

LIGGETT GROUP V. ENGLE:
FLORIDA HIGH COURT'S IMPERFECT
RESPONSE TO CLASS ACTION ABUSE

By
Professor Michael I. Krauss
George Mason University
School of Law

Washington Legal Foundation
Critical Legal Issues
WORKING PAPER SERIES No. 145
March 2007

TABLE OF CONTENTS

ABOUT WLF'S LEGAL STUDIES DIVISION	iii
ABOUT THE AUTHOR	iv
INTRODUCTION	1
I. ROUND 1: JUDGE ROBERT F. KAY'S TRIAL: "WHAT'S LAW GOT TO DO WITH IT?	1
II. ROUND 2: THE DISTRICT COURT OF APPEALS REPUDIATES THE TRIAL COURT	6
A. The Class Must Be Decertified	6
B. Punitive Damages May Not Be Awarded Before Liability Has Been Determined	7
C. In Any Case, the Punitive Damage Award Was Excessive	8
D. Plaintiffs' Counsel Engaged in Inappropriate Conduct Mandating Reversal	8
E. The Liggett Defendant: Confirmation of a Kangaroo Court	11
III. THE SUPREME COURT OF FLORIDA SPLITS THE BABY	11
CONCLUSION	16

ABOUT WLF'S LEGAL STUDIES DIVISION

The Washington Legal Foundation (WLF) established its Legal Studies Division to address cutting-edge legal issues by producing and distributing substantive, credible publications targeted at educating policy makers, the media, and other key legal policy outlets.

Washington is full of policy centers of one stripe or another. But WLF's Legal Studies Division has deliberately adopted a unique approach that sets it apart from other organizations.

First, the Division deals almost exclusively with legal policy questions as they relate to the principles of free enterprise, legal and judicial restraint, and America's economic and national security.

Second, its publications focus on a highly select legal policy-making audience. Legal Studies aggressively markets its publications to federal and state judges and their clerks; members of the United States Congress and their legal staffs; government attorneys; business leaders and corporate general counsel; law school professors and students; influential legal journalists; and major print and media commentators.

Third, Legal Studies possesses the flexibility and credibility to involve talented individuals from all walks of life - from law students and professors to sitting federal judges and senior partners in established law firms - in its work.

The key to WLF's Legal Studies publications is the timely production of a variety of readable and challenging commentaries with a distinctly common-sense viewpoint rarely reflected in academic law reviews or specialized legal trade journals. The publication formats include the provocative COUNSEL'S ADVISORY, topical LEGAL OPINION LETTERS, concise LEGAL BACKGROUNDERS on emerging issues, in-depth WORKING PAPERS, useful and practical CONTEMPORARY LEGAL NOTES, interactive CONVERSATIONS WITH, law review-length MONOGRAPHS, and occasional books.

WLF's LEGAL OPINION LETTERS and LEGAL BACKGROUNDERS appear on the LEXIS/NEXIS® online information service under the filename "WLF" or by visiting the Washington Legal Foundation's website at www.wlf.org. All WLF publications are also available to Members of Congress and their staffs through the Library of Congress' SCORPIO system.

To receive information about previous WLF publications, contact Glenn Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, (202) 588-0302. Material concerning WLF's other legal activities may be obtained by contacting Daniel J. Popeo, Chairman.

ABOUT THE AUTHOR

Michael I. Krauss is a Professor of Law at the George Mason University School of Law. He has been teaching at George Mason since 1987 and also has taught at the law schools of Seattle University, the University of Toronto, and the Université de Sherbrooke in Canada. Professor Krauss teaches Torts, Legal Ethics, Products Liability, and Jurisprudence. His research on torts and ethics issues is nationally known. His (co-authored) Second Edition of *Legal Ethics in a Nutshell*, was published in 2006. This book digests the Model Rules in an engaging and often critical fashion. He is a regular contributor to the PointsOfLaw.com blog and is the author of numerous journal and law review articles, op-eds, and other scholarly articles, including a number published by Washington Legal Foundation. Professor Krauss is currently working on a Products Liability textbook for West Publishing.

