

Filed: June 25, 2003

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1595
(CA-99-185-1, CA-99-207-1, CA-99-232-1)

R. J. Reynolds Tobacco Co., et al.,

Plaintiffs - Appellants,

versus

Philip Morris USA, Inc.,

Defendant - Appellee.

O R D E R

The court amends its opinion filed June 24, 2003, as follows:
On page 2, section 1, line 1 -- counsel's name is corrected to
read "Ronald Stuart Rolfe."

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RJ REYNOLDS TOBACCO COMPANY;
LORILLARD TOBACCO COMPANY;
BROWN & WILLIAMSON TOBACCO
CORPORATION,
Plaintiffs-Appellants,

No. 02-1595

v.

PHILIP MORRIS USA, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
Frank W. Bullock, Jr., District Judge.
(CA-99-185-1, CA-99-207-1, CA-99-232-1)

Argued: April 2, 2003

Decided: June 24, 2003

Before WIDENER and MICHAEL, Circuit Judges,
and Richard L. WILLIAMS, Senior United States District Judge
the Eastern District of Virginia, sitting by designation.

for

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Richard Melvyn Cooper, WILLIAMS & CONNOLLY,
L.L.P., Washington, D.C.; James Thomas Williams, Jr., BROOKS,
PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.,

Greensboro, North Carolina; Ronald Stuart Rolfe, CRAVATH, SWAINE & MOORE, New York, New York, for Appellants. David Boies, BOIES, SCHILLER & FLEXNER, L.L.P., Washington, D.C., for Appellee. **ON BRIEF:** Steven R. Kuney, WILLIAMS & CONNOLLY, L.L.P., Washington, D.C.; Jennifer K. Van Zant, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P., Greensboro, North Carolina; David Greenwald, CRAVATH, SWAINE & MOORE, New York, New York; Norwood Robinson, Michael L. Robinson, Kevin L. Miller, ROBINSON & LAWING, L.L.P., Winston-Salem, North Carolina; Irving Scher, August T. Horvath, WEIL, GOTSHAL & MANGES, L.L.P., New York, New York; Randolph S. Sherman, Mark S. Popofsky, KAYE SCHOLER, L.L.P., New York, New York; Daniel R. Taylor, Mark A. Stafford, KILPATRICK STOCKTON, L.L.P., Winston-Salem, North Carolina, for Appellants. Jonathan D. Schiller, Robert Silver, Stuart Singer, Michael A. Brille, Carl Nichols, BOIES, SCHILLER & FLEXNER, L.L.P., Washington, D.C.; Larry B. Sitton, Gregory G. Holland, SMITH MOORE, L.L.P., Greensboro, North Carolina; Jerome I. Chapman, ARNOLD & PORTER, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The plaintiffs, R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, and Brown & Williamson Tobacco Corporation, sued Philip Morris Incorporated in U.S. District Court for the Middle District of North Carolina for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; North Carolina General Statutes §§ 75-1, 75-1.1, 75-2, and 75-2.1; and North Carolina common law prohibiting unfair competition. The plaintiffs, who are cigarette manufacturers competing with Philip Morris, base their case on a retail marketing program called "Retail Leaders" that Philip Morris started

in 1998. Under Retail Leaders, Philip Morris provides discounts to retailers on its popular Marlboro brand in exchange for the most advantageous display and signage space in retail establishments. This arrangement, the plaintiffs say, restricts the flow of information to consumers, limits the plaintiffs' abilities to promote their products, insulates Philip Morris from effective competition, and results in higher cigarette prices.

The district court, after considering an exhaustive record that includes extensive data and information about sales, trends, and conditions in the cigarette market for over two decades, granted (in a thorough opinion) Philip Morris's motion for summary judgment as to all of the plaintiffs' claims. *See R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002). The district court concluded that in the period "since [Philip Morris] implemented its challenged Retail Leaders program [in 1998], the cigarette market in the United States remains highly competitive, as evidenced by the general stability of market shares in the light of long-term trends, the profitability of the Plaintiffs, and the ongoing entry and increasing market share of new manufacturers." *Id.* at 397. We affirm the grant of summary judgment to Philip Morris, and we do so on the reasoning of the district court with one exception. With respect to the plaintiffs' claim under section 1 of the Sherman Act, we decline to conclude, as did the district court, that Philip Morris lacks market power. We agree, however, with the rest of the district court's analysis of the section 1 claim. Assuming for the sake of argument that Philip Morris has market power, the plaintiffs did not show that Retail Leaders substantially forecloses competition in the relevant market. *See id.* at 386-93. Accordingly, as the district court ultimately determined, the plaintiffs' section 1 claim fails. On the remaining issues, we affirm on the reasoning of the district court without any modification.

The judgment of the district court is affirmed.

AFFIRMED