overwhelming" evidence which "easily meets the clear and convincing standard of proof." (Conclusion of Law VIII(G)(3)(a)). Plaintiff Class seeks to prove the exact same facts here that have already been established in the DOJ case. The causes of action in the two matters are based upon different statutes. Nonetheless, the elements of Minnesota's CFA are satisfied by the findings of fact and conclusions of law in the RICO case. For purposes of applying collateral estoppel, the issues in the two matters are identical.

The trial court, while recognizing there "may be a strong argument for application of collateral estoppel," ultimately decided against it, asserting that "there are several cases that are inconsistent with the trial court's judgment in DOJ." (Add. 39-42). The district court turns to Schwab v. Philip Morris USA Inc., 449 F. Supp. 2d 992, 1079 (E.D.N.Y. 2006), *reversed on other grounds*, McLaughlin v. American Tobacco Co., 522 F.3d 215 (2d Cir. 2008). The court in Schwab recognized the applicability of collateral estoppel, but declined to apply it offensively for reasons not relevant to its application here. Specifically, the court declined to apply the doctrine because Liggett was a defendant in Schwab and was considered a prevailing party in the DOJ case because it withdrew from

the tobacco conspiracy. 449 F. Supp. 2d at 1079. The Schwab court concluded that "[a]pplication of estoppel to all but one of the many defendants would confuse the jury, making administration of the case more difficult." Id.

Here, both Altria and Philip Morris were subject to specific findings of fraudulent and deceptive conduct in the DOJ case. Since Plaintiff Class is suing only Philip Morris and Altria, there is no risk of confusion.

The Schwab court also made other salient observations on the issue of collateral estoppel with respect to the DOJ findings that should be noted here:

- The allegations were identical to those in the DOJ case, specifically that Defendants engaged in deception to mislead the public about the health risks of "light" cigarettes;
- The defendant in the DOJ case had a "full and fair opportunity to litigate the issues" and in fact had "every incentive to fully and vigorously litigate the claim against him"; and
- The determination of defendant's deception in the DOJ case was necessary to support the verdict.

Id. at 1078-79.

The same is true here. The issue of Philip Morris' deception in order to sell light brand cigarettes is the same. Philip Morris was afforded a full and fair opportunity to litigate that issue in the DOJ case. Philip Morris' fraud and deception was a necessary element to establish the RICO claim in the DOJ case and is an essential element to establish consumer fraud in Minnesota.

The district court also turns to Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., No. 98-CV-3287 (E.D.N.Y. 2001) (A. 493), and Ironworkers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 23 F. Supp. 2d 771 (N.D. Ohio 1998), as amended. With regard to the Blue Cross and Blue Shield of New Jersey case, while it is true that the jury did not return a plaintiffs' verdict on the RICO claims, the jury actually found in favor of plaintiffs under New York's Consumer Fraud Act. Put plainly, Philip Morris lost this case on the same issues and with much of the same evidence as that in the DOJ case. The New Jersey court, in denying Philip Morris' motion, specifically concluded "evidence of a 'low tar fraud' was also supported by the trial record." (A. 501).

Ironworkers was not brought by any person or class claiming to have been harmed by Philip Morris' violation of a consumer fraud statute. Instead, it was essentially a subrogation suit by a conglomeration of union-affiliated trusts providing health benefits to their beneficiaries. The trust sought to recoup from a variety of tobacco companies the cost of treating its members' smoking-caused diseases. 23 F. Supp. 2d at 777. The Ironworkers verdict was rendered on March 18, 1999, in favor of the tobacco companies. (A. 510). As such, it predates significant evidence relied on by almost every judge or jury that has since found Philip Morris liable for light cigarette fraud.

The United States Supreme Court has recognized that in the context of collateral estoppel, a prior decision loses force after a significant change in the facts. Montana v. U.S., 440 U.S. 147, 155 (1979). "Risks Associated With Smoking Cigarettes With Low

Machine Measured Yields of Tar and Nicotine" (hereinafter Monograph 13) was published by the National Cancer Institute in October 2001, two and a half years after Ironworkers. Monograph 13 is one of the most important pieces of evidence supporting the DOJ court's conclusions with respect to the "lights" fraud. Along with the 2004 Surgeon General's Report, "The Health Consequences of Smoking," published five years after the verdict in Ironworkers, that Report and Monograph 13 provide essential evidence on this very issue. (See DOJ Finding 2116, "The conclusions of Monograph 13 and the 2004 Surgeon General's report – that lower tar cigarettes do not provide a health benefit – represent the consensus view of the scientific community on this issue."). Ironworkers, a third-party action, tried before the consensus evidence submitted in the DOJ case was even published, cannot preclude the use of offensive collateral estoppel here. Neither case demonstrates that inconsistencies exist so as to preclude collateral estoppel based on the DOJ findings.

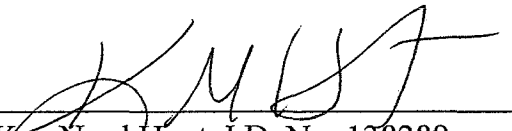
Finally, the trial court says collateral estoppel cannot be applied because the DOJ case was a bench trial and this case will be tried before a jury. (Add. 42). No court has precluded collateral estoppel based on who will be the trier of fact. Moreover, restitution is an equitable remedy and in this case, like the DOJ case, that issue should be tried to the court.

CONCLUSION

Appellant Plaintiff Class respectfully requests the judgment of dismissal be reversed and the case be reinstated. In addition, Appellant requests that the Court order the trial court to grant Appellant partial summary judgment precluding Respondents from re-litigating issues litigated and lost in the DOJ action.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: May 21, 2010

BY 

Kay Nord Hunt, I.D. No. 138289
Ehrich L. Koch, I.D. No. 159670
Valerie Sims, I.D. No. 30556X
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

SHELLER, P.C.
Martha K. Wivell, I.D. No. 0128090
P.O. Box 339
Cook, MN 55723
(218) 666-0250

Stephen A. Sheller
1528 Walnut Street
Philadelphia, PA 19102
(215) 790-7300

WILLIAMS CUKER BEREZOFSKY
Esther E. Berezofsky
Woodland Falls Corporate Center
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002
(856) 667-0500

Attorneys for Appellants

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,963 words. This brief was prepared using Word Perfect 12.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

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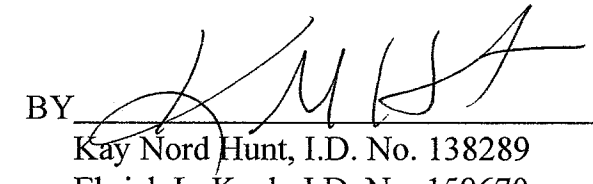
BY 

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(856) 667-0500

Attorneys for Appellants