IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CONNIE J. HOLMES, on behalf of herself and all others similarly situated,	)	C.A. No. 03C-08-167 JTV
Plaintiffs,	)	
v.	)	
PHILIP MORRIS USA INC.,	)	
Defendant.	)	

Submitted: July 10, 2009
Decided: December 4, 2009

Philip M. Finestrauss, Esq., Philip M. Finestrauss, P.A., Wilmington, Delaware. Attorney for Plaintiffs.

Donald E. Reid, Esq., Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Motion For Summary Judgment
DENIED

VAUGHN, President Judge

Holmes v. Philip Morris
C.A. No. 03C-08-167
December 4, 2009

OPINION

The plaintiff, Connie J. Holmes, on behalf of herself and others similarly situated, filed a class action complaint alleging that the defendant, Philip Morris USA Inc., violated the Delaware Consumer Fraud Act ("DCFA"), 6 *Del. C.* §§ 2511-2527, by using the descriptors "lights" and "lowered tar and nicotine" in the advertising and packaging of Marlboro Lights cigarettes. The defendant has moved for summary judgment.

FACTS

A. Pleadings

Connie J. Holmes is a Delaware resident who, for a period of almost twenty-three years, purchased and consumed an average of approximately 1 pack a day of Marlboro Lights. The plaintiff alleges that she switched from regular Marlboro brand cigarettes to Marlboro Lights in or around 1980, with the belief that "light" cigarettes presented reduced health risks. The plaintiff alleges that the defendant violated the DCFA[1] by deliberately deceiving consumers about the true and harmful nature of "light" and "lowered tar and nicotine" cigarettes.

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[1] The DCFA provides, in part:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

6 *Del. C.* § 2513(a).

The defendant claims that the descriptors "light" and "lowered tar and nicotine" are short hand references which were based upon measurements produced by the Cambridge Filter Method ("FTC Method").[2] The defendant contends that the use of the descriptors was developed and encouraged by the Federal Trade Commission ("FTC"). It further contends that the use of the descriptors is a merchandising practice which is exempt from the DCFA pursuant to 6 *Del. C.* § 2513(b)(2).[3]

B. History of the FTC's Interactions with the Cigarette Industry[4]

Beginning in the 1960's, before Marlboro Lights were introduced, the FTC developed a policy which encouraged manufacturers to reduce the tar and nicotine yields of cigarettes. Consistent with this policy, the FTC developed a uniform method for measuring tar and nicotine yields, known as the FTC Method. The FTC

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[2] As described by the United States Supreme Court:

> The Cambridge Filter Method weighs and measures the tar and nicotine collected by a smoking machine that takes 35 milliliter puffs of two seconds' duration every 60 seconds until the cigarette is smoked to a specified butt length. [T]he Federal Trade Commission . . . signaled in 1966 that the Cambridge Filter Method was an acceptable means of measuring the tar and nicotine content of cigarettes, but it never required manufacturers to publish test results in their advertisements.

Altria Group, Inc. v. Good, 129 S. Ct. 538, 542 n.2 (2008) (citation omitted). The Cambridge Filter Method is commonly referred to as the "FTC Method."

[3] § 2513(b)(2) exempts from liability "any advertisement or merchandising practice which is subject to and complies with the rules and regulations, of and the statutes administered by, the Federal Trade Commission . . . ."

[4] While the facts must be viewed in the light most favorable to the nonmoving party, discussion of the defendant's version of the FTC's interactions with the cigarette industry is helpful to the analysis of the issues.

Method utilized a smoking machine to measure the tar and nicotine content of cigarettes; however it failed to account for the compensatory behaviors of individual smokers.[5] Although the FTC was fully aware of this limitation, it decided to introduce the FTC Method to the cigarette industry.

In 1970, the FTC proposed a Trade Regulation Rule that would require cigarette manufacturers to disclose the tar and nicotine yields measured by the FTC Method. To avoid the cost and delay of the formal regulatory process, the FTC urged cigarette manufacturers to enter into an agreement which would effectuate the purpose of the proposed rule. The FTC rejected the tobacco industry's first proposed agreement and required a number of changes. After the industry revised the agreement to the FTC's exact requirements, the FTC voted to accept the agreement and withdrew its proposed rule. Under the terms of the resulting agreement, manufacturers were to disclose tar and nicotine yield measurements in non-permanent cigarette advertising with the legend "av. Per cigarette by FTC method." The FTC characterized the negotiation of the agreement as "Regulatory Activity" in its 1970 report to Congress. The FTC warned at the time that it would reinitiate rulemaking if the agreement was not effective in compelling tar and nicotine yield disclosures.

In 1971, manufacturers began using descriptors such as "lights" as short hand references to tar and nicotine yield measurements derived from the FTC Method. The FTC was fully aware of the use of these descriptors, but decided not to take any

[5] According to the plaintiff, these compensatory behaviors include inhaling deeper, taking more frequent puffs, taking larger puffs, and holding the smoke in the lungs for a longer period of time.

action to challenge their use. In fact, the FTC repeatedly told the tobacco industry that it would not challenge the use of such descriptors as long as they were only used as short hand references to FTC Method results.

