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Testimony of
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Good afternoon. I have practiced law for more than 40 years. In that time, I have initiated many lawsuits involving medical malpractice, toxic torts, medical device and drug product and complex catastrophic personal injuries. For the past 13 years, I have also dedicated a substantial portion of my practice to litigation involving the cigarette companies. While, as one federal judge once phrased it, “the tobacco industry may be the king of concealment and disinformation,”¹ the so-called light cigarette fraud is the most shameless example of outright fraud by this industry I have yet to encounter.

I have researched industry practices around light cigarettes and have worked with a number of attorneys around the country to file consumer fraud class actions against the cigarette manufacturers that seek compensation for customers who bought these cigarettes that were sold and marketed as “light,” but were, in fact, not really lower in tar or nicotine and certainly were not any less hazardous than so-called “full flavor” brands. This is accomplished by designing the cigarette to create misleading readings on puff machines using a technique for measuring tar and nicotine known as the FTC method.

The principal allegation in light cigarette lawsuits is that cigarette manufacturers have misled consumers by marketing light and low tar cigarettes as having less tar and nicotine than other brands, even though the actual exposure levels are no different. Those who smoked (and continue to smoke) light cigarettes, reasonably believing they were being exposed to less tar or nicotine, are seeking court-ordered damages for their losses. I believe that there have been about 40 lawsuits filed in 22 different states on the light cigarette issue. Certified class actions are pending in Massachusetts, Missouri, and New York at this time.

In fact, there is good reason to believe so called, “light, smooth, mild” cigarettes are potentially more dangerous to ones health than “full flavor” cigarettes.

An important key to uncovering the light cigarette fraud was Monograph 13 released by the National Cancer Institute in 2001.² That monograph concludes that “cigarette manufacturers recognized the inherent deception of advertising that offered cigarettes as light [and]...as having the lowest tar and nicotine yields...” but went ahead anyway with that advertising. Shortly after the release of the monograph, it was announced that the FTC asked for guidance from DHHS to determine whether the FTC testing method could be improved and a working group was to convene in 2002, but I am unaware of any outcomes from this request for guidance.³ The FTC appears to have gone to sleep as Rip Van Winkle did in the famous children’s story and clearly needs congress to wake them up.

What has been happening in these lawsuits is that the cigarette companies have been using the lack of clarity around regulation of testing accuracy and the regulatory role of the FTC in two distinct and important ways:

1. The cigarette companies claim that the use of the terms “light” and “lowered tar and nicotine” are regulated by the FTC and, therefore, state consumer protection laws’ exemption for federally regulated products defeats our state law claims of fraud. In the only light cigarette class action to go to trial, a verdict against Philip Morris for around \$10 billion dollars was reversed by the Illinois Supreme Court in a 4-3 decision.

That Court relied largely on a 1971 Consent Order with American Tobacco Company over the marketing campaign for the Carlton brand and required that tobacco company to print tar and nicotine comparisons with other brands for advertising that claimed “Carlton is the lowest.” This one consent order dealing with one company’s ad campaign hardly constitutes FTC adoption of a trade regulation or even a regulatory approach to the use of the terms “light” and “lowered tar and nicotine” which are at the heart of the light cigarette fraud. Nonetheless, this argument is being raised repeatedly by cigarette industry defendants in ongoing litigation.

2. The cigarette companies have, until this summer, removed light cigarette class action lawsuits from state to federal courts under the ruse that the companies are acting as agents under a federal officer and are, therefore, entitled to a federal court venue under the Federal Officer Removal Statute.⁴ This argument, while

absurd on its face, was successful in several cases and created expense, delay, and, most importantly, the assumption that the companies were simply following the regulatory requirements set down by the FTC around their products and should be immune to any claims of fraud. Ultimately, this argument was defeated by the U.S. Supreme Court on June 11 of this year in a unanimous decision⁵ that echoed the conclusion of the Solicitor General that the FTC has not asserted control over the marketing of light cigarettes.

Court Remedies

The courts in many jurisdictions either refuse to certify a class, or reverse the certification of a class in the appellate courts, thereby sanctifying the tobacco industry's misconduct and allowing them to continue this misconduct as we sit here. A solution is to consider legislation requiring that these cases be handled and certified as class actions, to encourage attorneys to take on what would ordinarily be a lawsuit on behalf of one individual with a very small damage claim. The tobacco industry knows that if a lawsuit cannot go forward as a class this will be the death knell of consumer claims. In addition, any money not claimed by consumers that is paid as part of a class action award by the tobacco industry, should be contributed to a *cy pres* fund.

This enormous fraud on the American people must stop. Federal legislation is needed to protect consumers from the cigarette industry's practices with their "light" brands and defrauded consumers should have the right to be compensated for their loss. I think that U.S. District Judge Gladys Kessler got it right when she ruled last year that the cigarette companies were racketeers in *U.S. v. Philip Morris*. About the light cigarette fraud, she said:

Even as they engaged in a campaign to market and promote filtered and low tar cigarettes as less harmful than conventional ones, Defendants either lacked evidence to substantiate their claims or knew them to be false.⁶

She goes on to say:

There is an overwhelming consensus in the public health and scientific community, both here and abroad, that low tar cigarettes offer no health benefit to smokers, have not reduced the risk of lung cancer and heart disease for smokers using them, and have not produced any decrease in the incidence

of lung cancer. Moreover, because of the misleading nature of the advertising for low tar cigarettes, smokers who might have quit have refrained from doing so in the belief that such cigarettes reduced their health risks.

Thank you for taking up this important issue.

¹ *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992). The judge was H. Lee Sarokin.

² Nat'l Cancer Inst., Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine, SMOKING AND TOBACCO CONTROL MONOGRAPH 13, NAT'L INST. OF HEALTH (Donald Shopland, David Burns, et al., eds., 2001).

³ See NCI's "Questions and Answers on Monograph 13" at Question 7, viewed at <http://www.cancer.gov/newscenter/monograph13-QA/print?page=&keyword=>

⁴ U.S.C. sec. 1442(a)(1).

⁵ *Watson, et al. v. Philip Morris Companies, Inc.*, 551 U.S. ____ (2007).

⁶ *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) at 430.