LIGGETT GROUP V. ENGLE:
FLORIDA HIGH COURT'S IMPERFECT
RESPONSE TO CLASS ACTION ABUSE

by
Professor Michael I. Krauss
George Mason University
School of Law

INTRODUCTION

In *Liggett Group v. Engle: A Case Study of Class Action Abuse*¹ this author argued that a Florida trial court judgment against tobacco companies was a poster child for national class action reform. That judgment was struck down in its entirety by a panel of Florida's intermediate appellate court. Now Round 3, the final round, of this torts boxing match has just been completed before Florida's highest court. Who won this bout? Though the decision was a mixed one, with both sides able to claim they scored major points, in the end result the plaintiffs may have won a long-term victory.

I. ROUND 1: JUDGE ROBERT F. KAYE'S TRIAL: "WHAT'S LAW GOT TO DO WITH IT?"

In May 1994 attorneys Stanley and Susan Rosenblatt filed a class action suit in Miami-Dade County Circuit Court in the name of three individuals seeking damages for injuries allegedly caused by smoking cigarettes. All three claimed that they were "unable" to stop smoking (though more Americans have ceased smoking than currently smoke) because they were addicted to the nicotine contained in cigarettes (though nicotine is

¹Michael I. Krauss, *Liggett Group v Engle: A Case Study of Class Action Abuse*, LEGAL BACKGROUNDER (Wash. Lgl. Fndt.), Oct. 31, 2003, available at <http://www.wlf.org/upload/103103LBKrauss.pdf>.

available from many sources other than tobacco). They sued not just for themselves, but to recover damages for a class that trial judge Robert Kaye certified as follows: "All United States citizens and residents, and their survivors, who have suffered, presently suffer, or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." Every major tobacco company in America was named as a defendant. The causes of action ranged from "strict liability" to negligence to intentional infliction of emotional distress to fraud.

First Year Torts students could easily find flaws in this complaint. Here are but a few:

- How can those who started smoking before the mandatory warning on cigarette packages be lumped in the same "class" as those who started smoking one year before the suit was launched, and who started coughing one week beforehand? How can those who started smoking at age 10 be grouped in the same class as those who began at age 30? One would expect a legal ruling on this issue from the trial judge.
- How can a *national* class be certified? Isn't the common law of torts a state issue?²
- Doesn't the notion of assumption of risk (the hazards of cigarettes have been publicly stamped on each pack for over 40 years now) preclude suit by at least some smokers?
- How can "strict liability" be maintained for a national class when some jurisdictions (like my own, Virginia) don't even recognize it? How can "intentional infliction of emotional distress" pass the straight-face test?

None of these issues fazed Judge Kaye. As mentioned, he certified the *Engle* suit. He then did something never before done in the annals of Anglo-American jurisprudence. He ruled that the Miami-Dade jury could decide punitive damages *first* – before even

²The class was later restricted, six years after the trial began, to Florida residents. However, as will be noted below, even that class was fatally defective.

deciding whether the tobacco companies were legally liable in tort to any member of the class, or what the compensatory damages to class members would be.

The *Engle* show trial began. For those familiar with our legal / literary history, the proceedings were in some ways an image of Tom Robinson's "trial" in *To Kill A Mockingbird*. Defending its very existence was an allegedly "white" corporation (how can a corporation be "white"?). Judging the defendant's behavior was a jury composed of folks who, according to the plaintiffs' lawyer, apparently did not like the defendants' "race."³ The Rosenblatts began making racially charged arguments on the very first day of trial. In their opening statement they pointed out that defendants' marketing studies consider distinct black and white advertising markets. Of course segmented marketing characterizes virtually every retail industry in the country. But plaintiffs' lawyers, over repeated objections by defense counsel, told the jury that the tobacco company's concern with marketing to black consumers "perpetuated" "racial segregation." The defendant thought its product was being attacked – instead somehow an alleged racial bias was inferred. In cross-examining one defense expert witness, for example, plaintiffs' counsel noted that his resume included scholarly articles about Vice President John Calhoun. The Rosenblatts suggested that since the witness had studied Calhoun, he must therefore admire Calhoun's defense of slavery. Over strong objection, counsel alluded to poll taxes, to Senator Strom Thurmond, and to similar issues totally irrelevant to the lawsuit. Judge Kaye mildly sustained defense objections with the following powder-puff "instruction":

We've gone into the past as far as this subject is concerned, and there's a lot about the discussion that we've had up to this point that has no relevancy or materiality [to] the issues in the trial. We understand that. Some sensitive issues have been raised back in the 1800's [sic]

³The six-person jury was composed of four blacks and two whites.

that [have] nothing to do with this case. So we'll proceed with that concept in mind. Go ahead.