Consistent with this policy, the FTC launched a proceeding against a cigarette manufacturer for stating that certain brands were "lower" in tar when the claim was not substantiated by the FTC Method. In a 1971 consent decree resolving the case, the FTC reaffirmed that it would not take action against the company for the use of descriptive terms such as "low," "lower," "reduced," or "like qualifying terms," provided that their use was "accompanied by a clear and conspicuous disclosure" of tar and nicotine yields substantiated by FTC Method results.[6]

In 1977, the FTC investigated claims that its measurements were misleading because some smokers might cover ventilation holes that are used on many cigarettes, including low yield cigarettes such as Marlboro Lights. The FTC also recognized that some smokers may "compensate" by covering ventilation holes, thereby increasing the amount of tar that they were actually inhaling. Notwithstanding these concerns, the FTC decided to retain its method.

In 1981, the FTC began an investigation of whether the unique filter design used in Barclay cigarettes was producing misleadingly low numbers when analyzed by the FTC Method's machine. Throughout the investigation and in subsequent litigation, the Barclay manufacturer argued that, because of compensatory smoking,

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[6] The quoted terms and phrases in this sentence are taken from an affidavit of a former FTC official, James C. Miller III.

the FTC system was so flawed that it was itself deceptive. In response, the FTC undertook a broad-based study of low tar cigarettes and compensatory smoking, consulted with renowned experts in smoking and health, and considered other testing methods. In the end, it again declined to change its method. In declining to change its regulatory program notwithstanding evidence of compensatory smoking, the FTC relied on epidemiological studies showing that persons who smoked cigarettes that measured lower in tar under the FTC Method were less likely to get smoking-related diseases than were persons who smoked cigarettes that measured higher in tar under the FTC Method.

In 1992, the FTC conducted an investigation focused specifically on whether the terms "lights" and "low tar" were deceptive and should be banned. After completing its investigation, the FTC again decided to take no action.

In 1995, the FTC entered into a consent decree with another cigarette manufacturer similar to the 1971 consent decree. The FTC reaffirmed its position that "express or implied representation[s] . . . that [a] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine" were not misleading or deceptive if the representations were substantiated by FTC Method results.[7] Consistent with these statements, the FTC repeatedly declined to challenge the use of descriptors such as "lights" in advertising (including the use of descriptors on packages), notwithstanding its awareness of allegations similar to those made by the plaintiff in this case.

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[7] The quoted terms and phrases are taken from an affidavit of a former FTC official, James C. Miller III.

In 2001, the National Cancer Institute issued Monograph 13, which conducted a re-analysis of the epidemiology and for the first time concluded that the reduced risk findings might be attributable to biases in the epidemiology. In September 2002, the defendant filed a petition with the FTC in light of new scientific developments, such as Monograph 13, asking the FTC to consider whether it should change its existing regulatory policies. The FTC finally took action to change its regulatory position in December 2008, more than five years after this lawsuit was filed.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[8] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[9] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[10]

DISCUSSION

In its motion for summary judgment, the defendant contends that its merchandising practice is exempt from the DCFA pursuant to § 2513(b)(2); and that

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[8] Super. Ct. Civ. R. 56(c).

[9] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[10] *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *1 (Del. Super.).

the U.S. Supreme Court's decision in *Altria Group, Inc. v. Good*[11] does not control whether the defendant is exempt from liability under § 2513(b)(2).

A. Exemption

The purpose of the DCFA is "to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices."[12] The General Assembly intended "that such practices be swiftly stopped and that [the DCFA] be liberally construed and applied to promote its underlying purposes and policies."[13] The subsection at issue in this case, § 2513(b)(2), states that the DCFA does not apply to "any advertisement or merchandising practice which is subject to and complies with the rules and regulations, of and the statutes administered by, the Federal Trade Commission."[14]

The defendant contends that the exemption requires only that the challenged conduct be (1) subject to the FTC's regulatory jurisdiction, and (2) compliant with the FTC's regulatory scheme. The defendant contends, and it seems clear, that its merchandising practices are subject to 15 U.S.C. § 45(a)(2), which empowers the FTC to prevent "unfair or deceptive acts or practices."[15]

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[11] 129 S. Ct. 538 (2008).

[12] § 2512.

[13] *Id.*

[14] § 2513(b)(2).

[15] 15 U.S.C. § 45(a)(2).

The defendant contends that it complied with the FTC's regulatory scheme because the FTC did not challenge the defendant's use of the descriptors and, in fact, permitted and encouraged their use. It relies in part on the Third Circuit case of *Pennsylvania Employees Benefit Trust Fund v. Zeneca Inc.*[16] In that case, suit was brought against a drug manufacturer and its parent company, alleging deceptive advertising under the DCFA.[17] The Third Circuit "decline[d] to read the DCFA exemption to require that an advertisement or merchandising practice must be expressly approved by the FTC in order to qualify for the exclusion."[18] The defendant contends that compliance with a regulatory scheme or practice administered by the FTC satisfies the exemption.

