STATE OF MINNESOTA DISTRICT COURT COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA, BY HUBERT H. HUMPHREY, III, ITS ATTORNEY GENERAL, and BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

PHILIP MORRIS INCORPORATED; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES P.L.C.; BRITISH-AMERICAN TOBACCO COMPANY LIMITED; BAT (U.K. & EXPORT) LIMITED; LORILLARD TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.; AND THE TOBACCO INSTITUTE, INC.,
Defendants.

Civil Case No. C 1-94-8565

October 21, 1997

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS BRITISH-AMERICAN TOBACCO COMPANY LIMITED ("BATCo") AND BAT (U.K & EXPORT) LIMITED ("BATUKE) FOR SUMMARY JUDGMENT

To: Plaintiffs above-named and their counsel, Robins, Kaplan, Miller & Ciresi, 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, Minnesota 55402.

Introduction

Despite the exhaustive discovery they have undertaken in this lawsuit, Plaintiffs have failed to identify a viable cause of action against British-American Tobacco Company Limited ("BATCo") or BAT (U.K. & Export) Limited ("BATUKE"). None of the claims raised in their Amended Complaint can be maintained as to these two defendants.

The most significant impediment to raising any claims here against BATCo or BATUKE is the complete failure of proof that either company caused injury to Plaintiffs. The discovery record is devoid of any evidence that any Minnesota Medicaid recipient smoked and was injured by cigarettes manufactured and/or sold by BATCo and BATUKE. The discovery record is also devoid of any evidence that Blue Cross and Blue Shield of Minnesota was liable for any charges incurred in connection with a smoking-related disease caused by BATCo and BATUKE products.

Plaintiffs' claims against BATCo and BATUKE fail for additional reasons. First, all of Plaintiffs' claims against BATCo and BATUKE are largely or completely preempted by the Federal Cigarette Labeling and Advertising Act and its amendments (the "Labeling Act"), 15 U.S.C. §§ 1331 et M., which precludes post-1969 claims based on allegations of failure to disclose information about smoking and health.

Moreover, no BATCo or BATUKE conduct could form the predicate of a cause of action alleging a breach of a duty to undertake a "special responsibility." Neither BATCo nor BATUKE ever breached any "special" duty, causing injury to the State of Minnesota.

Finally, Plaintiffs' statutory false advertising claim must also be rejected. As well as being preempted by the Labeling Act, there is simply no proof that BATCo and/or BATUKE issued any "untrue, deceptive, or misleading" advertisements in Minnesota, as is required to base a claim under the false advertising statute.

For these reasons and for the reasons stated below, Plaintiffs' claims against BATCo and BATUKE all fail as a matter of law.[1]

Statement of Facts

BATCo's Minuscule U.S. Market Share

Plaintiffs' counsel has stated that in the United States we do not "hear about very often" BATCo's primary brand of cigarettes, "State Express 555." (Colin Greig Dep. at 41 (Exh. A to the Affidavit of John W. Getsinger ("Getsinger Aff.")). This is actually quite an overstatement.

Plaintiffs' own market share allegations from their Amended Complaint indicate that it would be highly unusual for any American to "hear about"

Copyright © 1997 by TPLR, Inc.

BATCo cigarettes, no less for any Minnesota Medicaid recipient who sustained an allegedly smoking-related disease caused by smoking BATCo cigarettes. Plaintiffs allege that six cigarette manufacturers have controlled "virtually 100% of the market in the United

States and in Minnesota." (Amended Cmplt. ¶ 18). They supply the following market share figures:

Philip Morris 42%
R.J. Reynolds 29%
Brown & Williamson 12%
Lorillard 7%
American 7%
Liggett 3%
Total 100%

This leaves little room for BATCo. Indeed, BATCo has never had more than a 0.06% share of the American duty-paid market. (Affidavit of Peter Clarke ("Clarke Aff. ¶ 9).

Given this minuscule U.S. market share, it is no surprise that none of the thirteen representative Minnesota Medicaid recipients who were deposed in this action had ever smoked a BATCo product. When asked about their smoking histories, these individuals testified that they only smoked cigarettes manufactured by other Defendants.[2]

Consistent with its minuscule American market share is BATCo's almost complete lack of cigarette advertising in the United States. Indeed, there is no record evidence that any BATCo or BATUKE cigarette advertisement was ever run in the State of Minnesota. To the contrary, it appears that any BATCo and BATUKE advertising was targeted to areas outside of Minnesota. (Affidavit of Robert Wyn Jones ("Jones Aff.") ¶4; Affidavit of Thomas E. Bensen ("Bensen Aff.") ¶ 4; Affidavit of Richard Brentnall ("Brentnall Aff.") ¶ 6).

