

STATE OF MISSOURI )  
 ) SS  
CITY OF ST. LOUIS )

**FILED**  
DEC 17 2009

MISSOURI CIRCUIT COURT  
TWENTY-SECOND JUDICIAL CIRCUIT BY \_\_\_\_\_ DEPUTY  
(City of St. Louis)

MARIANO V. FAVAZZA  
CLERK, CIRCUIT COURT

DAYNA CRAFT, JASON STONE, )  
DEBORAH LARSEN, WENDY ALPER- )  
PRESSMAN, Individually and )  
on Behalf of All Others )  
Similarly Situated, )  
 )  
Plaintiffs, )

vs. )

PHILIP MORRIS COMPANIES, )  
INC., a corporation, and )  
PHILIP MORRIS INCORPORATED, )  
a corporation, )  
 )  
Defendants. )

Case No. 002-00406-02

Division No. 6

ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION OF  
CLASS DEFINITION

The Court has before it Plaintiffs' Motion for Reconsideration Pursuant to Rule 52.08. The Court has reviewed the submissions of the parties, the relevant authorities, and the arguments of counsel, and now rules as follows.

Plaintiffs bring the present action for damages and injunctive relief on behalf of a class of Missouri residents who smoke or have smoked Marlboro Lights cigarettes, excluding any persons with smoking-related claims for personal injuries. Plaintiffs claim that Defendants have violated the Missouri Merchandising Practices Act, and thereby cheated Plaintiffs and the class, by falsely representing that Marlboro Lights are a

low-tar, low-nicotine cigarette that delivers less tar and nicotine than regular Marlboros or other comparable "regular" cigarettes, when in fact they do not deliver such lower amounts of tar and nicotine.

This case was filed on February 14, 2000. On December 31, 2003, this Court certified the class in this case defined as follows:

All residents of Missouri who purchased and consumed Defendants' Marlboro Lights cigarettes, in Missouri, at any time between the first date the Defendants placed their Marlboro Lights cigarettes into the stream of commerce in Missouri through the date the Court certifies this suit as a class action, but who do not have a claim for personal injury resulting from the purchase or consumption of cigarettes.

On September 13, 2004, this Court ordered that the class certification be amended to state as follows:

All residents of Missouri who purchased and consumed Defendants' Marlboro Lights cigarettes, in Missouri, at any time between the five years immediately preceding the filing of the Petition in this suit through the date the Court originally certified this suit as a class action (December 31, 2003), but who do not have a claim for personal injury resulting from the purchase or consumption of cigarettes.

Plaintiffs seek an order from this Court reinstating the class definition certified in the Court's December 31, 2003 Order. Plaintiffs contend that under Missouri law the earliest

possible time the statute of limitations could have begun to run is in 1998 and, as such, the current class definition is inconsistent with Missouri law. In the alternative, Plaintiffs argue that Defendants' fraudulent concealment tolled the statute of limitations until 2001.

Rule 52.08, which governs class actions, is identical to Federal Rule 23, and federal interpretations of Rule 23 are considered in interpreting the Missouri rule. Craft v. Philip Morris Cos., 190 S.W.3d 368, 376 (Mo. App. E.D. 2005); See also Koehr v. Emmons, 55 S.W.3d 859, 864 n.7 (Mo. App. E.D. 2001), State ex rel. Byrd v. Chadwick, 956 S.W.2d 369, 377 (Mo. App. W.D. 1997).

Rule 52.08(d) states as follows:

**Orders in Conduct of Actions.** In the conduct of actions to which this Rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative

parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 62, and may be altered or amended as may be desirable from time to time.

Plaintiffs' claims are governed by Missouri's five-year statute of limitations for statutory actions under § 516.120 RSMo. Under Section 516.100 RSMo, Plaintiffs' claims would "not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment." See Powel v. Chaminade College Preparatory, Inc., 197 S.W.3d 576, 581 (Mo. banc 2006); Carr v. Anding, 793 S.W.2d 148, 150 (Mo. App. E.D. 1990).

Damages are sustained and capable of ascertainment as an objective matter "when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury." Powel, 197 S.W.3d at 581. "Because the capable of ascertainment standard is an objective one, where relevant facts are uncontested, the statute of limitations issue can be decided by the court as a matter of law." Id. at 585. "However, when contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is

a question of fact for the jury to decide." Id., citing Lomax v. Sewell, 1 S.W.3d 548, 552 (Mo. App. W.D. 1999).

Section 516.280 RSMo states as follows:

If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented.

"If a party takes affirmative action to conceal [a] fraud, the statute is tolled until the fraud is discovered." Misischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848, 867 (Mo. App. E.D. 2000). "[I]mproper acts by the defendant do not toll the statute of limitations unless the acts kept the plaintiff from actual knowledge of harm." Doe v. O'Connell, 146 S.W.3d 1, 4 (Mo. App. E.D. 2004). "There can be no fraudulent concealment that will prevent the running of the statute of limitations where the plaintiff knows of the cause of action or there is a presumption of such knowledge." Id.

Plaintiffs rely on Powel v. Chaminade College Preparatory, Inc., in their argument that the current class definition is inconsistent with Missouri law. 197 S.W.3d 576 (Mo. banc 2006). However, the objective standard for when damages are capable of ascertainment outlined in Powel is not inconsistent with and did not overrule the case law relied upon by this Court when it ordered that the class certification be amended on September 13,

2004. In fact, Powel explicitly contemplates a standard based upon a reasonable person in each individual plaintiff's position. Id. at 578. Powel supports this Court's finding in its September 13, 2004 Order that "the only alternative to holding mini-trials on this issue for essentially every class member is to limit the class definition to purchases made within five years preceding the filing of the Petition." See 197 S.W.3d at 578.<sup>1</sup>

In addition, it is clear under Missouri law that the actual knowledge of each individual class member is relevant to whether or not Defendants' alleged fraudulent concealment would toll the statute of limitations. See 146 S.W.3d at 4; See also Greeson v. Ace Pipe Cleaning, Inc., 830 S.W.2d 444, 447 (Mo. App. W.D. 1992) ("The concealment of a cause of action from a party who has a right to bring the action tolls the statute of limitations until the action is discovered or reasonably could be discovered by the owner of the cause of action."). As such, it is impossible to determine whether Defendants' fraudulent concealment would act to toll the statute of limitations on a class-wide basis.

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<sup>1</sup> As Defendant has noted, Federal Courts have consistently ruled that the statute of limitations presents individual issues that cannot be resolved on a class-wide basis in other "lights cases." See McLaughlin v. A. Tobacco Co., 522 F.3d 215, 233 (2<sup>nd</sup> Cir. 2008); Mulford v. Altria Group, Inc., 242 F.R.D. 615, 630 (D.N.M. 2007); Benedict v. Altria Group, Inc., 241 F.R.D. 668, 680 (D. Kan. 2007).

Order

THEREFORE, it is Ordered and Decreed that Plaintiffs' Motion for Reconsideration Pursuant to Rule 52.08 is hereby DENIED.

SO ORDERED:

December 17, 2009



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Michael P. David, Judge

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