

No. A10-215
**STATE OF MINNESOTA
 IN SUPREME COURT**

Gregory Curtis, et al., individually and on behalf of all others similarly situated,

Respondents,

vs.

Altria Group, Inc.,

Dismissed Defendant, and

Philip Morris, Inc.,

Appellant.

**BRIEF AND ADDENDUM OF
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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).

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The Product Liability Advisory Council, Inc. (PLAC) respectfully submits this brief in support of petitioner Philip Morris USA, Inc. (PMUSA) on the issue of the propriety of class certification under the Minnesota Prevention of Consumer Fraud Act (CFA).¹ PLAC takes no position on the other issues addressed in Philip Morris USA's petition for further review.

INTEREST OF AMICUS CURIAE

PLAC is a non-profit association with 99 corporate members representing a broad cross-section of American and international product manufacturers. (A list of PLAC's current corporate members is included as an Addendum to this brief.) These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 900 briefs as *amicus curiae* in both state and federal courts, including this court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

¹ Pursuant to Minn. R. Civ. App. P. 129.03, PLAC states that no counsel for any party has authored any part of this brief, and that no person other than PLAC, its members, and its counsel have made any monetary contribution to the preparation or submission of this request.

PLAC's interest in this case is both public and private. With respect to the public interest, PLAC's members share sincere concerns that the Court of Appeals' affirmance of the trial court's certification of a class under Minnesota's consumer fraud statutes will encourage the filing of unfair, expensive, and abusive class action suits against product manufacturers and sellers. Such suits will increase costs for manufacturers and sellers and ultimately for consumers as well. Moreover, given that the vast majority of courts addressing substantially identical claims have denied class certification, see In re Light Cigarettes Marketing Sales Practices Litigation, 271 F.R.D. 402 (D. Me. 2010) (collecting cases), the decision threatens to make Minnesota courts a target venue for similar claims.

PLAC's members also have a significant private interest in the trial court's improper certification of a class under the CFA and the Court of Appeals decision upholding that certification. These courts' flawed interpretation of the CFA and of Minnesota's class action rule pays only lip service to this court's precedent, which holds that "reliance is a component of the causal nexus requirement for a private consumer fraud class action." Wiegand v. Walser Automotive Groups, Inc., 683 N.W.2d 807, 812 (Minn. 2004). The courts here incorrectly applied this court's "indirect aggregate reliance" analysis to claims that necessarily require direct individual reliance, effectively relieving plaintiffs of the burden of demonstrating that class treatment of causation is both viable and preferable and effectively preventing the defendant from rebutting causation. In addition, the trial court and the Court of Appeals used the unsupported presumption that the named Plaintiffs' claims were typical of the class claims to satisfy

Rule 23.02(c)'s predominance requirement. Such a presumption misapplies Rule 23 and severely impairs any defendant's ability to resist the class certification of consumer fraud claims, even when those claims undisputedly involve compelling real-world differences among them. PLAC urges the court to reverse the class certification.

ARGUMENT

The Minnesota Court of Appeals decision in this case relied heavily on this court's decision in Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2 (Minn. 2001), both in analyzing Plaintiff's burden of proof on the issue of causation and in extending that analysis to the class action context. PLAC's brief focuses on two points concerning the application of the Group Health decision:

- The Minnesota Court of Appeals misapplied this court's holding in Group Health and its progeny to grant a factually unsupported presumption of reliance and causation to individual claims; and
- The trial court and the Court of Appeals erroneously extended the Group Health aggregate causation analysis into the present class action, ignoring the proof of individual causation necessary here.

I. THIS COURT'S HOLDING IN GROUP HEALTH DOES NOT JUSTIFY THE PRESUMPTION OF CAUSATION THE COURT OF APPEALS ADOPTED.

This court's analysis in Group Health does not define the nature or degree of proof necessary to establish reliance and causation in the present case. The Group Health decision addressed consumer-fraud claims by HMO plaintiffs based on the indirect, aggregate effects on HMO members of widely disseminated advertising. The claims here

are materially different and rest on the direct and individual effects on consumers of Defendant's statements.