Such a “rebuke” far from chastened the Rosenblatts. They continued to engage in this demagoguery immediately thereafter.

Later in the trial, when the tobacco companies pointed out, as of course they were duty bound to do, that the composition and method of sale of their product and all of its contents were heavily regulated and perfectly legal, plaintiffs' counsel rejoined that slavery had been legal, and that Hitler had legalized the Holocaust, too. The record reflects the following exchange, among others:

[Plaintiffs' counsel, addressing the defendants' desk] "You want to be fair, and you say: Right, there's two sides to every question. What's the other side to the Holocaust? What is it?"

[Defense counsel] "Objection, your honor!"

[Plaintiffs' counsel, ignoring the objection] "What is the other side to slavery?"

The Rosenblatts encouraged the jury to ignore existing Florida tort law. "And let's tell the truth about the law, before we all get teary-eyed about the law. Historically, the law has been used as an instrument of oppression and exploitation." Rosa Parks got the Congressional Gold Medal for violating a law, the jury was told – surely the jury could do the same. The court sustained defendants' objections, but of course counsel ignored the ruling and went on: "In this building, *in this building*, a temple to the law, there were drinking fountains which said Whites Only. I tell my kid about that. He said: how did you put up with this, daddy?" Counsel then added: "The point I'm making is, the point I'm making, that some day, some day our kids and grandchildren are going to say ... [h]ow did you let them get away with it? How did you let them get away with it?"

Despite the court's ruling sustaining defendants' objections, counsel succeeded in completing his argument to the jury. The Miami-Dade jury condemned defendants to pay the plaintiff class (restricted by the judge to Floridians) an eye-popping \$145 billion in punitive damages, the largest punitive award in American legal history.

The law holds, however, that a defendant may not be punished for lawful conduct.⁴ It also holds that selling cigarettes cannot be, in and of itself, tortious under state common law because of federal pre-emption.⁵ Finally, both state⁶ and federal⁷ law hold that punitives may not be granted without a prior finding that there is liability – yet only liability to the three named plaintiffs, not to the class, was ever determined by the jury.⁸

Who cared? To paraphrase Tina Turner, "What's law got to do with it?" Judge Kaye ordered defendants to immediately pay the punitives award. Interest was determined by Judge Kaye to run (at an annual rate of 10%) immediately, notwithstanding appeal. Defendants were liable for *\$39,726,030.00 per day in interest alone*, on the punitive award.

Defendants appealed to Florida's Third District Court of Appeals.

⁴*State Farm Insurance v. Campbell*, 2003 WL 1791206, at *9.

⁵*FDA v. Brown and Williamson Tobacco*, 529 U.S. 120 (2000).

⁶*W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994) (punitives in a bifurcated trial may not be determined until after the jury has determined liability for compensatory damages and the amount of compensatory damages).

⁷*BMW v. Gore*, 517 U.S. 559, 580 (1996) (Due Process requires that punitives consider the appropriate ratio to the actual harm wrongfully inflicted on the plaintiffs).

⁸Even this was farcical. The three named plaintiffs received over \$12 million in compensatories, even though the statute of limitations had clearly run against one of them.

II. ROUND 2: THE DISTRICT COURT OF APPEALS REPUDIATES THE TRIAL COURT

On May 21, 2003, in a scathing repudiation of Judge Kaye and of plaintiffs' counsel, a unanimous panel of Florida's Third District Court of Appeals overturned the punitive award and the compensatory awards to class representatives, and ordered a decertification of the *Engle* class.

