IN THE SUPREME COURT OF THE STATE OF OREGON

MARILYN C. PEARSON and LAURA GRANDIN, individually and on behalf of all similarly situated person,

Plaintiffs-Appellants,
Respondents on Review,

vs.

PHILIP MORRIS, INC., aka Philip Morris USA, Inc., a foreign corporation,

Defendant-Respondent,
Petitioner on Review,

and

PHILIP MORRIS COMPANIES, INC., aka Altria Group, Inc., a foreign corporation,

Defendant.

Multnomah County Circuit Court
Case No. 0211-11819

CA A137297

SC S061745

MERITS BRIEF OF *AMICUS CURIAE* MAURICE J. HOLLAND IN SUPPORT OF PETITIONER ON REVIEW

En Banc Court of Appeals Decision, June 19, 2013
Decision on Reconsideration, August 23, 2013

Opinion by Armstrong, J., joined by Wollheim,
Ortega, Sercombe,
Nakamoto, and Egan, JJ.

Dissent by Duncan, J., joined by Haselton, CJ, and
Schuman and Hadlock, JJ.

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February 2014

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I. INTRODUCTION

I should state at the outset that my attention to this case was first drawn by counsel representing defendants, Philip Morris USA (hereinafter "defendant"), who had concluded that the Court of Appeals erred in this case by reversing the circuit court judgment, and had erroneously applied Oregon's class action provision, ORCP 32. They had also concluded that, if allowed to stand, the prevailing opinion in the Court of Appeals, *Pearson v. Philip Morris, Inc.*, 257 Or App 106, 306 P3d 665 (2013) (en banc), could confuse the law respecting class actions in this state. After studying the opinion of the circuit court and that of the Court of Appeals, I have independently come to agree with both of those conclusions. The circuit court judgment, as elucidated by the letter opinion of the Hon. Janice R. Wilson (ER-11), denied plaintiffs' motion to certify this action as a class action and their alternative motion to certify a so-called issue class.

I am under no obligation to adopt the arguments of counsel representing Philip Morris, Inc., or those of any other counsel of record in this case. Rather, the views expressed in this brief are attributable only to me. For that reason, unusual in a court document of this kind, I shall for the most part write in the first person.

In consideration of your already heavy reading burden, I shall be brief. Except when their absence would be inexcusable, I shall dispense with the citations to the record and case law I am sure the parties' briefs will supply in ample measure.

Another consideration counseling brevity on my part is that the parties in this case are represented by experienced, highly-skilled counsel, whose briefs will doubtlessly advance every reasonable contention for, respectively, reversal or affirmance of the Court of Appeals judgment. It would be a misuse, perhaps an abuse, of the permission this Court has graciously granted me to file this brief *amicus curiae* only to burden you, and counsel for the parties, with reading yet another brief which merely summarizes or rewords arguments and contentions perfectly well advanced in the briefs filed on behalf of the parties.

My credentials for imposing on you with my views concerning the certifiability of this action as a class action consist of some thirty-five years teaching, among others, the first-year course in Civil Procedure at the law schools of the University of Oregon and Indiana University and, for about ten years, co-teaching with the Hon. Karsten H. Rasmussen an upper-level course on Oregon civil procedure. In addition, I had the privilege of serving as Executive Director of the Oregon Council on Court Procedures for twelve

years. Of course, I am not authorized to speak on behalf of the Council, and do not purport to do so.

I am now fully retired, so my motivation for writing this brief stems solely from my continuing interest in the excellence of Oregon civil procedure.