A. The Group Health Decision Addressed the Standard of Proof for Consumer Fraud Claims Based on the Indirect, Aggregate Effects on Consumers of Widely Disseminated Advertising.

In Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2 (Minn. 2001), the plaintiffs were health maintenance organizations that claimed they had incurred increased health care costs as a result of their members' tobacco-related injuries. 621 N.W.2d at 4-5. The HMOs asserted that the defendant tobacco companies had misled the public about the health effects of tobacco and tobacco use, resulting in the public's continued use of tobacco products and consequent tobacco-related illnesses. Because the plaintiff HMOs were contractually obligated to provide medical services to members who suffered such tobacco-related illnesses, the HMOs claimed, they were "indirectly injured by the tobacco companies' conduct" and were entitled to recover under Minnesota's consumer fraud statutes. Id. The Group Health case was not a class action, and the plaintiff HMOs sought to recover damages only for themselves, not on behalf of their individual members.

Answering a federal district court's certified questions, the Group Health court first held that a plaintiff need not be a purchaser of a product to assert a claim under Minnesota's consumer fraud statutes. 621 N.W.2d at 11. The court went on to hold that even a nonpurchaser plaintiff seeking recovery under those statutes must prove reliance on the defendant's statements or conduct to satisfy the element of causation. Id. at 14-15. Addressing the procedural posture of the HMOs' claims specifically, the court held that

where a plaintiff seeks damages based on the indirect aggregate effect on consumers of widely disseminated advertising (as the HMOs did), the plaintiff need not present direct evidence of reliance by individual consumers. Id.

The Group Health decision was careful to restrict its holdings to the specific certified questions before it. See id. at 16 n.10 (“We emphasize that we are addressing here only the requirements for the misrepresentation in sales actions before us on these certified questions.”); see also id. at 14-15 (using limiting language including “in cases such as this” and “in the context of the certified question”). The Group Health court specifically reserved the question of whether or how its analysis might apply to other types of consumer fraud claims in other postures. See id. at 16 n.10 (“The type of proof required to satisfy the causation-based reliance factor may be different in a case of different scope or based on different causes of action.”). The certified questions in Group Health did not raise, and this court did not address, any issue concerning the nature or quantum of evidence necessary to create a *prima facie* Minnesota consumer fraud claim (1) where the element of causation is based on individual reliance rather than aggregate reliance or (2) where the damages claimed are direct rather than indirect.

B. The Group Health Decision’s Indirect Aggregate Causation Analysis Does Not Apply Here.

Despite this limiting language and the Group Health court’s reliance on the indirect aggregate nature of the claims, Plaintiffs argued below that the Group Health decision established a broad rule of law that controlled the issues in this case, and the Court of Appeals decision essentially adopted that view. See Curtis v. Philip Morris

USA, 792 N.W.2d 836, 858-59 (Minn. App. 2010) . But does the Group Health standard for “the causation-based reliance factor” given the different scope and nature of the Plaintiffs’ claims here? 621 N.W.2d at 16 n.10. A thorough comparison demonstrates that it does not.

In Group Health, each of the HMO plaintiffs claimed to have been indirectly injured by the collective effect of the prohibited conduct on a large group of its members. 621 N.W.2d at 14. Because of this, the Group Health court ruled that the evidence that would be “relevant and probative as to the relationship between the alleged damages and the alleged prohibited conduct,” *id.*, could include evidence relating to the effect of the defendants’ advertising on that same “large number of consumers.” Put another way, the HMO plaintiffs’ claimed damages by their nature did not depend on whether any *individual* HMO member smoker relied on the claimed misrepresentations, but only on the extent of the *aggregate* reliance of its members. It would be sufficient if half of their members had relied, or a third, or even ten percent. The HMOs’ claims also did not depend on *which* particular consumers formed the ten percent; regardless of who the individuals were, the HMOs would have proved that they suffered damages.