The Court of Appeals gave numerous reasons for its ruling. Here, in a nutshell, are the five most important ones:

A. The Class Must Be Decertified

The court of appeals noted that a basic (though not the only) problem in any product liability suit against tobacco companies is one of legal causation – were plaintiffs injured by smoking (and not from dangers voluntarily assumed by smokers)? To determine whether the cause of an individual smoker's illness is, say, fraud (one of the causes of action invoked by the Rosenblatts) requires a detailed and individualized analysis. The trial court had itself expressed "reservations about the manageability of this case," but as we have seen Judge Kaye did not allow such "reservations" to get the better of him. The court of appeals demurred. The fundamental issue to be litigated was an individual one, not a collective one. No class action could lie in such circumstances.

In addition, the Court of Appeals noted that even the narrowed Floridian class of smokers was too geographically diverse. Over 65% of the members of the class had allegedly become addicted to nicotine *before* they moved to the Sunshine State. Under Florida's conflicts rules, the state whose law would apply to each suit would be the state having the closest connection with each smoker's allegedly tortiously inflicted injury. This

determination would vary for each smoker, thus precluding the class. Since different states' product liability law would ultimately apply, so would different states' statutes of limitation, rules on assumption of risk, and rules on punitive damages. These reasons made the suit even less amenable to class adjudication.

Interestingly from an ethical standpoint, the Rosenblatts had claimed that a class action was appropriate because individual suits are "cost prohibitive and impractical," i.e., because lawyers won't make money on individual suits like they can on class actions. Kudos to the Court of Appeal for concluding, on this count, that Florida's class action statute was not meant to create profit centers for lawyers, at least not unless the substantive requirements of class actions are met.⁹

B. Punitive Damages May Not Be Awarded Before Liability Has Been Determined

The Court of Appeals noted laconically that Florida law requires that a defendant be found liable before punishment is imposed.¹⁰ Since there was no finding that a tort had been committed against the class (as opposed to the named plaintiffs), no punitive damages could be awarded to it.

Judge Kaye had not found this problem to be insuperable. The Rosenblatts maintained that the jury had found wrongdoing by defendants, and the Judge implicitly "extrapolated" from the damages suffered by the named representatives to infer compensatory damages for the entire class, thereby authorizing the determination of punitives. But the Court of Appeals pointed out that wrongdoing is insufficient for liability unless there is also legal causation. So any such "extrapolation" of damages, if

⁹*Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *7.

¹⁰*Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *9.

indeed it did occur, was illegal. Essential information about the composition of the class had not been produced, and it was illegitimate to conclude that the entire class was a clone of the named plaintiffs (who were hand-picked by the Rosenblatts). Extrapolation from handpicked individuals to 700,000 Floridians, then granted punitives, creates an irrefutable presumption that the 700,000 suffered injuries comparable to those suffered by the representatives. This would have been directly contrary to the Supreme Court's recent holdings on punitive awards.

C. In Any Case, the Punitive Damages Award Was Excessive

Unlike Judge Kaye, the Florida Court of Appeals actually took seriously the requirement of Florida law that punitive damages not financially destroy a defendant.¹¹ The combined net worth of all defendants was \$8.3 billion, less than 6% of the *punitives* award (recall, compensatories to the class had not yet been determined...). No reported Florida decision had ever granted punitives exceeding net worth, let alone seventeen times net worth. The Court of Appeals observed that "awarding the GDP of several European countries was an error."¹² It chastised Judge Kaye for refusing to grant defendants' motion for *remittitur*.

D. Plaintiffs' Counsel Engaged in Inappropriate Conduct Mandating Reversal

The Court of Appeals described in detail the Rosenblatts' race-baiting and Judge Kaye's refusal to sanction their unethical behavior. Jury nullification may have a cherished place in criminal law, but it is not a part of civil adjudication, where a judge can

¹¹See, e.g., *Arab Termite & Pest Control v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982).