Virtually None Of Plaintiffs' Conduct Allegations Apply To BATCo And BATUKE

Plaintiffs' conduct allegations in the Amended Complaint against BATCo and BATUKE are scant. The overwhelming majority of Plaintiffs' assertions of wrongdoing discuss meetings, committees and public statements -- none of which involved BATCo or BATUKE.

Plaintiffs allege in the Amended Complaint that a "conspiracy on smoking and health" began more than forty years ago at a meeting among American tobacco company executives at New York City's Plaza Hotel. (Amended Cmplt. ¶¶ 21-23). No one representing BATCo or BATUKE was present at that meeting. (Clarke Aff. ¶ 4).

Plaintiffs further allege that the American tobacco industry made "representations and undertakings" in 1954 when announcing the formation of the Tobacco Industry Research Committee ("TIRC"), which later became known as the Council for Tobacco Research ("CTR"). (Amended Cmplt. ¶¶ 24-29). BATCo and BATUKE were never members of the TIRC or the CTR (Clarke Aff. ¶ 6), and were not signatories to the "advertisement" announcing the TIRC's formation (the "Frank Statement to Cigarette Smokers") (Clarke Aff. ¶ 5). This is clear from the face of the "Frank Statement," which lists its signatories. BATCo and BATUKE are, of course, not listed. (Getsinger Aff. Exh. O).

Nor were BATCo and BATUKE ever members of the Tobacco Institute ("TI") (Clarke Aff. ¶ 7), which Plaintiffs claim ran various advertisements misleading the American public about smoking and health (Amended Cmplt. ¶¶ 28-29).

Finally, BATCo and BATUKE were not among the "Big Six" cigarette manufacturers, and were not parties to a purported "Gentlemen's Agreement." (Clarke Aff. ¶ 8). Plaintiffs claim that through this alleged Agreement the American cigarette manufacturers conspired "to suppress research and product development." (Amended Cmplt. ¶¶ 35-37).

There are only three allegations in the Amended Complaint which specifically mention BATCo. First, Plaintiffs complain that internal BATCo documents from 1957 use a code word -- "Zephyr" -- to refer to cancer. (Amended Cmplt. ¶ 54). Second, Plaintiffs point to statements by three internal BATCo researchers at a 1962 meeting held in Southampton, England. (Amended Cmplt. ¶ 55). Third, Plaintiffs allege that BATCo often undertook "sensitive research" at a British Laboratory called Harrogate. (Amended Cmplt. ¶ 61).

None of these allegations can form the predicate of a cause of action against BATCo or BATUKE.[3]

Statement of Issues

1. Can Plaintiffs show that they have been inured by the conduct of BATCo and BATUKE?

2. Are Plaintiffs' claims against BATCo and BATUKE partially preempted by federal law, which has required health warnings on cigarette packages for the last thirty-one years?

Copyright © 1997 by TPLR, Inc.

3. Can the State maintain a "special duty" claim against BATCo and BATUKE?

4. Can Plaintiffs maintain their false advertising claim against BATCo and BATUKE?

Argument

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits" show "that there is no genuine issue as to any material fact." Minn. R. Civ. P. 56.03.

In opposing a summary judgment motion, a party "cannot rely upon mere general statements of fact but rather must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial." *Hunt v. IBM Mid American Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986) (emphasis added). *See also St. Louis County Attorney's Office v. Twenty-Four Thousand Six Hundred Forty-Three and 01/100 Dollars in Various Denominations of U.S. Currency*, 524 N.W.2d 542, 546 (Minn. Ct. App. 1994) ("nonmoving party may not rely upon mere averments in the pleadings and unsupported allegations but must come forward with specific facts to satisfy its burden of production").

I.

