

Hello again!

I didn't think I'd be writing again so soon but there's some big news on the tobacco front that I thought I'd share with you. Even if your company doesn't sell tobacco products, I think you'll find these developments to be broadly applicable.

The big news is that an intermediate appellate court in Florida yesterday overturned the largest punitive damage award in U.S. history -- a \$145 billion jury verdict against five cigarette makers. The plaintiffs represented a class of approximately 700,000 smokers who claimed that they could not stop smoking because of an addiction to nicotine and therefore developed medical problems ranging from colds and sore throats to cancer and heart disease. The trial took two years. In the first phase the jury found that the defendants had lied to the public about the addictive nature of their products and the harmful effects of smoking. In the second phase the jury decided the amount of punitive damages. Phase 3 -- which has not yet happened -- was supposed to decide compensatory damages on an individual basis for the class members.

The primary reasons for the appellate court's reversal were (a) the excessive amount of the punitive damages and (b) error in trying the case as a class action. The court found the punitive damages to be excessive for many of the reasons discussed in my two previous updates. It found that \$145 billion was roughly 18 times the proven net worth of the defendants and would have bankrupted them if it had to be paid. "The amount awarded should be large enough to provide retribution and deterrence, but cannot be so great as to result in bankruptcy."

Class action treatment was improper because each smoker's claim was too unique and individualized. Such factors as when the smoking began, how long it lasted, what warnings were given and understood, what attempts to quit were made, what illnesses occurred, the extent of disability and the appropriate amount of compensatory damages would all have to be considered before appropriate punitive damages could be awarded.

Barring any change on further appeal to the Florida Supreme Court or the U.S. Supreme Court, this ruling ends the class action and leaves each class member with the choice of whether to proceed to trial individually.

The other news concerns tort reform. With a Republican in the White House and 2002 election results which gave Republicans control of Congress, there have been high hopes among product sellers for significant federal tort reform. Such reforms as caps on damages, defenses based upon compliance with governments standards and elimination of punitive damages against non-manufacturer product sellers appeared to be on the horizon. However, although legislation protecting gun sellers from liability to crime victims and placing caps on medical malpractice awards has progressed through the House of Representatives, no reform has yet been enacted into law. In an ominous sign that serious tort reform may not get through the Senate, last week 14 Republican senators joined with the Democratic minority to reject legislation that would have capped plaintiffs' lawyers' fees in tobacco cases where more than \$100 million was awarded. Although this hardly seems to be a radical proposal, apparently the plaintiffs' lawyers and their allies in the Senate viewed it as an opening thrust in the tort reform battle that had to be defeated. Given the result, I am pessimistic that we will see any meaningful tort reform soon. [By the way, I purposely used the term "plaintiffs' lawyers" instead of "trial lawyers." Unfortunately, the media has created confusion and defense lawyers like me now find it necessary to clarify that although we're trial lawyers we aren't the "trial lawyers" frequently referred to in the media who sue physicians, product sellers and insurance companies.]

Hope this is helpful. Let me know if you have questions or comments.

Best regards.

Remy

P.S. Last chance to sign up! Most of you receiving this have affirmatively indicated that you want to be on the list. Some of you haven't yet responded. So that I'm not viewed as a spammer, future updates will only go to those who have replied by e-mail.

**For more information on U.S. product liability please contact Remy Zimmermann, Shaun Sullivan or Alan Schwartz at 203.498.4400. Please visit**

**www.wiggin.com**

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