¹²*Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *21.

and indeed must substitute the correct legal decision notwithstanding an illegal jury verdict. As the Court of Appeals noted, Mr. Rosenblatt's 1992 book, *Murder of Mercy: Euthanasia on Trial* boasts of the author's disdain for the Rule of Law. "The area I would need to spend the most time on [during trial] was my 'Piss on the Law' theme," wrote Rosenblatt. The book went on to detail techniques of pandering to racial preferences and fears, techniques followed to the letter by the Rosenblatts in the *Engle* trial.

It is interesting to note that the Court of Appeals alluded to Judge Kaye's warning to the Rosenblatts, at trial, that their race baiting might generate a detrimental result on appeal.¹³ Presumably, if their behavior would have led an appellate court to reverse as a matter of law, it should have led Judge Kaye to order a mistrial. That Judge Kaye warned the Rosenblatts that a higher court might enforce the law is eloquent testimony to the judge's own lack of concern for it.

Another subterfuge engaged in by the Rosenblatts, and cited by the Court of Appeals as a reason to quash lower court proceedings, was a fraud on the jury regarding the effect of a massive punitive award. The Rosenblatts personally vouched to the jury that a huge award would not bankrupt the defendants, since payments could be made in installments. But the Rosenblatts knew that Florida law did not provide for such payments. Contrary to the Rosenblatts' representations to the jury, and as they knew he would, Judge Kaye ordered defendants to pay \$145 billion immediately. Again, the judge's weak management of the case contributed to the appellate decision. The judge himself seemed to regret his timid approach:

Now, the record does reflect I made a ruling [prohibiting the Rosenblatts' references to installment payments]. And it will also reflect that I did admonish Mr. Rosenblatt not to do it again, and,

¹³*Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *14.

unfortunately, he did; not only once, he did it several times.... I let it slide, and maybe I should not have.... But this being as unusual case as it is [sic], I sort of took a back seat on some of these admonition issues and I didn't do anything definitive....¹⁴

What Judge Kaye's "back seat" approach created was millions of dollars in wasted legal fees and taxpayer-borne court costs. What the Court of Appeals didn't do, apparently, was report the Rosenblatts' behavior to the Florida Bar and Judge Kaye's passivity to the state Judicial Council, for possible disciplinary action. As a professor of Legal Ethics, the author is as happy to see violations singled out by Courts of Appeal as he is frustrated when the violations go unpunished.

Stanley Rosenblatt's behavior merited judicial discipline. He told the jury that "I wanted to punch" one witness. As to another witness, he opined, "I figured, well, this guy hasn't been prepped on the subject [by defendants' counsel], so maybe I'll get an honest answer," thereby accusing his adversary of suborning perjury. He offered that yet another defendant's witness "wouldn't know science if he fell on science." Yet Florida law (like the law of every other state) expressly forbids an attorney's expressing personal opinions about a case, or attacking the integrity of counsel without producing evidence.¹⁵ In the face of the Rosenblatts' repeated misconduct, the Court of Appeals held that Judge Kaye's refusal to grant defendants' motions for mistrial "was an abdication of [his] most basic duty."¹⁶ It is not too late for the professional bodies governing lawyers and judges in the state of Florida to demonstrate that they are serious about ethical and professional behavior.

¹⁴*Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *22.

¹⁵*See, e.g., Owens-Corning Fiberglas Corp. v Crane*, 683 So. 2d 552, 554-55 (Fla. 3d DCA 1996) (reversal required by derogatory comments concerning opposing counsel).

E. The Liggett Defendant: Confirmation of a Kangaroo Court

What precedes is evidence that Judge Kaye presided over a judicial travesty. The treatment of the Liggett Group (one of the defendant corporations) is icing on this case.