II. WHY THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND CIRCUIT COURT JUDGMENT REINSTATED.

A. Class Actions Require a Higher Degree of Cohesion Than Exists in the Case at Bar.

No one knowledgeable about class actions doubts that, to function properly, the representative plaintiff's claim must be cohesive with the claims of proposed individual class members. "Cohesive" in this context means that, apart from the measure of damages recoverable by the named plaintiffs and by proposed individual class members, the latters' claims must involve a sufficient number of issues of law and fact identical to the claims of would-be representative plaintiffs. This cohesion, or common issues, consideration is set forth in ORCP 32 B(3).[1]

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[1] ORCP 32(B) provides, in relevant part:

> "An action may be maintained as a class action if the prerequisites of section A of this rule are satisfied, and in addition, the court finds that a class action is superior to other available methods for the fair and

ORCP 32 B(3) is a challenging provision to apply, both for trial and appellate courts. For the trial judge, it is just one of eight factors to be considered when ruling on a motion to certify a class action, but there is no indication stated in ORCP 32 B about the relative weight assignable to each, necessarily leaving that calculation to the sound exercise of discretion on the part of the motion judge. That is one reason, probably the main one, why the ultimate determination of whether "a class action is superior to other available methods" is rightly regarded as an exercise of trial court discretion, not a ruling on a point of law. *See, e.g.*, *Newman v. Tualatin Dev. Co.*, 287 Or 47, 51, 597 P2d 800 (1979).

ORCP 32 B is, as well, attended with some difficulty for appellate courts asked to review grants or denials of motions to certify class actions. An important reason for that is that the scope of appellate review varies, ranging from review for legal error for questions of law, to abuse for the trial court's

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> efficient adjudication of the controversy. The matters pertinent to this finding include:
>
> "* * * * *
>
> "B(3) The extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members * * *."

exercise of discretion, and to substantial support in the evidence of record for limited review of trial court findings of fact. The lines separating these varied scopes of review are often blurry when they must be respected in a particular case.

Cohesion is required, not merely to achieve efficiency by aggregating hundreds or thousands of individual claims, but, more importantly, to assure fundamental fairness to class action defendants. For example, in the case at bar, suppose that the named co-plaintiffs prevail in their action against the defendant. Were this action certified as a class action, the defendant would thereby be subject to liability to each member of the class who can prove his or her entitlement to recovery, numbering, by plaintiffs' counsel's estimate, some 100,000 individuals. That would transform the present individual action, wherein the defendant might be held liable to one or both the named plaintiffs in amounts of a few hundred dollars, into one where the defendant could ultimately be adjudged liable in an aggregate amount totaling in the hundreds of thousands, or even millions, of dollars.

There is nothing in principle objectionable when Philip Morris USA, or any defendant, is required to pay millions of dollars in damages if that is the appropriate sum found to have injured or harmed someone in some manner for which the law provides redress. But that is so only if the defendant is accorded

an opportunity fairly to contest any claim against it, including availing itself of any pertinent affirmative defenses, such as a pertinent statute of limitations. That opportunity is guaranteed in Oregon courts by the due process clause of the Fourteenth Amendment to the United States Constitution.

The degree of certainty required properly to certify a class action in the context of this case strikes me as much akin to that required when a trial judge grants a defendant's motion for summary judgment. In other words, granting certification in this case seems to me the equivalent of granting each member of the proposed class summary judgment against the present defendant on all issues deemed to be common, assuming that the class representatives prove the elements of their claims with common proof.

Our procedure allows for summary judgment in appropriate cases when the motion judge concludes that letting the case go to trial would be a waste of time because, judging from the record, the plaintiff's lack of evidence is such that, after ample time for discovery and investigation, it would not withstand a directed verdict motion at the close of his case. We do not say that a proper grant of summary judgment unlawfully deprives the adverse party of the right to try his or her case to a jury since that right is conditioned on plaintiffs, and on defendants respecting issues as to which they bear the burden of production, furnishing a modicum of admissible probative evidence in advance of trial.