In contrast here, neither the named Plaintiffs nor the absent class members claim to have been injured by the collective effect of the defendant’s conduct on a large group of product users. On the contrary, each plaintiff and class member claims he or she has suffered financial injury based on the *individual* effect of the defendant’s conduct on that *individual* plaintiff or class member him- or herself. See 792 N.W.2d at 858 (noting Plaintiffs’ claim that PMUSA engaged in conduct “to influence consumers to pay money

(the damages claimed)"); *id.* at 841 (noting class membership requires purchase of defendant's product "for personal consumption"). This unavoidable reliance by each class member on the individual effect of Defendant's representation on that class member fatally undercuts Plaintiffs' invocation of Group Health's approval of aggregate and indirect evidence of reliance. Unless aggregate evidence can demonstrate that 100% of class members engaged in the same conduct for the same reason (which Plaintiffs do not and cannot claim here), such aggregate evidence cannot show the reason for the conduct of any individual class member. Even if expert opinion or survey results suggest that Defendants' advertisements influenced a substantial percentage of light cigarette smokers, any individual class member might have smoked light cigarettes for some other reason. Conversely, any one individual class member might have relied on the defendant's representations about light cigarettes even if the aggregate evidence suggested that no one else did. By its nature, aggregate evidence simply is not competent to demonstrate the individual reliance claimed here.

This conclusion follows logically from the differences between the claims here and in Group Health. The HMO plaintiffs in Group Health could not possibly have demonstrated their own reliance on defendants' conduct with respect to purchases of the defendants' products because the HMOs admittedly did not purchase those products. The *only* way they could demonstrate a "legal nexus" between the defendants' conduct and their claimed indirect injuries was through circumstantial evidence demonstrating the aggregate conduct of their members. That causal chain did not need to go through individual smokers or those smokers' individual reliance on the defendants' conduct;

because the HMO plaintiffs claimed damages resulted from the effect of defendants' conduct on the member group, not the effects on individual members, the HMOs could build their causal chain based on broader circumstantial evidence of the claimed widespread effect of the defendants' conduct on smokers' behavior. Such evidence could have been sufficient, this court held, to permit a jury to conclude that the defendants' conduct had a sufficient "legal nexus" with the HMOs' damages to justify imposing liability on the defendants. 621 N.W.2d at 14.

In contrast here, the only way that Plaintiffs can establish a legally sufficient chain of causation supporting any individual class member's claim is to offer evidence of reliance, and thus causation, that is specific to that class member. Indeed, both the pleadings and the factual support for the named Plaintiffs' own claims show that such member-specific evidence is the only logical means to meet the causation element here. The named plaintiffs do not ground their own individual claims on broad circumstantial studies or expert testimony. Instead, each of the named plaintiffs has testified that he or she believed that light cigarettes were safer than regular cigarettes and likely would not have purchased light cigarettes if he or she had known of Defendant's claimed misrepresentation. 792 N.W.2d at 857. And each named Plaintiff asserts an individual lack of knowledge of any facts contrary to Defendant's claimed misrepresentations. See

App.-5-6 (Second Amended Complaint ¶¶ 19-22).² This is a case involving individual claims of direct reliance, and the Group Health analysis does not apply.

In sum, Group Health held only that circumstantial evidence of studies and expert testimony concerning the effect of defendants' conduct on the public at large could be sufficient to create a jury question where a plaintiff's claimed damages resulted from its contractual obligation to a substantial portion of the public at large. 621 N.W.2d at 14-15. In the present case, where each class member's claimed damages results from that class member's individual purchase of Defendant's products, such broad circumstantial evidence does not and cannot establish that Defendant's conduct affected that individual class member's conduct or caused that class member's claimed injuries. The Court of Appeals erred in relying on the Group Health causation/reliance analysis and, because the class certification decision rested on that analysis, this court should vacate that certification.

II. THE GROUP HEALTH "LEGAL NEXUS" DOES NOT TRANSLATE TO THE CLASS CLAIMS PRESENTED HERE.

Even assuming *arguendo* that the Group Health decision could be extended to permit proof of an individual claim through circumstantial evidence of aggregate effects, that analysis nevertheless does not and cannot support the class certification here. On the

² In addition, as described in PMUSA's brief, several of the named Plaintiffs continued to smoke light cigarettes even after they commenced this lawsuit. See discussion at PMUSA brief at 27. This evidence adds yet another aspect to the issue of reliance that the jury will have to resolve on an individual basis.

contrary, the class certification context exacerbates the problems with applying the “aggregate causation” analysis of Group Health to the claims of individual purchasers.