In the part of the trial dealing with damages to the three class representatives, the jury allocated zero fault to Liggett. Nonetheless, it held Liggett jointly and severally liable for (i.e., liable for the entire amount of) \$12.7 million in compensatories for three named plaintiffs, and \$145 billion in punitive damages for the class. Liggett was punished for its nonexistent fault. Judge Kaye nonetheless denied Liggett's motion to set aside the judgment against it. But as the court pointed out, no evidence against Liggett was produced at trial. There was no proof that any of the named class representatives had ever once used a Liggett product. The Court of Appeals concluded, "the jury was obviously swept along in lemming-like fashion to find all the defendants responsible because they participated in the tobacco industry. This is not the law. Mere participation in the tobacco industry does not destine a corporation to legal suicide upon the shores of bankruptcy."¹⁷

III. THE SUPREME COURT OF FLORIDA SPLITS THE BABY

The Court of Appeals panel denied plaintiffs' motion to have it rehear *Engle*, and similarly denied their motion to reargue the case to the court *en banc*. Also denied was a motion to certify the case to the Florida Supreme Court. This would have seemed to deny any further recourse to plaintiffs, as there is no appeal of right in such cases.

¹⁶*Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *23, note 44.

¹⁷*Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *23.

But Florida's Supreme Court does have jurisdiction *if* it concludes that a lower court has misapplied one of its precedents.¹⁸ The Court of Appeals had determined, *inter alia* that Florida's multibillion dollar settlement with tobacco companies precluded tobacco lawsuits by individual Floridians, pursuant to *Young v. Miami Beach Improvement Co.*, 46 So.2d 26 (Fla.1950) (holding that each member of the public was bound by a general-interest decision reached in a case filed by a governmental body). The Florida Supremes unanimously distinguished *Young*, among other reasons because in *Engle* the class members were suing for punitive damages not available to the state in its lawsuit against Defendants. Therefore, it held, the *Young* precedent was inapposite and should not have been used by the Court of Appeals. Thus, the Supreme Court granted itself jurisdiction in the case.

On the substance of the matter, the Florida Supreme Court's message was mixed. Here, in a nutshell, is what it decided:

1. The appellate court's reversal of the \$145 billion punitive damages award was unanimously upheld, as the award was excessive as a matter of law. The *idea*, however, of determining punitives before compensatories have been determined for each plaintiff was upheld. On this issue an appeal to the U.S. Supreme Court, based on *BMW v Gore*¹⁹ and *State Farm v Campbell*,²⁰ may be warranted.
2. The appellate court's decertification of the plaintiffs' class was also upheld, but (ruled a majority) without prejudice to class members filing individual claims (and maybe even another, more narrowly tailored, class action claim) within one year of its decision.
3. A majority held that the trial jury's compensatory awards in favor of Mary Farnan for \$2,850,000 and Angie Della Vecchia for \$4,023,000 should be reinstated, except against defendant Liggett, as the court conceded that it is hard to be held liable when one has been found 0% negligent. In addition, the court unanimously

¹⁸See ART. V, § (B)(3), FLA. CONST.

¹⁹*BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

²⁰*State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

agreed that the compensatory damage award in favor of Frank Amodeo must be vacated based on the statute of limitations.

4. A majority of the court concluded, overturning the Court of Appeals, that it had been proper to allow the jury to make findings in Phase I of the trial. Because of these findings, individual plaintiffs who sue in the future pursuant to note 2 above will not have to prove:
 - a. that smoking cigarettes, as a general matter, causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer);
 - b. that nicotine in cigarettes is addictive;
 - c. that the defendants placed cigarettes on the market that were defective and unreasonably dangerous, and therefore that they are strictly liable under Florida products liability law for damages caused by these cigarettes;
 - d. that the defendants concealed or omitted material information not otherwise known or available concerning the health effects or addictive nature of smoking cigarettes, or that it disseminated material on this subject knowing that the material was false or misleading, or both;
 - e. that 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;
 - f. that all of the defendants sold or supplied cigarettes that were defective;
 - g. that all of the defendants (save Liggett) were negligent.

In other words, individual suits will focus only on issues of reliance (was this individual plaintiff actually "tricked" into smoking) and on cause-in-fact (was this individual plaintiff's health problem "caused" by smoking). Punitive damages will be available for each of the individual plaintiffs, given the findings above.

