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RULE OF LAW

A Spanking for the Trial Lawyers

By WALTER OLSON

One hundred and forty-five billion dollars! It was the biggest punitive damage award in U.S. history -- and it resulted from a "fundamentally unfair" trial in which plaintiffs' lawyers "succeeded in inflaming the jury's passions," most notably through "egregious" appeals to racial sentiment, to the point that its members "ran amuck." That's what a unanimous state appeals court said on Wednesday when it struck down the award -- \$145 billion! -- against the tobacco industry purportedly on behalf of all sick smokers in the state of Florida.

The decision isn't the final word on the much-hyped *Engle* class action, since appeal to the Florida Supreme Court is likely. But Wall Street cheered, bidding up tobacco stocks by more than 10%. And other businesspeople should take note, since defendants in other industries are only too vulnerable to the tactics and techniques justly rebuked by the appeals court this week.

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The case started off on a surreal note when Miami trial lawyer Stanley Rosenblatt and his wife, Susan, stepped forward to ask a Dade County court to designate them as legal representatives of every person in the country made ill by smoking -- a "class" very few of whose members had sought them out as champions. Rather than collapse in helpless laughter, appellate judges allowed the husband-and-wife team to proceed, but narrowed the class to include Florida smokers only. Then there began a jury selection phase lasting three months, with 800 prospects being sent home in search of the perfect six. (If you took the view that smoking is a matter of individual responsibility, you got bounced.) When the trial itself got under way, Mr. Rosenblatt called to the stand three plaintiffs allegedly typical of his huge class, including a 44-year-old nurse who said she "had no idea there was anything wrong with cigarettes at all," and packed the courtroom with attendees wheezing loudly amid oxygen tanks and voice boxes.

Logically the case should have had no racial angle since smokers are drawn from all ethnic groups. Yet having obtained a mostly minority jury (four blacks, one Hispanic, one non-Hispanic white), Mr. Rosenblatt proceeded to put experts on the stand who depicted smoking as particularly lethal to blacks and hammered away at tobacco firms for advertising in black magazines and consciously pursuing black customers. (That black publishers, radio stations and event promoters had avidly sought such "targeted marketing," and sometimes complained of bias when they didn't get enough of it, seemed neither here nor there.) Helping matters along, Dade County Judge Robert Kaye handed down numerous rulings favorable to the plaintiffs.

When the two-year trial was finally over, the six-member jury deliberated for a mere five hours before deciding that the tobacco industry should pay a sum more than twice the gross domestic product of New Zealand. (It also voted \$12.7 million to the three individual plaintiffs.) The \$145 billion was many times the tobacco companies' net worth, and thus (as the appeals court pointed out) in bald violation of state law, which prohibits punitive damages set so high as to bankrupt a defendant. Yet the verdict was soon hailed by such anti-tobacco stalwarts as Sen. Dick Durbin (D., Ill.) and even the American Medical Association, which seems to have trouble recognizing litigation excess when its own members are not among the intended targets.

Now, in its 68-page ruling, the appeals court calmly explains why virtually every aspect of the *Engle* verdict flunks on grounds of basic fairness and legality. As was widely expected, it found the damage award grossly excessive, both as a matter of Florida law and under constitutional standards of due process. Also as widely expected, it found that the case should not have gone forward as a class action. Separate trials are needed because of the vast differences among individuals on such issues as why they decided to smoke or quit. Indeed, the *Engle* jury found three different degrees of contributory fault on the part of the three named plaintiffs.

While the appeals court opinion criticizes many of Judge Kaye's rulings, it reserves its greatest ire for something barely touched on in many news accounts of the case -- namely, the pervasive misconduct of Mr. Rosenblatt. "Plaintiffs' counsel began making racially charged arguments on the first day of trial," it notes. Among the milder ones were frequent gratuitous references to such figures as Rosa Parks and Martin Luther King Jr. Aside from "inflaming the jury with racial pandering," Mr. Rosenblatt attacked opposing counsel, made reference to matters not in evidence, personally vouched for matters that were supposed to be up to the jury, and more. In one especially damaging episode, Mr. Rosenblatt repeatedly planted with the jury the idea that the defendants could sustain a larger verdict by paying it out in installments, rather than all at once. He had good reason to know this was false -- Florida law makes such damages payable immediately; and even Judge Kaye found him in contempt over that one. But it seems to have swayed the jury.

"It is obvious," concludes the court, "that the 'runaway' jury award was largely the result of numerous improper comments by plaintiffs' counsel directing the jury to disregard limitations on punitive damages. The trial was book-ended with prejudicial attorney misconduct which incited the jury to disregard the law." The court even found that in a 1992 book Mr. Rosenblatt had boasted of winning acquittal for a murder defendant by way of racially based appeals that turned up "almost verbatim" in his *Engle* arguments. In the book, he wrote of his ability to communicate to jurors "in a subtle way" that they needn't be bound by legal instructions.

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One other portion of Wednesday's ruling has far-reaching implications, yet went almost unremarked in early press accounts. At trial, Judge Kaye had barred defendants from arguing that their \$246 billion settlement with the 50 states had already resolved the punitive damages issue. But the appeals court took a different view. The state of Florida's lawsuit against the tobacco industry, it pointed out, asserted claims of fraud, conspiracy, addictiveness and so forth against the companies, and demanded punitive damages. By consenting to a lucrative settlement of those claims, the court said, the attorneys general of Florida (and presumably the other 49 states) foreclosed further claims for punitive damages on behalf of the community as a whole over those pre-1998 offenses.

Tobacco companies -- punished enough? Now there's a heretical thought.

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