PLAINTIFFS CANNOT SHOW THAT THEY HAVE BEEN INJURED BY THE CONDUCT OF BATCo OR BATUKE

There is a complete failure of proof to show that any product manufactured and sold by BATCo or BATUKE caused injury to Plaintiffs. There is no evidence that a Minnesota Medicaid recipient sustained an allegedly smoking-related illness caused by BATCo cigarettes. Nor is there evidence that Blue Cross and Blue Shield of Minnesota ("BCBS") was ever liable for charges incurred for smoking-related diseases caused by BATCo cigarettes.

Further, BATCo's minuscule U.S. market share makes it highly unlikely that either a Minnesota Medicaid recipient or a BCBS insured ever sustained a smoking-related illness from smoking BATCo cigarettes. As explained in the Clarke Affidavit, the largest market share BATCo ever had in the United States was 0.06%. (Clarke Aff. ¶ 9).

Plaintiffs cannot proceed to trial against BATCo and BATUKE unless they are able to show at this stage of the proceedings that they somehow have been injured by these defendants' cigarettes. A mere possibility that BATCo's and BATUKE's cigarettes caused injury to Plaintiffs is not enough. Nor is it sufficient for Plaintiffs to argue that they will present such proof at trial.

Wetzel v. Eaton Corp., 62 F.R.D. 22 (D. Minn. 1973) is on point. There, the court granted summary judgment against FWG Corporation, a manufacturer of component parts for tractors' steering mechanisms. Plaintiff had claimed that his injuries from a tractor accident were caused by a defect in the component part. The court rejected the plaintiffs suit because there was a lack of evidence showing that the defendant had manufactured the particular component part which caused the injury.

In arriving at its ruling, the *Wetzel* court articulated a basic legal proposition which is particularly apt here. The court explained:

> It is manifest that any holding that a producer, manufacturer, seller, etc., is liable for injury caused by a particular product must necessarily be predicated upon proof that **the product in question** was one for whose condition the defendant was in some way responsible. . . . **[I]f recovery is sought from a manufacturer, it must be shown that he actually was the manufacturer of the product which caused the injury.**

Wetzel, 62 F.R.D. at 28 (citation omitted) (emphasis added). *See also Fought v. Hayes Wheels International, Inc*., 101 F.3d 1275, 1278 (8th Cir. 1996) (rejecting claims where plaintiffs failed to offer proof that defective wheel which caused injury was supplied by defendant); *Souder v. Owens-Corning Fiberglass Corp*., 939 F.2d 647, 650-51 (8th Cir. 1991) (affirming summary judgment for defendant asbestos manufacturers where plaintiff failed to show that his injury was caused by defendants' products).

Thus, because there is no evidence that BATCo and BATUKE caused any injury to Plaintiffs, all of Plaintiffs' claims against them must be rejected.

II.

PLAINTIFFS' CLAIMS AGAINST BATCo AND BATUKE ARE LARGELY PREEMPTED BY FEDERAL LAW

Copyright © 1997 by TPLR, Inc.

As explained more fully in Defendants' Joint Memorandum In Support Of Their Motion For Summary Judgment On Federal Preemption Grounds, the Federal Cigarette Labeling and Advertising Act and its amendments (the "Labeling Act"), 15 U.S.C. §§ 1331 *et seq*. precludes Plaintiffs from raising any claims based on the theory that Defendants failed to disclose information about smoking and health to their consumers after July 1, 1969. *See Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 524 (1992).

Post-1969 preemption is particularly warranted with respect to BATCo and BATUKE. There is no allegation that BATCo or BATUKE made any affirmative misrepresentations in the State of Minnesota about smoking and health at any time, no less after July 1, 1969. As such, Plaintiffs' claims against BATCo and BATUKE are merely based on the assertion that they failed to warn Minnesota smokers about particular risks associated with smoking. Such post-1969 claims are clearly preempted by the Labeling Act. *See, e.g., Cipollone, 505 U.S. at 524; Allgoood v. R.J. Reynolds Tobacco Co*., 80 F.3d 168, 171 (5th Cir.), *cert. denied* , _ U.S. _, 117 §. Ct. 300 (1996); *Sonnenreich v. Philip Morris Inc*., 929 F. Supp. 416, 418-19 (S.D. Fla. 1996).