This is not the place to recall for you the basics of first-year Civil Procedure, beloved as it doubtless is in memory, and the forgoing discussion might seem an annoying digression. Of course I do not intend it to be so since it seems to me that just as an improper grant of summary judgment, if not reversed on appeal, would unlawfully deprive the adverse party of his or her right to trial by jury, so too in the case at bar an improper certification of a class action would unlawfully deprive the defendant of the right to defend, before a jury, against perhaps thousands of class members' claims deemed provable by common evidence, but not homogeneous with the claims of the named plaintiffs. The judiciary's understandable enthusiasm for efficiency, by means of aggregation and consolidation of apparently similar claims, obviously cannot countenance that result, for the ends of justice must always trump the siren calls of sheer judicial efficiency. The reason that class certification of this action would defeat the ends of justice will, I trust, become clear in the immediately following subsection of this brief.

B. Why the circuit court was correct in determining that, there are crucial issues of fact that are not common, but require individual adjudications.

The named plaintiffs and the projected class members all base their claims substantively on the same provision of Oregon's Unfair Trade Practices

Act (UTPA).[2] Also, it appears that all class members were, by definition of the class, exposed to the same conduct on the part of the defendants, namely, the marketing of Marlboro Light cigarettes with the words "Light" and "lower tar and nicotine" on the packaging. So far, so good as far as certifiability is concerned.

However, there are many glaring exceptions to this commonality of legal issues, one of which is the issue of whether a few, many, or most class members' individual claims might be time-barred by operation of the pertinent statute of limitations.[3]

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[2] ORS 646.638(1) provides, in relevant part:

> "Except as provided in subsections (8) and (9) of this section, a person that suffers an ascertainable loss of money or property, real or personal, as a result of another person's willful use or employment of a method, act or practice declared unlawful under ORS 646.608, may bring an individual action * * * to recover actual damages or statutory damages of $200, whichever is greater."

[3] ORS 646.638(6) provides:

> "Actions brought under this section must be commenced within one year after the discovery of the unlawful method, act or practice. Notwithstanding this limitation, if a prosecuting attorney filed a complaint to prevent, restrain or punish a violation of ORS 646.607, the complaint tolls the statute of

The Court of Appeals discussion of the limitations defense was, with respect, puzzling. *Pearson*, 257 Or App at 166-69. It recognized that whether a given claim was time-barred depends on what each claimant knew and when he or she knew it, and that whatever was determined in that regard in the trial of the named co-plaintiffs' action would not be common to all 100,000 members of the proposed class. It also recognized that the damages recovered by each class member, if not wholly barred, could well turn on the exact date on which he or she learned that Marlboro Lights did not "inherently" deliver tar and nicotine lower than "full-flavored" cigarettes such as Marlboro Regulars. (By "inherently," the court apparently meant that the brand of cigarettes in question would deliver "lower tar and nicotine" regardless of how intensely they are smoked.)

A determination that either, both, or neither of the named plaintiffs' claims was time-barred could have no application to the claims of the class members, since the running of the applicable one-year limitations period depends upon what each class member knew and when he or she knew it. *See*

> limitations with respect to every private right of action under this section that is based in whole or in part on any matter set forth in the prosecuting attorney's complaint for the period of time in which the proceeding that the prosecuting attorney initiated is pending."

ORS 646.638(6). Thus, one untoward consequence of certifying this class would be to deprive the defendant of this valid affirmative defense against class members' claims that are time-barred. A possible result of this could well be a final assessment of total damages against the defendant far exceeding the amount provided by pertinent substantive law. In my opinion, this one lack of legal cohesion should, by itself, suffice to deny class certification in this case.

The Court of Appeals ventured a solution to this problem, but it is one that would negate class action certification. This solution would assign any limitation defense against class members to separate adjudications against each individual member. It is difficult to see how such a procedure would lend itself to a simple claim form method for ascertaining which claims are time-barred, with no live testimony and or cross-examination. Given the widespread publicity at the time about the failings of "light" cigarettes (SER 33-39, ¶¶ 68-80; SER 44-51, ¶¶ 103-17), limitations is certainly no "theoretical defense requiring individual inquiries, for which there is little basis in fact." *Pearson*, 257 Or App at 150 (quoting *Bernhard v. First Nat'l Bank*, 275 Or 145, 158, 550 P2d 1203 (1976)).

