Method to Bifurcate Class Actions for Common Determinations When Damages Issues are Not Appropriate for Class Treatment

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Bifurcation of Class Actions for Separate Damages Determinations

On October 1, 2007, the United States Supreme Court rejected an appeal by tobacco companies and issued an order declining to review a 2006 Florida Supreme Court decision certifying the existence of a plaintiff class of more than 700,000 smokers for a limited purpose (i.e., for the determination of liability) and further holding that certain common liability findings at trial can stand even after the decertification of the class for other purposes (i.e., for the determination of compensatory damages). As a result, class smokers may have a much easier burden to show they were misled by the tobacco industry and that the deception led to compensable injury. *Howard A. Engle, M.D., et al. v. Liggett Group, Inc., et al.* (Fla.3d 1996) 945 So.2d 1246.

Procedural History

The Florida Tobacco Litigation — as it is often referred to in the print media — began in 1994 as a class action products liability lawsuit filed in a Miami-Dade County state court on behalf of approximately 700,000 Florida residents suffering from various illnesses alleged to have been caused by their addiction to cigarettes. *R.J. Reynolds Tobacco v. Engle*, 06–1545. Class representative plaintiffs Howard A. Engle, M.D., Mary Farnan, Angie Della Vecchia, and Frank Amodeo brought the class action lawsuit against Philip Morris USA, a unit of Altria Group, Inc.; Brown and Williamson Holdings, Inc., a unit of British American Tobacco, PLC; Lorillard Tobacco Co., a unit of Loews Corp.; and, R.J. Reynolds Tobacco Co., a unit of Reynolds American, Inc., seeking damages based on claims of strict liability, fraud and misrepresentation, conspiracy to commit fraud and to misrepresent, breach of the implied warranty of merchantability and fitness, breach of the expressed warranties, intentional infliction of emotional distress, and negligence.

On October 31, 1994, the judge certified the class as “all United States citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.”

On interlocutory appeal, the Florida Court of Appeals affirmed the certification on January 31, 1996, but reduced the class to only Florida smokers. *see R.J. Reynolds Tobacco Co. v. Engle* (Fla.3d DCA 1996) 672 So.2d 39. In May 1997, the judge reconsidered an earlier partial summary judgment order where he had ruled certain claims were preempted by the 1969 Federal Cigarette Labeling and Advertising Act, which requires the warning message that smoking is dangerous to your health. In January 1998, the judge denied a motion to decertify the class, although he did express reservations regarding the manageability of the class, and allowed an interlocutory appeal on that issue.

The trial plan projected a three-phase trial. Phase I consisted of resolving the questions of liability and whether the class as a whole is entitled to punitive damages, in which the jury found for the plaintiff class. Phase II-A addressed entitlement to compensatory damages for the representative plaintiffs. Phase II-B determined a lump sum punitive award assessed on behalf of the class as a whole. A year-long jury trial resulted in a judgment on November 6, 2000 of actual damages for the three named plaintiffs in the amount of $12.7 million and a $145 billion punitive damages pool to be split among the class members after hearings on each individual case.

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According to the trial plan, a Phase III was to occur to select new juries to decide the compensatory damages for each of the 700,000 members of the class, and to have the punitive award apportioned among the successful class members, with interest accruing on the award until its final distribution. Phase III of the trial never occurred because of the Florida Supreme Court decision.

On May 21, 2003, the court of appeals reversed the judgment and decertified the class. Engle v. R.J. Reynolds Tobacco (Fla. 3d DCA 2003.) 853 So.2d 434. The plaintiffs appealed.

**Florida Supreme Court Decision**

In July 2006, the tobacco industry won a largely favorable ruling from the Florida Supreme Court, which refused to reinstate a $145 billion punitive damage award against the defendant tobacco companies for injuring smokers, ruling that such an award of punitive damages was improper and excessive as a matter of law. The court also declined to revive the lawsuit’s class action status, recognizing such a huge class of victims was inappropriate. It remanded the case to be decertified without prejudice to individual claims filed within one year. The court reinstated the compensatory damages for two of the plaintiffs, ruling the third was barred by the statute of limitations.

However, the Florida Supreme Court revived portions of the trial court’s ruling and set up the structure under which plaintiffs in the original class could bring new actions against the tobacco industry through January 2008 and use certain of the common liability findings from the extensive jury trial in these future cases. Of particular interest, it also held that certain findings of the trial court were resolved for any such future cases such that these findings against the defendant companies were settled and could be used in the individual suits by the former members of the class in their individual cases. The defendant tobacco companies appealed to the U.S. Supreme Court.

There were eight findings of the trial court that are now resolved for future cases against the defendant companies. These resolved findings are: (1) cigarettes cause disease; (2) nicotine is addictive; (3) the defendant tobacco companies placed defective and unreasonably dangerous cigarettes on the market; (4)(a) the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both; (5)(a) the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment; (6) all of the defendants sold or supplied cigarettes that were defective; (7) all of the defendants sold or supplied cigarettes that at the time of the sale or supply did not conform to representations of fact made by the defendants; and (8) all of the defendants were negligent.

The court determined that these findings were resolved as to the members of the class, although the class itself had been decertified as to the Phase II and Phase III parts of the litigation, because the Federal Rules of Civil Procedure and current federal case law provide persuasive authority to allow certifying a class for only limited issues of liability.

Federal Rule of Civil Procedure 23(c)(4)(A) provides that “[w]hen appropriate... an action may be brought or maintained as a class action with respect to particular issues.” As such, after a review of several U.S. Courts of Appeals opinions, the Florida Supreme Court

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determined that a trial court can properly separate liability and damages issues, certifying class treatment of liability, while leaving damages to be determined on an individual basis.

In this case, the Phase I trial had been complete. The pragmatic solution, and the interpretation of which the court agreed, was to decertify the class, retain the jury’s Phase I findings regarding certain of the liability questions, and allow the class members to choose to initiate individual actions for the purpose of determining the damages for each of the class members.

The court declined to reconsider and clarify the judgment upon request of the defendant tobacco companies. As such, the defendants appealed to the United States Supreme Court.

Denied Appeal to the U.S. Supreme Court: Affirmation of Process

The tobacco companies asked the Supreme Court to bar the individual class members from using the existing jury findings to bring new cases, a maneuverFlorida state courts hoped would speed up the already 13-year-old tobacco litigation as it moved toward full resolution. The tobacco companies also argued that federal tobacco advertising laws bar state level lawsuits over tobacco marketing and the failure of companies to warn of smoking risks.

Attorneys for plaintiffs in the lawsuit, while urging the Supreme Court to reject the appeal, said the tobacco industry had challenged successfully much of the damages judgments in the class action case already and that the appeal to the Supreme Court merely demonstrated that the industry is asking the court “to completely erase all traces of the 13-year Florida class-action”—a request that would effectually require the 700,000 individual members of the class to start over—if the thought of starting over did not deter them from pursuing a resolution to their claims against the tobacco industry.

The tobacco industry, for its part, argued the state court ruling preserving jury findings—which the defendant companies said are vague and abstract—is unfair as it faces additional smoker litigation because the claims of the class members have no more than a handful of factual and legal issues in common.

The reason why the United States Supreme Court rejected the appeal by the tobacco industry is unknown. However, it appears that the Justices were unmoved by the appellants’ arguments that there was no fundamental due process available to the defendant tobacco companies to challenge meaningfully the claims against them in these future cases. Questions regarding legal causation, comparative fault, and damages will provide a vast playing field for legal maneuvering in the (possibly) hundreds of thousands of cases derived from the Florida Tobacco Litigation.

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