As a threshold matter, the class certification improperly alters the substantive rights of the parties, relieving absent class members of the burden of proving causation that they would bear if they brought their claims separately. Moreover, although the trial court acknowledged that Defendant has the right to challenge Plaintiffs’ indirect, aggregate evidence on causation, it has not addressed the inherent inconsistency in permitting such evidence in a class action in which it has already deemed the claims of the named Plaintiffs to be “typical.” Finally, even if the trial court were to permit Defendant to offer evidence contesting Plaintiffs’ theory of reliance, the class certification would make the jury’s consideration and use of that evidence confusing, unworkable, and unfair.

A. The Class Certification Relieves Plaintiffs of the Burden of Proving Causation as to Individual Class Members and Thereby Alters the Substantive Rights of the Parties

The class certification here relieves Plaintiffs of the burden of proving causation as to each individual class member, and instead permits the claimed reliance of the few named Plaintiffs to serve as a proxy for the reliance of each absent class member. This result both alters the substantive right of the parties in violation of the Rules-Enabling Act and denies Defendant the constitutionally guaranteed right to due process and a jury trial on factual issues.

1. The Application of Rule 23 Here Violates the Rules Enabling Act

The class certification here is improper and ultra vires because it alters the rights of the parties and tips the field in favor of the plaintiffs and the class members.

Minnesota Statute section 480.051, which grants this court the authority to promulgate Rule 23 and the other rules of procedure, also provides that “[s]uch rules shall not abridge, enlarge, or modify the substantive rights of any litigant.” The question of whether a rule alters a substantive right turns on whether the result would have been the same prior to the adoption of the rule in question. See Vista Fund v. Garis, 277 N.W.2d 19, 26 (Minn. 1979) (holding Rule 23’s requirement of contemporaneous stock ownership to bring derivative class action did not alter the plaintiff’s substantive rights because plaintiff could not prove result would have been different before enactment of rule).

In the instant case, the result of an individual class member’s claims of causation would *not* be the same in the absence of Rule 23. If any member of the class asserted the consumer fraud claims here as an individual plaintiff in a separate action—as opposed to a class member under Rule 23—that plaintiff would need to prove that he or she relied on the claimed fraud in order to prevail. As this court stated in Group Health:

[W]here, as here, the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct in violation of the misrepresentation in sales laws, *as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes*. Therefore, in a case such as this, it will be necessary to prove reliance on those statements or conduct to satisfy the causation requirement.

621 N.W.2d at 13 (emphasis added). Thus, an individual plaintiff who brought a consumer fraud claim against PMUSA would need to demonstrate, not just that *some* people were misled by PMUSA's representations, but that *that individual plaintiff was misled him- or herself*.

Here, however, the employment of Rule 23 modifies the litigants' substantive rights by removing the Plaintiffs' burden of proving reliance by absent class members. Under the class certification ruling, Plaintiffs need not prove that any individual class member relied on Defendant's statements for those class members to recover; Plaintiffs need only prove that *some* smokers of light cigarettes relied on the statement. Once that is established, according to the Court of Appeals decision, every individual class member is effectively swept along on this wave of causation, regardless of whether that class member *actually* relied on Defendant's statement or not. The certification rulings thus permit absent class members to recover as part of a class *regardless of whether they could have recovered as individual plaintiffs*. This application of Rule 23 undeniably modifies the substantive rights of the parties—and violates section 480.051—by significantly lowering the individual class members' burden of proof on the issue of causation. See Davies v. Philip Morris USA, 2006 WL 1600067, *3 (Wash. Super.) (noting class action “is simply a procedural device” and not “a means by which the Plaintiff is relieved of proving its case”); General Motors v. Garza, 179 S.W.3d 76, 81 (Tex.App.2005) (“The procedural differences of a class action eliminates the necessity of adducing the same evidence over and over again in a multitude of individual actions. It

does not lessen the quality of evidence required in an individual action or relax burdens of proof.”).