Moreover, Plaintiffs' Deceptive Trade Practices claim pursuant to Minn. Stat. § 325D.44 is not just partially preempted by the Labeling Act, but must completely fail as to BATCo and BATUKE. Minn. Stat. § 325D.44 was first enacted in 1973, and does not provide that it may apply retroactively. Absent such a provision, Plaintiffs cannot recover under this statute-for- any conduct occurring before 1973. *See* Minn. Stat. § 645.21 ("No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."); *see also Baertsch v. Minnesota Department of Revenue*, 518 N.W.2d 21, 24 (Minn. 1994*); City of St. Paul v. FMC Corp*., 1990 WL 265171, at *7 (D. Minn. Feb. 27, 1990).

Therefore, Plaintiffs' § 325D.44 claim is completely preempted against BATCo and BATUKE because Plaintiffs have not even alleged that either of these Defendants made any affirmative misrepresentations in Minnesota after 1973. *See, e.g., American Tobacco Co. v. Grinnell*, 1997 Tex. LEXIS 56, at * 57-59 (Tex. June 20, 1997) (rejecting claim against cigarette manufacturer under Texas' Deceptive Trade Practices Act where plaintiffs were unable to point to any alleged affirmative misrepresentations after the Texas statute's 1973 effective date).

III.

THE "SPECIAL DUTY" CLAIM DOES NOT APPLY TO BATCo AND BATUKE

The State raises a claim based on the theory that Defendants breached a "special" duty to render services for the protection of the public health. (Amended Cmplt. ¶ 85). In assuming this "special" duty, the State claims that Defendants "recognized that their undertaking was necessary for the protection of the public health and that their conduct would affect the smoking habits and health of millions of Americans." (*Id*. ¶ 86). According to Plaintiffs, by issuing the "Frank Statement," the **American** manufacturers "accept[ed] an interest in people's health as a basic responsibility" and pledged "aid and assistance to the research effort into all phases of tobacco use and health." (Id. ¶ 25).[4]

This claim does not apply to BATCo and BATUKE. Unlike the American cigarette manufacturers, neither BATCo nor BATUKE were signatories to the "Frank Statement to Cigarette Smokers."

No affirmative "pledge" was made by BATCo and BATUKE to the citizens of Minnesota. Therefore, Plaintiffs cannot proceed to trial against BATCo and BATUKE on a claim that they breached a "special" duty. *See, e.g., Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806-08 (Minn. 1979) (rejecting cause of action based on a "special duty" where "the record fail[ed] to show" that the defendant agreed to go beyond what the law required "for the protection of others"). *See also In re Norwest Bank Fire Cases*, 410 N.W.2d 875, 879-80 (Minn. Ct. App. 1987).

IV.

PLAINTIFFS' FALSE ADVERTISING CLAIM AGAINST BATCo AND BATUKE MUST BE REJECTED

Plaintiffs' false advertising claim against BATCo and BATUKE must be rejected for a number of reasons. First, there is simply no evidence that BATCo and BATUKE ever advertised their cigarettes in Minnesota. This requirement is, of course, essential for a finding that a defendant violated Minnesotans false advertising statute. *See* Minn. Stat. § 325F.67. *See also State v. Granite Gate Resorts, Inc*., 1997 WL 557670, at *6 (Minn. Ct. App. Sept. 5, 1997).

Second, to the extent BATCo and BATUKE conducted any advertising of cigarettes in the United States during this action's relevant time period, Plaintiffs' claim for false advertising would still have to

Copyright © 1997 by TPLR, Inc.

be rejected. The only relevant advertising conducted by BATCo and BATUKE in the United States was from the late 1970's. (Jones Aff. I 4; Hansen Aff. ¶ 4; Brentnall Aff. ¶ 16). The advertising featured the torso of a man dressed in a tuxedo, extending his hand with a package of "State Express 555's." (Jones Aff. ¶ 4 & Exh. A). The text of the advertisement stated: "How the English express themselves." (*Id*.).

This advertisement cannot be found to be "untrue, deceptive or misleading," as is required to state a claim under the false advertising statute. The advertisement makes no affirmative misrepresentation. Nor can Plaintiffs base their claim on the premise that the advertisement should have included additional information about the health risks of smoking. *See, e.g.*, *Masepohl v. American Tobacco Co*., 1997 WL 456585, at *9 (D. Minn. Aug. 8, 1997) (rejecting argument that false advertising claim could be maintained based on theory that cigarette advertisement "minimize[d] the risks [of cigarettes] and conceal[ed] the truth").

