Legal Backgrounder

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REGULATED INDUSTRIES BENEFIT FROM ILLINOIS CONSUMER PROTECTION RULING

By

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On December 15, 2005, the Illinois Supreme Court issued its long awaited ruling in *Price v. Philip Morris, Inc.* (known as *Miles-Price*), vacating the largest judgment in Illinois history — a $10.1 billion verdict against Philip Morris. *Price v. Philip Morris, Inc.*, No. 96326, 2005 WL 3434368 (Ill. Sup. Ct. Dec. 15, 2005). The judgment resulted from a bench trial in Madison County, Illinois, a jurisdiction consistently listed as a "Judicial Hellhole"™ by the American Tort Reform Association. The Illinois Supreme Court's ruling may have significant implications beyond light cigarette litigation and affect private litigation under state consumer protection statutes, particularly those involving other products and services in regulated industries.

The Circuit Court Ruling. *Miles-Price* involved a claim under the Illinois Consumer Fraud Act (ICFA) in which the plaintiffs alleged that Philip Morris's advertising and packaging of light cigarettes was unfair and deceptive. The class certified by the trial court included all consumers (estimated by the court at over one million) who purchased light cigarettes in Illinois during a thirty-year period. On March 21, 2003, Judge Nicholas G. Byron of the Third Judicial Circuit in Madison County, Illinois rendered a $10.1 billion judgment. *Price v. Philip Morris, Inc.*, No. 00-L-112, 2003 WL 22597608 (Ill. Cir. Ct., Mar. 21, 2003). The judgment included $7.1 billion in compensatory damages, $1.77 billion of which was allocated for payment of attorneys' fees, and $3 billion in punitive damages paid to the State of Illinois.

In reaching its decision to certify the class, the trial court glossed over many individual issues of fact. For example, based on the testimony of several class representatives as well as expert testimony on the psychological motivations of consumers, the court found that "[a]lthough Philip Morris's misrepresentations in this case were not in the form of an explicit statement that Marlboro Lights or Cambridge Lights were healthier or safer, the Court finds that Class members *universally* understood the message of reduced risk from these products." *Id.* at *6 (emphasis added). Thus, the Court assumed that all consumers were deceived into believing light cigarettes were healthier or safe, simply because of the use of the word "light" or phrase "lowered tar and nicotine." Despite Illinois law requiring those alleging ICFA claims to show they were actually deceived by the allegedly deceptive conduct, the Court found "universal reliance by Class members." *Id.* The trial court found that "testimony and evidence also establishes that this understanding

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was relied upon as a causative or determining factor for all Class members even if the degree or extent to may have varied between Class members." *Id*. Finally, the trial court accepted a novel approach to determining damages based on an economist's testimony that consumers would have hypothetically demanded a deep discount had they known that light cigarettes were not healthier than regular cigarettes.

The Illinois Supreme Court Reversal. The Illinois Supreme Court, by a 4-2 vote, vacated the award on grounds that the ICFA exempts this type of claim because of the extensive regulation of cigarette advertising. *See* No. 96326, 2005 WL 3434368 (Ill. Sup. Ct. Dec. 15, 2005). Thus, other than in advisory dictum, the Court did not address the issue of the appropriateness of class certification. First, the Court closely examined federal regulation of light cigarettes over the past thirty-five years. This included the Federal Trade Commission's (FTC) entry into consent orders with the major tobacco companies in the 1970s. The consent orders specifically allowed the use of the words "low," "lower," or "reduced" or "like qualifying terms," such as "light," so long as the tar and nicotine content of the cigarette being advertised was clearly and conspicuously disclosed. The tar and nicotine level of the product were to be determined through a testing method used by the FTC. FTC regulation of light cigarettes continued with the enforcement of these consent orders, the continued monitoring and reporting to Congress on the sale of the products, and the FTC's reevaluation and continued use of its testing method over the past three decades. These actions were included in the FTC's annual report to Congress on its regulatory activities.

The Court then found that the ICFA's exception to actions or transactions "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States" applied to bar the claim. *Id*. at *33-45 (quoting 815 ILL. COMP. STAT. 505/10b(1)). The long-standing actions of the FTC with respect to regulating cigarette advertising including promotions regarding light cigarettes or low tar or nicotine cigarettes, the Illinois Supreme Court found, was sufficient to bar any private cause of action under the ICFA.