It is also worth noting the converse effect of section 480.051 if the court were to uphold class certification here. If the court concludes that Plaintiffs may establish the reliance element of absent class members’ consumer fraud claims through aggregate evidence alone, there would be no principled basis to limit that holding to class actions or class members. Because section 480.051 mandates that the substantive law governing a claim is the same regardless of the applicability of Rule 23 (or any other rule), such a holding concerning the claims of class members would necessarily compel the same result for *all* consumer fraud claims, including those brought separately by individuals. No consumer fraud plaintiff would need to prove that he or she *actually* relied on the defendant’s claimed fraud; instead, each such plaintiff could, like the absent class members here, establish a *prima facie* case of causation simply by offering evidence of “a lengthy course of prohibited conduct that affected a large number of consumers.” Curtis, 792 N.W.2d at 857 (quoting Group Health). PLAC respectfully submits that such a conclusion is not consistent either with this court’s decision in Group Health or with Minnesota’s consumer fraud statutes.

2. The Application of Rule 23 Here Deprives Defendant of Its Right to a Jury Trial on Fact Issues

This alteration of the plaintiffs’ burden of proof also violates Defendant’s constitutional rights to have a jury hear and resolve all of Defendant’s factual defenses. If a reasonable jury, based on the record before it at trial, could reach different decisions

for different plaintiffs, the rules of procedure must allow the jury to do so. To tie the jury's hands by certifying a class and thus requiring the jury to reach the same result for every class member on the certified issues would violate both due process and the Minnesota and federal constitutions jury guarantees by denying the jury the right to act on individual defenses. See Lindsey v. Normet, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (quoting American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932)); U.S. Const., Amend. 7 ("the right of trial by jury shall be preserved"); Minn. Const. art. I, § 4 ("[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy").

Here, the evidence indisputably would permit a reasonable jury to reach different decisions for different claimants on the issue of reliance. See App-157-58, 177, 193-94, 229-30, 264 (showing examples of factual differences in reliance among class representatives). The trial court's certification of all claimants as a class, however, effectively forces the jury to rule either *in favor of* the class as a whole, thus granting some claims that it could have reasonably denied if given the chance, or *against* the class as a whole, thus denying some claims that it could have reasonably granted if given the chance. The constitutional provisions cited above do not permit such a result. See, e.g., McLaughlin v. American Tobacco Co., 522 F.3d 215, 231-32 (2d Cir. 2008) (rejecting plaintiffs' proposal to prove "collective damages on a class-wide basis" when individual liability issues existed because it would "offend[]the Due Process Clause"); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319 (5th Cir. 1998) (reversing class judgment after

trial because causation had been submitted for a class determination when it was an individual issue, and “the Seventh Amendment gives the right to a jury trial to make that determination” and “[t]here was no such trial determination made”).

The procedural restriction of class certification is permissible only if a reasonable jury would be required to treat every class member the same in any event. Because a jury here could treat different class members differently, the class certification is improper, and the court should vacate it.

B. The Class Certification Ruling Is Inconsistent with Defendant’s Opportunity to Contest Causation as to Class Members Other than Named Plaintiffs.

The class certification here is also logically inconsistent with Defendant’s rebuttal of the causation claims of individual absent class members. Defendant has the right at trial to offer its own evidence disputing Plaintiffs’ evidence and offering other reasons for class members’ decisions. See In re St. Jude Medical, 522 F.3d 836, 840 (8th Cir. 2008) (reversing class certification of Minnesota CFA claim and noting that Group Health holding “did not eliminate the right of a defendant to present evidence negating a plaintiff’s direct or circumstantial showing of causation and reliance”). Indeed, the trial court itself acknowledged that PMUSA has such a right of rebuttal here, see Add-83-85 (stating that PMUSA “would be able to raise as a defense at trial” evidence that some class members relied on entities other than PMUSA for information on health benefits of light cigarettes), and the Court of Appeals at least implicitly agreed. See 792 N.W.2d at 859 (noting PMUSA “has raised some questions that are unique to individual smokers, but has not, *at this point in the litigation*, negated the commonsense inference that its

massive advertising campaign was successful in persuading consumers that Lights were healthier than regular cigarettes” (emphasis added)).