Third, any claim based on this advertisement would be preempted by the Labeling Act, since the advertisement was only published in the United States after 1969. As explained in *Cipollone*, a plaintiff suing a cigarette manufacturer cannot base a claim on the assertion that a post-1969 advertisement somehow neutralized the effect of the federally-mandated health warning. *See Cipollone* , 505 U.S. at 527.

Finally, any claim based on this advertisement, which ran approximately twenty years ago, would have long been time-barred. The false advertising statute imposes a six year statute of limitations, which accrues at the time of a product' s purchase. *See* Minn. Stat. § 541.05 subd. 1(2). *See also Klehr v. A.O. Smith Co*., 875 F. Supp. 1342, 1352-53 (D. Minn. 1995), *aff'd*, 87 F.3d 231 (8th Cir. 1996), *aff'd on other grounds*, _ U.S. _,117 S. Ct. 1984 (1997). Here, there is no proof that any Minnesota Medicaid recipient or any BCBS insured purchased BATCo cigarettes based on this advertisement within six years of the date this action was filed.

Thus, Plaintiffs' false advertising claim against BATCo and BATUKE must be rejected.

Conclusion

For the reasons stated above, Defendants British-American Tobacco Company Limited and BAT (U.K. & Export) Limited should be granted summary judgment, and all of Plaintiffs' claims against these two Defendants should be dismissed with prejudice.

Dated: October 21, 1997

/s/ Byron E. Starns
Byron E. Starns (# 104486)
John W. Getsinger (#I 5863X)

LEONARD, STREET AND DEINARD
Professional Association
Suite 2300
150 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500
Facsimile: (612) 335-1657

CHADBOURNE & PARKE LLP
30 Rockefeller Plaza
New York, New York 10112
Telephone: (212) 408-5100
Facsimile: (212) 541-5369

Attorneys for British-American Tobacco Company Limited, BAT (U.K. and Export) Limited and Brown & Williamson Tobacco Corporation (as successor by merger to The American Tobacco Company)

Copyright © 1997 by TPLR, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION I

STATEMENT OF FACTS 2

BATCo'S MINUSCULE U.S. MARKET SHARE 2

VIRTUALLY NONE OF PLAINTIFFS' CONDUCT ALLEGATIONS APPLY TO BATCo And BATUKE 5

STATEMENT OF ISSUES 7

ARGUMENT 7

I. PLAINTIFFS CANNOT SHOW THAT THEY HAVE BEEN INJURED BY THE CONDUCT OF BATCo OR BATUKE 8

II. PLAINTIFFS' CLAIMS AGAINST BATCo AND BATUKE ARE LARGELY PREEMPTED BY FEDERAL LAW 10

III. THE "SPECIAL DUTY CLAIM DOES NOT APPLY TO BATCo AND BATUKE 11 11

IV. PLAINTIFFS' FALSE ADVERTISING CLAIM AGAINST BATCo AND BATUKE MUST BE REJECTED 13

CONCLUSION 15

Copyright © 1997 by TPLR, Inc.

TABLE OF AUTHORITIES

Cases	Page(s)
Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168 (5th Cir.), *cert. denied*, _ U.S. _, 117 S. ct. 300 (1996)	10
American Tobacco Co. v. Grinnell 1997 Tex. LEXIS 56 (Tex. June 20, 1997)	11
Baertsch v. Minnesota Department of Revenue, 518 N.W.2d 21 (Minn. 1994)	10
Cipollone v. Liggett Group, Inc, 505 U.S. 504 (1992)	10
City of St. Paul v. FMC Corp., 1990 WL 265171(D. Minn. Feb. 27, 1990)	11
Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979)	12
Fought v. Hayes Wheels International. Inc. 101 F.3d 1275 (8th Cir. 1996)	9
Hunt v. IBM Mid American Employees Federal Credit Union, 384 N.W.2d 853 (Minn. 1986)	*7*
Klehr v. A.O. Smith Co1p., 875 F. Supp. 1342 (D. Minn. 1995), *aff'd*, 87 F.3d 231 (8th Cir. 1996), *aff'd on other grounds*, _ U.S. _, 117 S. Ct. 725 (1997)	14
In re Norwest Bank Fire Cases, 410 N.W.2d 875 (Minn. Ct. App. 1987)	12
Masepohl v. American Tobacco Company, Inc., 1997 WL 456585 (D. Minn. Aug. 8,1997)	13
Sonnenreich v. Philip Morris. Inc., 929 F. Supp. 416 (S.D. Fla. 1996)	10
Souder v. Owens-Corning Fiberglass Corp., 939 F.2d 647 (8th Cir. 1991)	9
St. Louis County Attorney's Office v Twenty-Four Thousand Six Hundred Forty-Three and 01/100 Dollars in Various Denominations of U.S. Currency, 524 N.W.2d 542 (Minn. Ct. App. 1994)	*7*
State v. Granite Gate Resorts, Inc., 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997)	13
State v. Philip Morris Inc., 551 N.W.2d 490 (Minn. 1996)	12
Wetzel v. Eaton Corp., 62 F.R.D. 22 (D. Minn. 1973)	8