Almost lost in the multiplicity of pages (over 100) is the sound public policy rationale that supports this opinion. The public policy rationale can and should have broader application. There are two public policy bases for the decision. The first is reasonable expectation of an industry about the legality of its conduct. The Court believed, and articulated, why the tobacco industry was reasonable in believing that it acted in a legitimate way in promoting nicotine and tar content of its cigarettes and in using words such as "light" or "ultra-light" with respect to lower tar and nicotine products. The Court also recognized "a legislative policy of deference to the authority granted by Congress or the General Assembly to federal and state regulatory agencies and a recognition of the need for regulated actors to be able to rely on the directions received from such agencies without risk that such reliance may expose them to tort liability." *Id*. at *34. The second rationale has even broader application. The Court was clear that it might have personally chosen to prohibit or admonish cigarette companies from using words such as "light" or "low tar," but it was not a judicial function to use liability law to achieve that end:

> [B]y exempting certain conduct from liability even if the conduct itself is objectionable, serves to channel objections to agency policy and practice into the political process rather than into the courts. Parties who desire to bring about change in agency policies or rules can take their complaints to the agency itself and can participate in the formal rulemaking process. If their concerns are not addressed by the agency, they may seek assistance from their legislators and may use the political process, including the power of the ballot box, if their voices are not heard.

Id. (internal citations omitted). In a nutshell, the majority opinion is an authoritative condemnation of "regulation through litigation." *See* Victor E. Schwartz & Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, Briefly, (Nat'l Legal Center for the Pub. Int., Wash., D.C.) Vol. 3, No. 11, Nov. 1999.

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In *dicta*, the Court discussed two additional issues and gave its view on matters that also have broad implications. First, it suggested that class action treatment in "light" cigarette cases was inappropriate because there were individual questions of fact that varied from person to person. There could be no broad finding that all persons chose to smoke "light" cigarettes because they believed that they were healthier than full-flavored cigarettes, particularly given ICFA's requirement that plaintiffs show they were actually deceived and that this deception caused them to purchase the product. For example, the Court noted that some youth might have chosen to smoke "light" cigarettes because their friends did. *See id*. at *48. Others may have switched between various brands and cigarette types during their smoking history as a matter of personal preference. Finally, consumers may have smoked the cigarette in different ways, which would have affected the actual level of inhaled nicotine and tar.[1]

In a second *dictum*, the Court sharply criticized the damage model the plaintiffs' lawyers attempted to use. The plaintiffs could not show that "light" cigarettes were more expensive than full-flavored ones; in fact, both types of cigarettes were sold at the same price. In an attempt to overcome the lack of any actual damages, the plaintiffs presented "expert" testimony that found, on the basis of an Internet survey of lights smokers that they would have sought a discount of between 77.7% and 92.3% of the purchase price had they known that the light cigarettes did not have the health attributes that they claimed their advertising and labeling suggested. The plaintiffs sought recovery of this hypothetical "overpayment." The Illinois Supreme Court expressed "grave reservations" about this "novel approach" to computing damages. In a concurring opinion, Justice Karmeier expanded upon this issue and made absolutely clear that a plaintiff seeking recovery in a consumer fraud case had to show actual economic loss. *See id.* at *50-55 (Karmeier, J., specially concurring).

Significance of the Ruling. Should courts in other states follow the Illinois Supreme Court's sound reasoning, *Miles-Price* could have a broad impact on claims brought under consumer protection statutes, particularly lawsuits involving products or services in regulated industries.

1. Application of Consumer Protection Statutes to Regulated Conduct. The *Price* decision will increase the importance of statutory exemptions for conduct that is approved or authorized by federal or state government agencies. In that regard, approximately two thirds of state consumer protection statutes include an exemption similar to the contained in the Illinois law. *See* Victor E. Schwartz & Cary Silverman, *Commonsense Construction of Consumer Protection Statutes*, 54 KAN. L. REV. – (forthcoming 2006). While the narrow holding of the Court is tobacco industry-specific, the decision could have positive implications for the pharmaceutical industry, particularly with respect to direct-to-consumer advertising. This advertising is directly reviewed by the Food and Drug Administration with even more specificity than the FTC's *de facto* approval of tobacco companies' utilizing the words "light" and "ultra light." The Court's decision may also affect consumer protection litigation involving other industries where advertising or labeling falls under a specific state or federal regulatory body. The multi-page and painstaking analysis by the Court of the FTC's regulation of light cigarette marketing suggests that defendants in other industries need to carefully spell out how their advertising of products is regulated in claiming similar exemptions.