On the other hand, a class action is by its nature a *representative* action in which the named plaintiffs stand in as surrogates for the unnamed class members. See, e.g., Black’s Law Dictionary at 243 (7th ed. 1999). The viability of such a representative action depends on the premise that the named plaintiffs’ claims are *actually* characteristic of the absent class members’ claims; that is, (in the words of Rule 23.01(c)) that “the claims and defenses of the representative parties are typical of the claims or defenses of the class.” See also 792 N.W.2d at 856 (court of appeals quoting Rule 23.01(c)’s typicality requirement); Add-81 (trial court certification order quoting same requirement). Thus here, under Rule 23.01(c), the decision certifying the class necessarily holds that the named Plaintiffs’ claims are typical of all class members’ claims.

The trial court’s certification here holding the named Plaintiffs’ claims to be “typical” is inconsistent with that court’s assurance that Defendant may defend the case based on class-member-specific rebuttal evidence on reliance, creating an unavoidable dilemma. If the trial court *permits* Defendant to introduce evidence demonstrating the conduct of absent class members, it would undercut its own finding that the named plaintiffs’ claims are typical of the class, and would thwart the procedural efficiency on which the class action is premised. See Miller v. Farmer Brothers. Co., 64 P.3d 29, 57, 115 Wn.App. 815, 828 (2003) (noting that “the advantage of the class action vehicle would all but disappear” where class members’ CPA claims “vary too much to be established by representative testimony”). But if the trial court rules consistent with its

finding of “typicality” and *excludes* the defendant’s individualized reliance evidence concerning absent class members plaintiffs as duplicative and unnecessary, it would deny Defendant the causation defense that its own class certification ruling promised. See Add-83. The trial court thus cannot *both* keep its promise to permit Defendant to contest the reliance of absent class members at trial *and* maintain the integrity of the class action. Neither the trial court’s order nor the Court of Appeals decision addresses this dilemma.

This problem is further aggravated by the fact that nothing in the record *actually* demonstrates that the named Plaintiffs’ claims *are* “typical” of the claims of class members with respect to reliance on PMUSA’s conduct. Both the trial court and the court of appeals decisions recite Rule 23.01(c)’s typicality requirement for class actions. See 792 N.W.2d at 856; Add-81. But neither court actually applies the requirement to the circumstances here, and neither decision contains any finding that the named Plaintiffs’ claims are in fact typical of the claims of the class, either generally or with respect to their reliance on the representations of Defendant. If anything, the record suggests otherwise; the evidence to date suggests that the class representatives’ actions with respect to reliance are not even consistent with each other, much less typical of the conduct of all other class members. For example, some (but not all) class representatives continued buying light cigarettes even after learning of the claimed misrepresentations on which they now base their claims, a fact that goes directly to the issue of reliance. See App-157-58, 177, 193-94, 229-30, 264. Thus, even among the class representatives, the record demonstrates no “typical” conduct.

In sum, the class certification's necessary corollary of "typicality" is unsupported by the record and is logically inconsistent with the courts' assurances that Defendant may offer evidence rebutting the reliance of absent class members. Under these circumstances, this court should not sustain the certification of the class. See Mulford v. Altria Group, Inc., 242 F.R.D. 615, 627 (D. N.M. 2007) (applying New Mexico law, finding that "a significant number of persons in the purported class received the promised lower tar and nicotine" and consequently concluding that "evidence regarding each purported class member's smoking habits must be submitted in order to demonstrate causation and loss").

C. The Class Certification Ruling Will Substantially Impede the Fair and Efficient Adjudication of the Controversy

Even if the trial court overlooked the inconsistency discussed above and permitted Defendant to offer rebuttal evidence concerning the lack of reliance of absent class members, the admission of such evidence unavoidably create problems of jury confusion and uncertainty. These problems inhere in the nature of a class action, and they arise regardless of whether Defendant's responsive evidence is circumstantial (i.e., surveys and expert testimony to counter Plaintiffs' surveys and expert testimony) or direct (i.e., testimony from individual class members concerning the reasons for their purchasing decisions).