The plaintiff contends that the "express" language relied upon by the defendant is merely dicta, and that this Court should instead follow *Aspinall v. Philip Morris, Inc.*[19] *Aspinall* was a "lights" cigarette case similar to this one. The plaintiffs brought suit against this same defendant and others, alleging unfair or deceptive marketing of cigarettes as delivering lower tar and nicotine than regular cigarettes. The Massachusetts consumer fraud statute contained the following exemption: "Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws

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[16] 499 F.3d 239 (3d Cir. 2007), *vacated and remanded on other grounds*, 129 S. Ct. 1578 (2009).

[17] 499 F.3d at 241.

[18] *Id.* at 242-43.

[19] 902 N.E.2d 421 (Mass. 2009).

as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States."[20] In affirming a grant of summary judgment for the plaintiff, the Supreme Judicial Court of Massachusetts held that the manufacturers failed to meet their burden of showing that the FTC affirmatively permitted the use of descriptors such as "lights" and "lower tar and nicotine."[21] In doing so, it described the defendants' arguments as resting on the premise that through consent decrees with other manufacturers, such as the 1971 decree, and the FTC's failure to take action against manufacturers who used the descriptors, the FTC "permitted" their use.[22] The Supreme Judicial Court of Massachusetts interpreted *Good* as expressly rejecting these arguments.[23]

The plaintiff also relies upon the U.S. Supreme Court's decision in *Good*.[24] In that case, cigarette smokers sued a tobacco products manufacturer, alleging that the manufacturer's use of the descriptors "light" and "lowered tar and nicotine" were misrepresentations under the Maine Unfair Trade Practices Act ("MUTPA").[25] The Court concluded that the FTC "never required that cigarette manufacturers disclose

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[20] Mass. Gen. Laws ch. 93A § 3 (2006).

[21] 902 N.E.2d at 436-37.

[22] *Id.* at 437 n.9.

[23] *Id.*

[24] 129 S. Ct. 538 (2008).

[25] *Id.* at 541.

tar and nicotine yields, nor has it condoned representations of those yields through the use of 'light' or 'low tar' descriptors."[26]

Another pertinent case favorable to the plaintiff is *U.S. v. Philip Morris USA Inc.*[27] In that case, the United States Court of Appeals for the District of Columbia affirmed a district court judge's finding that this same defendant, with others, engaged in a scheme to defraud smokers by falsely representing that light and low tar cigarettes delivered less nicotine and tar, and therefore presented fewer health risks than full flavor cigarettes (among other acts not relevant here).[28]

After considering all of the parties' contentions and the authorities upon which they rely, I have concluded that the Delaware exemption is not satisfied by a showing that a defendant complied with an FTC regulatory scheme or practice, or that the FTC decided not to take action against a merchandising practice, or even that the practice was blessed by FTC policy. The plain language of the exemption requires that the defendant show that the merchandising practice complied with rules and regulations of and statutes administered by the FTC.

In the wake of the recent "lights" cigarettes cases relied upon by the plaintiff, summary judgment in favor of the defendant does not seem possible. For example,

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[26] *Id.* at 550. As discussed later in this opinion, *Good*, while instructive, is legally distinguishable because it was a preemption case.

[27] 566 F.3d 1095 (D.C. Cir. 2009).

[28] The case is legally distinguishable because it was a RICO case.

I conclude that the factual findings recited in *U.S. v. Philip Morris USA Inc.*[29] seem utterly in conflict with any contention that, as a matter of law, the defendant's merchandising practice complied with a statute administered by the FTC.[30] In addition, *Good* and *Aspinall* lead to the conclusion that there is at least a question of fact which precludes summary judgment for the defendant.

B. Application of *Good*

The defendant contends that the U.S. Supreme Court's decision in *Good* does not control whether the defendant is exempt from liability under § 2513(b)(2) because the Court did not address whether the FTC's regulatory history triggers the exemption. In support of its argument, the defendant relies, in part, upon another lights class action case, *Price v. Philip Morris, Inc.*[31] In *Price*, the Illinois Supreme Court concluded that the Illinois exemption required deference to FTC policy and practice as it carries out its duties. The Illinois exemption is materially distinguishable from the Delaware exemption, and therefore the analysis in that case is not persuasive here. I have also reviewed the other cases relied upon by the defendant and find them unpersuasive.

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[29] I express no opinion as to the district court judge's findings of fact in that case.

[30] I note that a seeming question may be whether the exemption requires a showing of compliance with rules and regulations of *and* statutes administered by the FTC, or whether it is satisfied by a showing of compliance with a statute administered by the FTC where there are no applicable rules and/or regulations. This issue, if it is an issue, was not addressed by the parties and need not be addressed by me to decide the motion.

[31] 848 N.E.2d 1 (Ill. 2005).

I do, however, agree with the defendant that *Good* is not controlling, because it is a preemption case and did not consider the Delaware statute. Despite these distinguishing characteristics, the Supreme Court's comments on the history of the interactions between the FTC and the cigarette industry, and the inferences drawn from that history, are relevant to the defendant's motion.

Based on the foregoing, the defendant's Motion for Summary Judgment is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
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