5. As for plaintiffs' counsel's "rhetoric," a majority of the Court disagreed with the Appellate Court's conclusion that Mr. Rosenblatt's race-baiting arguments required reversal of the individual verdicts in favor of Farnan and Della Vecchia, but nonetheless condemned these arguments as "unbecoming an attorney practicing in our state courts."²¹ The court did not address the racially

²¹*Engle v. Liggett Group, Inc.*, 2006 WL 3742610 (Fla.), at 18 (Dec. 21, 2006).

inflammatory arguments made during Phase II of the trial, since it reversed the punitive damages award that resulted from that phase.

What to make of this outcome? Though on its face the ruling is favorable to the tobacco defendants (because of the confirmation of the reversal of punitives and the decertification of the plaintiffs' class) the Supreme Court of Florida has handed an important victory to the trial bar. First, the majority accepts the possibility of a future class action, despite the fact that by definition each class member is exposed to nicotine in differing quantity, from different products, over different periods of time, and with vastly different individual knowledge about risks.²² Tobacco companies' likely future class action exposure in Florida is tremendous. In the words of Northeastern University's [Tobacco Products Liability Project](#), which is closely aligned to the trial bar,

To be relatively conservative, assume that the class size is 200,000 and that one third of these individuals actually file complaints within the year. That means we would see about 67,000 new cases. If the plaintiffs win only half of these (bearing in mind that most of the difficult issues have already been decided), this could mean 38,500 verdicts. Looking at the very low end of compensatory damages for one of the smoking-caused diseases, assume that these verdicts average \$500,000. Assume that only half of these verdicts will trigger punitive damages and that punitive damages average nine times the compensatory damages. That would mean \$19.2 billion in compensatory damages and an additional \$86.6 billion in punitive damages for a total of around \$106 billion.

If and when individual suits are filed, it will be a monumental challenge for defendants to simultaneously defend so many cases. Clearly tens of thousands of trials will take years to play out, and this could very well require cigarette companies to defend hundreds of trials at a time in Florida alone. The cost of figuring out which individual actions are affected by the statute of limitations is daunting. Does the holding mean that

²²See *Castano v. American Tobacco Co.*, 84 F. 3d 734 (5th Cir., 1996) at 742-3.

any Florida resident whose injury was manifested prior to November 21, 1996 (date of the Phase 1 findings) has one year to sue and benefit from these findings as *res judicata*? Likely that is true. This means that anyone whose injury manifested itself from November 22, 1996 on must establish the findings enumerated in #4 above again before a new factfinder. This sets up at least two prospective class actions, and of course inconsistent findings among the numerous individual suits, as well as tremendous costs of determining the date of manifestation of injuries.

In addition, since Florida is a comparative fault state and since the comparative negligence of each plaintiff smoker will almost certainly be argued, the majority's decision will lead to the unprecedented comparison of *one* jury's determined defendants' negligence with *another* jury's determined plaintiff's negligence. Determining shares of comparative negligence is hard enough to do when one jury is casting all the blame. But how is the jury in future trials to know *how comparatively* negligent the *Engle* jury found defendants as compared with plaintiff's wrongdoing? Since comparative negligence reduces the compensatory award to plaintiff, wouldn't it follow that the previously determined (under the majority's ruling) punitives might be too high, constitutionally, vis-à-vis that plaintiff? The majority defended itself by noting that "the procedural posture of this case is unique and unlikely to be repeated,"²³ but it is not clear to me that this uniqueness can validate the ruling. If comparative negligence is the law of that land, it is hard to see how due process of law is possible to maintain.

CONCLUSION

Is the *Engle* Saga over? It surely is in Florida. But a petition for certiorari to the

²³*Engle v. Liggett Group, Inc.*, 2006 WL 3742610 (Fla.), at fn 12 (Dec. 21, 2006).

U.S. Supreme Court could be forthcoming. If this happens, the arguments raised in this report will surely be brought up again – and a fourth and final round to this epic battle over the nature of American tort law will be fought.

WLF LEGAL POLICY ADVISORY BOARD

The Honorable Dick Thornburgh

*Kirkpatrick & Lockhart Preston
Gates Ellis LLP
Washington, D.C.*

CHAIRMAN OF THE BOARD

Frank J. Fahrenkopf, Jr., Esq.
Hogan & Hartson LLP

The Honorable Richard K. Willard
CHAIRMEN EMERITUS

Joseph A. Artabane, Esq.
Artabane & Belden, P.C.