Should the trial court permit Defendant to present evidence at trial that absent class members did not rely on Defendant's advertisements, the class action verdict form will present the jury with confusing and illogical questions. For example, consistent with

the class certification, the trial court's verdict form may ask the jury a single question concerning whether Defendant's conduct caused the class members' collective injuries. See, e.g., Peterson v. BASF Corp., 675 N.W.2d 57, 64 (Minn. 2004) (noting jury answered question concerning whether defendant's conduct caused collective loss to class members), vacated and remanded, 544 U.S. 1012 (2005), reaff'd, 711 N.W.2d 740 (Minn. 2006).³ But if Plaintiffs establish that some class members (e.g., themselves) *relied* on Defendant's advertisements and PMUSA establishes that other class members did *not* rely on the advertisements, how could the jury possibly answer a single reliance question relating to the class as a whole?

Likewise, with respect to damages, the trial court may ask the jury a single aggregate question about whether class members were injured by Defendant's conduct. Cf. Peterson, 675 N.W.2d at 64 (noting plaintiff offered expert testimony of aggregate damages for all class members based on total difference in price between more and less expensive herbicides). But again, if Plaintiffs establish that some class members were injured because they were misled by Defendant's advertisements and PMUSA establishes that other class members received exactly what they expected and thus were not injured, how could the jury answer a single injury question relating to the class as a whole?

³ As the Court of Appeals decision here notes, this earlier decision in the Peterson litigation remains precedential notwithstanding the case's subsequent history. See 792 N.W.2d at 858 n.5.

In sum, practical problems created by the class certification here undercut any contention that a class action is “superior to other available methods for the fair and efficient adjudication of the controversy.” Minn. R. Civ. P. 23.02(c).

D. The Other Authority on Which the Court of Appeals Relied is Inapposite

The Minnesota authority other than Group Health on which the Court of Appeals relied does not address the issues discussed above, much less justify the certification of the class here. For example, although the Court of Appeals decision relied heavily on Peterson v. BASF Corp., 675 N.W.2d 57 (Minn. 2004) (subsequent history omitted), see 792 N.W.2d at 858-59, Peterson does not support the class certification here for several reasons. First, Peterson applied the New Jersey Consumer Fraud Act (NJCFA), which offers a much broader basis for recovery than Minnesota’s CFA. Unlike the specific prohibitions in Minnesota’s CFA, the NJCFA permits recovery based on “unconscionable commercial conduct,” which is described as “an amorphous concept obviously designed to establish a broad business ethic.” 675 N.W.2d at 72 (quoting Kugler v. Romain, 58 N.J. 522, 279 A.2d 640, 651 (N.J. 1971)). The scope of conduct that may constitute “unconscionable commercial conduct” and thus cause injury to a consumer is much broader than the scope of conduct encompassed by the Minnesota statutory prohibitions on misrepresentation on which plaintiffs here rely. Compare Minn. Stat. §§ 325F.68-.70; 325D.09-.16; 325D.43-.48; 325F.67.

Second, as the Court of Appeals itself acknowledged in its decision here, the Peterson case addressed the issue of causation under the foreign statute “in the context of

a challenge to a jury's award of damages, not class certification." 792 N.W.2d at 858 n.6 (citing Peterson, 675 N.W.2d at 73).

Finally, and most significantly, the nature of the claimed consumer fraud in Peterson differed markedly from the fraud claimed here. In Peterson, no one claimed that there was anything wrong with the product at issue, and no one claimed that the class members' use of the product had harmed any persons or property. The Peterson plaintiffs did not dispute that they and the rest of the class members had received exactly what they had been promised and had paid for: an effective herbicide. Instead, the Peterson plaintiffs claimed that, as a result of the defendant's "unconscionable commercial practices," the class members had had to pay too much to get that effective herbicide. Because the claimed damages rested directly and exclusively on the *price* of the product, everyone who had purchased the more expensive product had by definition suffered the same injury: the difference in price between the two products. And because the court defined the class as those who had purchased the more expensive product, every class member by definition had suffered the claimed injury, that is, had paid the higher price. The defendant in Peterson thus could not argue that some class members had received a benefit that others had not, or that some class members were not injured despite purchasing the more expensive product.

