

Not Reported in P.3d, 2001 WL 34090200 (Ariz.Super.)
 (Cite as: 2001 WL 34090200 (Ariz.Super.))

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Superior Court of Arizona.
 Julie COCCA, et al.
 v.
 PHILIP MORRIS INC

No. CV 1999-008532.
 July 20, 2001.
 July 24, 2001.

RULING ON CERTIFICATION OF CLASS
 KAUFMAN, J.

1. *Ruling and Summary of Reasons for Ruling.*

*1 The Motion to Certify this Action as a Class Action is denied. The four most important reasons, each of which is sufficient for denial, are the following:

1. Plaintiffs fail to meet the requirements of Rules 23(a)(3) and 23(a)(4) of the Ariz. Rules of Civil Procedure.
2. Although there are significant common questions of law and fact concerning liability, questions that vary from class member to class member are predominant as to liability and overwhelmingly predominant as to damages.
 - 2.1 Damages issues would require separate hearings for many class members. The plaintiffs' suggestion to use statistical averaging of claims to arrive at equal amounts of compensation for each class member (if liability were proved) would significantly overcompensate some class members and undercompensate others.
 - 2.2 With respect to liability issues, there are significant differences in the products bought, the advertising used, and evidence with respect to the reasons that individuals bought products.
3. Neither declaratory nor injunctive relief would be proper because of issues related to federalism and

the Federal Trade Commission's occupation of the field.

4. Efforts to create a certifiable class, by excluding from the class of light cigarette purchasers all those with health problems, would distort the litigation with potential prejudice to many potential class members and defendant.

2. *"Splitting" of Cause of Action.*

Arizona law prohibits splitting of a cause of action. People who neither know, nor have reason to know, that they have health claims would not be adversely affected if they are excluded from the class. However, people who have claims for monies used in buying light cigarettes may also have developing health claims. They may be at risk under the doctrine that prohibits splitting of a cause of action. Potential claimants, fearing that they may be on notice of smoking-induced health problems, would join or fail to join the class at their own peril.

Potential individual awards to defined class members are relatively small. The risk to persons who are ill with conditions not clearly determined to be smoking related, and must decide whether to opt in or opt out, is much greater. Potential attorneys' fees in the litigation are great when compared with potential recovery for any individual class member. It is not in the best interests of some potential but unidentifiable class members for the Court to certify the class. It is, of course, in the best interests of others for the Court to do so.

3. *Findings and Conclusions*

I. *In General:*

Neither the requirements of Rule 23(a)(3) nor those of Rule 23(a)(4) are present in this case. Each of those subsections is an absolute prerequisite to certification of the class. In addition, the questions of law and fact common to the members of the class are less significant than, and do not predominate over, the questions of law and fact affecting individual members.

*2 There is no substantial risk of inconsistent or varying adjudications with respect to individual

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members of the class which would establish incompatible standards of conduct for Philip Morris, the party opposing the class; however, such adjudications might impair or impede non-parties' abilities to protect their interests.

II. In Greater Detail:

Specifics.

1. Plaintiffs' complaint alleges that defendant fraudulently marketed light and ultra-light cigarettes under an implied representation that these products are healthier than regular cigarettes.

2. The complaint raises claims under Arizona's Consumer Protection Statute and for unjust enrichment and restitution.

3. In addition to profits and damages, plaintiffs seek an order enjoining defendant from advertising cigarettes as "light" or "ultra-light" and compelling defendant to publish research relating to these products. Plaintiffs also seek a monetary award to "fund a corrective public education campaign ... and clinical smoking cessation programs in the state."

4. On January 12, 2001, plaintiffs filed a motion seeking certification of a class under Ariz. Rules of Civil Procedure Rule 23(b)(2) and 23(b)(3). The proposed class is to comprise "all residents of the state of Arizona who have purchased any type of Philip Morris 'light' or 'ultra-light' cigarettes." However, counsel attempt to preserve the action by removing those with related health problems and possibly those who used the cigarettes with lowest tar and nicotine from the class. These efforts do not avoid fundamental barriers to class certification.