Mary Azcuenaga, Esq.
Heller Ehrman White & McAuliffe

Professor Thomas E. Baker
Florida International University
College of Law

Mark A. Behrens, Esq.
Shook, Hardy & Bacon L.L.P.

Thomas Hale Boggs, Jr., Esq.
Patton Boggs

Gary B. Born, Esq.
Wilmer Hale
London, England

Michael K. Brown, Esq.
Reed Smith LLP
Los Angeles, California

George M. Burditt, Esq.
Bell, Boyd & Lloyd
Chicago, Illinois

The Hon. James H. Burnley, IV
Venable LLP

Henry N. Butler
Director, Judicial Education
Project, AEI-Brookings Joint
Center for Regulatory Studies

The Honorable Tom Campbell
Dean, Haas School of Business
University of California, Berkeley

Michael A. Carvin, Esq.
Jones Day

Charles Cooper, Esq.
Cooper & Kirk

Joseph E. diGenova, Esq.
diGenova & Toensing

Professor Viet D. Dinh
Georgetown University Law Center

The Honorable John Engler
President and CEO
National Association of
Manufacturers

The Honorable Harold Furchtgott-Roth
Furchtgott-Roth Economic
Enterprises

Kenneth S. Geller, Esq.
*Mayer, Brown, Rowe & Maw
LLP*

Stuart M. Gerson, Esq.
Epstein Becker & Green, P.C.

Albert Gidari, Esq.
Perkins Coie LLP
Seattle, Washington

Benjamin L. Ginsberg, Esq.
Patton Boggs LLP

Steven B. Hantler
Assistant General Counsel
DaimlerChrysler Corporation

Professor William F. Harvey
Dean Emeritus & Carl M. Gray
Emeritus Professor of Law
Indiana University School of
Law

Professor Maurice J. Holland
University of Oregon
School of Law

The Honorable Troy King
Attorney General
State of Alabama

Clarence T. Kipps, Jr., Esq.
Miller & Chevalier

Philip A. Lacovara, Esq.
*Mayer, Brown, Rowe & Maw
LLP*

Susan W. Liebeler, Esq.
Lexpert Research Services
Los Angeles, California

Roger J. Marzulla, Esq.
Marzulla & Marzulla

Arvin Maskin, Esq.
Weil, Gotshal & Manges
New York, New York

The Honorable Rob McKenna
Attorney General
State of Washington

John A. Merrigan, Esq.
DLA Piper

Professor John Norton Moore
University of Virginia
School of Law

Mark C. Morril
Senior Vice President & Deputy
General Counsel
Viacom Inc.

Glen D. Nager, Esq.
Jones Day

The Honorable Theodore B. Olson
Gibson, Dunn & Crutcher LLP

W. Hugh O'Riordan, Esq.
Givens, Pursley & Huntley
Boise, Idaho

Robert D. Paul, Esq.
White & Case

Professor Stephen B. Presser
Northwestern University
School of Law

Professor George L. Priest
John M. Olin Professor of
Law and Economics
Yale University

Charles F. (Rick) Rule, Esq.
*Fried, Frank, Harris, Shriver &
Jacobson*

The Honorable Mark Shurtleff
Attorney General
State of Utah

The Honorable Kenneth W. Starr
Dean, Pepperdine University
School of Law

The Honorable Don Stenberg
Former Attorney General
State of Nebraska

The Honorable Hal Stratton
Dykema Gossett PLLC

Ambassador Robert S. Strauss
*Akin, Gump, Strauss, Hauer &
Feld*

The Honorable Eugene R. Sullivan
CEO, Gavel Consulting Group

George J. Terwilliger, Esq.
White & Case

Daniel E. Troy, Esq.
Sidley Austin Brown & Wood LLP

Steven J. Twist, Esq.
Vice President & General Counsel
Services Group of America

The Honorable William F. Weld
New York, New York

Joe D. Whitley, Esq.
Alston & Bird LLP

Wayne Withers
Senior Vice President
& General Counsel
Emerson Electric Co.