Statutes	
Minn. Stat. § 325D.44	10,11
Minn. Stat. § 325F.67	13
Minn. Stat. § 541.05	14
Minn. Stat. § 645.21	10
15 U.S.C. §§ 1331 *et seq.*	1,10

---

[1] BATCo and BATUKE additionally incorporate the relevant arguments raised in the various memoranda of law in support of Defendants' joint motions for summary judgment.

[2] See Recipient MSIS No. 476097020 Dep. at 24, 26, 151 (Marlboro, Lucky Strike, Camel, Old Gold, Carlton and Winston); Recipient MSIS No. 358440004 Dep. at 49, 51 52, 60, 130 (Belair, Lucky Strike, Salem, Newport, Benson & Hedges, Kool, Pall Mall, Viceroy, GPC, Tareyton and Winston); Recipient MSIS No. 472261407 Dep. at 37, 41 (Camel, Lucky Strike, Marlboro and Winston); Recipient MSIS No. 468867906 Dep. at 42, 44 (GPC, Newport and Players); Recipient MSIS No. 431787167 Dep. at 39, 41 (Lucky Strike, Kool and Pall Mall); Recipient MSIS No. 573469419 Dep. at 29, 31, 83-85 (Camel, Lucky Strike, Marlboro, Pall Mall, Philip Morris, Salem and GPC); Recipient MSIS No. 474689966 Dep. at 39-40 (Kool and GPC); Recipient MSIS No. 587461733 Dep. at 72, 75-78, 93-93, 171 (Kool, Pall Mall, Newport, GPC, Virginia Slims and Camel); Recipient MSIS No. 471920598 Dep. at 24, 31-32, 120-21, 141-42 (Benson & Hedges, Newport, Marlboro, Menthol 100's, Newport and GPC); Recipient MSIS No. 469549320 Dep. at 24, 26, 28, 30, 130 (Chesterfield, Winston, Marlboro, GPC, Camel, Lucky Strike, Philip Morris, Pall Mall, Kool and Salem); Recipient MSIS No. 394545635 Dep. at 38-39, 135-37, 148 (Lark, Pall Mall, Marlboro, Philip Morris, Old Gold and Salem); Recipient MSIS No. 474341727 Dep. at 36-38 (GPC, Camel, Lucky Strike, Old Gold and Marlboro); Recipient MSIS No. 429702261 Dep. at 44, 47-49 (Pall Mall and Winston) (Getsinger Aff. Exhibits B-N).

[3] In accordance with Gen. R. Prac. 115.03 (d)(2), BATCo and BATUKE state that their motion for summary judgment relies upon Plaintiffs' Amended Complaint and the affidavits of Robert Wyn Jones (including the exhibit attached thereto), Thomas E. Bensen, Richard Brentnall, Peter L. Clarke and John W. Getsinger (including the following exhibits attached thereto: excerpts of the depositions of Colin Greig, Recipient MSIS Nos. 476097020, 358440004, 472261407, 468867906, 431787167, 573469419, 74689966, 587461733, 471920598, 469549320, 394545635, 474341727, 429702261 and the "Frank Statement to Cigarette Smokers").

[4] The Minnesota Supreme Court has ruled that Blue Cross and Blue Shield does not have standing to raise this "special duty" claim. *See State v. Philip Morris Inc.*, 551 N.W.2d 490, 495 (Minn. 1996).

Copyright © 1997 by TPLR, Inc.