5. Ariz. Rules of Civil Procedure, Rule 23 has a two-part approach to class certification. Four absolute prerequisites are set forth in Rule 23(a) and additional prerequisites are set forth in alternative or disjunctive form in Rule 23(b). As noted earlier, plaintiffs failed to meet the requirements of Rule 23(a)(3) and Rule 23(a)(4). None of the requirements of Rule 23(b) has been met.

6. The risks described in Rule 23(b)(1) have not been shown to exist. There is no showing of a

ground for injunction and injunctive relief would be inappropriate under principles of federalism described earlier in this order.

7. The requirements of Rule 23(b)(3) are not met because the predominant issues in the case on both liability and damages (especially on damages) require individual adjudications rather than class adjudications.

8. Thus, plaintiffs meet only the requirements of Rule 23(a)(1) and 23(a)(2). This is insufficient as a matter of law for the certification of the class to go forward.

9. The burden of proof on class certification is on the plaintiffs and they have failed to meet that burden.

10. With respect to the standards for private action under the Arizona Consumer Fraud Act ([ARS Sections 44-1521](#) et seq.), they are adequately stated in defendant's proposed findings of fact and conclusions of law beginning at page 6. There is a close question as to whether the combined issues of law and fact relevant to the Consumer Fraud Act would involve substantial differences among potential class members. The Court is not prepared to decide at this time whether common issues predominate concerning the propriety of a Consumer Fraud Act claim. At this stage of proceedings, it appears that they would predominate on liability but they would not predominate on damages. A decision on this point, however, is unnecessary because of plaintiffs' inability to meet the requirements of Rule 23 Ariz. Rules of Civil Procedure.

*3 11. During the relevant time period, cigarette materials and designs changed frequently. For purposes of determining whether a particular smoker would have received significant health benefits through ingestion of less nicotine and fewer tars, the issue is likely to be brand specific and time-period specific. From the materials submitted to the Court, it appears highly likely that the accused brands do not all belong in the same class action. It is more likely than not that, for some individual brands, smokers belong in different classes from each other based on the time periods during which they used cigarettes of that brand.

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12. Significant issues are presented by the Federal Trade Commission's required methods for testing cigarettes. Tar and nicotine "contents" were measured by yields determined by smoking machines rather than by laboratory testing of tobacco and other materials present in the products. Advertising of light cigarettes referred to Government mandated testing. Presumably, the effects of that portion of advertising done in accordance with FTC tests varied among light cigarette smokers. Different smokers will present different liability and different damages issues based on knowledge of and reliance on government-mandated test information.

13. "Compensation" in smoking habits, and increasing the numbers of cigarettes smoked, varied also. This would require individualizing evidence as to class members on both liability and damages issues.

14. Beginning on p. 19 of defendant's proposed findings and conclusions, facts are set forth dealing with differences among the five plaintiffs. Significant differences exist and are somewhat predictive of wide variations among class members concerning liability and damages issues. This order will not repeat the record citations found in the proposed findings, but they are persuasive.

15. The requirement of Rule 23(a)(1), Ariz.R.Civ.P., is met.

16. The requirement of Rule 23(a)(2), Ariz.R.Civ.P., is met.

17. The requirement of Rule 23(a)(3), Ariz.R.Civ.P., is not met.

18. The requirement of Rule 23(a)(4), Ariz.R.Civ.P., is not met.

19. None of the requirements of Rule 23(b), Ariz.R.Civ.P., is met.

20. Plaintiffs have not met their burden of proof.

21. For this group of potential class members, a class action is inferior, not superior, to other available methods for claims adjudications.

22. Statute of Limitations issues will vary from class member to class member.

23. On the whole, the issues presented by the class would be unmanageable or uneconomic to manage.

24. Unlike [*Godbey v. Roosevelt Sch. Dist. No. 66*, 131 Ariz. 13, 638 P.2d 235, \(App.1981\)](#) there is no single policy or central fact that would largely dispose of all liability issues.

25. The unjust enrichment claims are questionable under the law; but assuming their propriety, they do not avoid the legal and procedural barriers to class certification.

Ariz.Super.,2001.
 Cocca v. Philip Morris Inc.
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