Other predominating individual issues also exist. The circuit court ruled that claims arising under ORS 646.638(1) require the claimant to prove, among other facts, two things, the first thing being that the alleged misrepresentation

was a misrepresentation with regard to him or her, meaning that the claimant did not actually get lowered tar and nicotine from smoking Marlboro Lights as a result of the manner in which he or she smoked them. ER 19. The second matter requiring proof was that the claimant had relied on the words "Light" and "lower in tar and nicotine" on the packaging, meaning that, in choosing Marlboro Lights, the purchaser did not do so for a reason having nothing to do with lower tar and nicotine, such as a liking for their taste. ER 16.

Both the circuit court and the Court of Appeals analyzed the question of certifiability from the perspective of the second claim or count set forth in paragraph 23 of plaintiffs' Fourth Amended Complaint, which alleged that Marlboro Lights were misrepresented as being "inherently" lower in tar and nicotine than full-flavor cigarettes such as Marlboro Regulars. *See* ER 20; *Pearson*, 257 Or App at 134. From the plaintiffs' perspective, this second count must be intended to obviate the difficulties presented by the fact that the amount of tar and nicotine a smoker receives from a cigarette depends on the manner in which he or she smokes it, a fact amply supported by the evidentiary record before the circuit court.

According to the Court of Appeals opinion, plaintiffs' counsel has chosen to present the case for class certification, both at the certification hearing in circuit court and before the Court of Appeals itself, entirely in the terms

established by the aforementioned second claim, the claim alleging that the defendant misrepresented Marlboro Lights as "inherently" lower in tar and nicotine regardless of how they are smoked. *Id.* at 134. The second claim, unlike the first, removes the troubling variable of individual smoking habits from the certification calculus, a variable strongly hinting at a factual issue not common throughout the prospective class, but one requiring individual adjudications.

But the proofs required by the second count do not, to my mind, strengthen the case for class certification. My reason for so thinking is simple and straightforward. That reason starts from the undisputed fact that the packaging of Marlboro Lights did not contain the word "inherent," or any of its variations or equivalents. Nor was there anything on the packaging stating anything to the effect of "lower in tar and nicotine no matter how you smoke them." To read the words that did appear on the packaging as representing that Marlboro Lights were "inherently" low requires a purely factual inference made by a jury.

If that issue is allowed to go to a jury, it must happen in individual adjudications at the instance of each class member. That is because the necessary inference implicates states of mind, perceptions and beliefs, all matters that vary from one individual to another. The defendant in this case

must not be deprived of the opportunity to disprove the required inference the "old fashioned way," one claimant at a time. This should not be obviated by allowing proof of this issue by common evidence. The judgment of the circuit court would avoid that sorry outcome; with respect, the judgment of the Court of Appeals would not, and should be reversed.

III. CONCLUSION

Readers might assume from what I have just written that I am hostile to class actions. But they would be wrong. I believe class actions have been considerably overused in recent years, and have gained a certain allure from their association in many minds with some of the fine work they have surely accomplished.

Class actions seem to function at their best when the relief sought is prospective, as when an injunction or declaration is the desired remedy.

Class actions seeking consumer protection by means of monetary compensation for past harms, along the same lines as the case at bar, are more problematic and complex.

The case at bar, a consumer protection action, is appealing to most peoples' sense of justice, but is fraught with procedural difficulties, in large part because it is predominated by individual issues. The Court of Appeals decision

amplifies those difficulties and will alter Oregon's law of class actions in ways that this court should avoid.

Respectfully submitted this 26th day of February, 2014.

By: _____

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(D)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,975 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 26, 2014, I filed the foregoing **MERITS BRIEF OF *AMICUS CURIAE* MAURICE J. HOLLAND IN SUPPORT OF PETITIONER ON REVIEW** by mailing the original and seven copies deposited in the United States Mail at Eugene, Oregon, enclosed in a sealed envelope with postage prepaid, addressed to:

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