The circumstances here differ materially in every one of these respects. In contrast to Peterson, where the product at issue undisputedly performed as promised, Plaintiffs here claim that the product at issue did *not* perform as promised and is in fact more harmful to health than Defendant represented. As a consequence, Plaintiffs here do

not complain about the price of the product, as in Peterson, but instead base their claimed economic damages on their assertion that they did not get what they paid for (i.e., a less dangerous product). (App-3-5, 10-14) And unlike Peterson, mere membership in the class here is not synonymous with suffering injury. Defendant's evidence strongly suggests that many of the smokers who purchased light cigarettes in Minnesota for personal use (and are thus members of the defined class) purchased the product for reasons other than PMUSA's claimed misrepresentations, App- 193-94, 229-30, 482, 487-89, or in fact received lower tar and nicotine, App.-302-03, 818-24, 831-32, 834, and thus were *not* deprived of the benefit of their bargain. See In re Light Cigarettes Marketing Sales Practices Litigation, 271 F.R.D. 402, 410 (D. Me. 2010) ("If smokers did not fully compensate, they were not injured by the misrepresentations because they received lower levels of tar and nicotine."). In sum, this court's decision in Peterson decision addressed a materially different claim based on materially facts in a materially different procedural posture under a materially different substantive law. As a result, the case offers little assistance to the court here.

Plaintiffs also find no support for class certification in Wiegand v. Walser Automotive Groups, Inc., 683 N.W.2d 807, 812 (Minn. 2004), the other case the Court of Appeals cited on this issue. See 792 N.W.2d at 859. First, the Wiegand decision involved a motion to dismiss, and the court addressed only "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." Id. at 812 (citations omitted). The court therefore reached no holding concerning the nature or quantum of proof necessary to get to a jury on such a claim.

Second, the plaintiff in Wiegand alleged actual reliance, see id. at 812 (“[Plaintiff] alleges that he agreed to purchase the service contract and credit insurance *based on the misrepresentations of* [defendant’s] representative.” (emphasis added)), so the issue of an alternative “causal nexus” did not arise. Third, the Weigand court did not address the reliance requirement in the context of a class action. Although the plaintiff in Weigand had styled his action as a class action, no class had been certified, see id. at 809-10, and neither the propriety of class certification nor the sufficiency of the plaintiff’s class allegations was before the court.

In sum, neither Group Health nor any of the other Minnesota authority on which the Court of Appeals decision relies supports the certification of the class here.

CONCLUSION

The certification of a class under Minnesota consumer fraud law here tips the balance of equities heavily and unfairly against the manufacturers of consumer products. The decisions permit a few plaintiffs to represent the claims of an entire class without ever showing that their claims are typical of the class. The decisions also permit the class action mechanism to alter the substantive rights of the litigants, permitting class members to recover as part of a class even if they could not have recovered as individual plaintiffs. Finally, the decisions permit class members to recover even if they did not rely on Defendant’s statements and even if they did not suffer any damages. Given that these decisions arise specifically in the context of consumer fraud, they are likely to place a particularly heavy and unfair burden on product manufacturers like the members of

PLAC. PLAC therefore urges the court to reverse the Court of Appeals decision and to vacate the order certifying the class in this case.

Dated: April 21, 2011

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STATE OF MINNESOTA
IN SUPREME COURT

Gregory Curtis, et al., individually and on
behalf of all others similarly situated,

Respondents,

vs.

Altria Group, Inc.,

Dismissed Defendant, and

Philip Morris, Inc.,

Appellant.

CERTIFICATION OF
BRIEF LENGTH

Appellate Court
Case Number: A10-215

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,261 words. This brief was prepared using Microsoft Word 2003 software.

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