2. The Fundamental Choices Available to State Courts in Interpreting Consumer Protection Acts. The *Miles-Price* decision, and the split between members of the Illinois Supreme Court, highlights several fundamental choices available to courts in interpreting state consumer protection statutes. Courts can allow personal injury lawyers to utilize regulation through litigation theories and promote overly broad interpretations of consumer protection statutes. In effect, the personal injury lawyers will try to create

[1]The Illinois Supreme Court's reasoning in this regard is directly contrary to the Supreme Judicial Court of Massachusetts' approach in *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476 (Mass. 2004), which swept this issue under the rug and placed all "light" cigarette smokers' decisions in a Cuisinart. *See* Victor E. Schwartz & Leah Lorber, *State High Court Ruling Departs From Tort Principles In Consumer Protection Cases*, WLF LEGAL BACKGROUNDER, vol. 20, no. 4, Jan. 14, 2005, at http://www.wlf.org/upload/011405LBSchwartz.pdf.

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lawsuits targeting any conduct that they can allege is either "unfair" or "deceptive," regardless of whether a regulatory body permitted or authorized the transaction or activity. Courts can also permit plaintiffs' lawyers to circumvent the need to show an actual injury and for the product or service to have caused that injury, or they uphold these traditional requirements of tort law. Courts can allow plaintiffs' lawyers to disguise product liability claims as consumer protection lawsuits when they cannot show that a product is defectively designed or lacked sufficient warnings. Courts can exacerbate these misstep by certifying class actions where individual issues of fact or law do not predominate. The trial court in *Miles-Price* followed this flawed path, but the Illinois Supreme Court's decision upheld fundamental principles of tort law and rejected those fallacies.

It is important to note that the Illinois Supreme Court's decision was not based on federal preemption, but an interpretation of its own state consumer protection statute. Unlike federal preemption, a state court's interpretation of a state law does not raise a federal question that is subject to further appeal before the Supreme Court of the United States. In addition, although such statutory provisions are similar, courts in different states could reach different decisions as to their effect based on variations in the text, principles of tort law, and public policy. For example, in *Miles-Price*, the Illinois Supreme Court found that even though the text of the statutory exemption was fairly narrow in that it required the federal or state agency to "specifically authorize" the conduct, as opposed to being based on "mere compliance," the close and persistent regulation of the marketing of light cigarettes over three decades fulfilled this requirement. The Court gave a sound and practical interpretation of the ICFA.

3. The Appropriateness of Class Certification of Consumer Protection Claims Where There Are Individual Issues of Fact. Earlier this year, in *Avery v. State Farm Mutual Insurance Company*, 835 N.E.2d 801 (Ill. 2005), the Illinois Supreme Court addressed another instance of abuse of the ICFA. That case involved an insurer's practice of using generic crash parts instead of more expensive original equipment manufacturer parts in insurance-covered automobile repairs. It was brought as a nationwide class action in Williamson County covering 4.7 million State Farm policyholders in forty-eight states and the District of Columbia. The Illinois Supreme Court's reversal of class certification in *Avery* reemphasized the need to show actual deception under the statute and expressed constitutional doubts over speculative damage awards based on speculative expert testimony. The primary basis of its ruling with respect to the Illinois Consumer Fraud Act claim, however, was its finding proper respect for the sovereignty of sister states suggested that the statute should not apply to transactions that occurred outside of Illinois. Thus, the question of whether the requirement that each class member show actual deception precludes class certification in Illinois was left for another day. In *Miles-Price*, the Illinois Supreme Court addressed that issue in very strong *dicta*. We believe that both *Avery* and *Miles-Price* reaffirm the need for each individual to show he or she was actually deceived by a representation of the defendant, and casts doubt over the viability of class certification that would ignore this significant issue of fact.

Conclusion. Consumer protection acts serve a legitimate public purpose. State attorneys general can utilize them to stop true acts of fraud and deception. Private claims can and should address situations where an individual has suffered true economic harm because of a defendant's deceptive practice. On the other hand, as *Miles-Price* illustrates, consumer protection acts should not be utilized by personal injury lawyers or courts to enforce personal agendas of public policy. That is for the relevant administrative agency to perform. Finally, although in dicta, *Miles-Price* is a strong reminder that consumer protection acts should not be used as a lawnmower for fundamental principles of substantive and procedural law. When individual consumer claims vary on key issues as they did with respect to how individual members and the public viewed the words "light" and "ultra light," those differences should be respected by courts and class action treatment of such claims should be rejected.

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