Legal Backgrounder

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LIGGETT GROUP V. ENGLE: A CASE STUDY OF CLASS ACTION ABUSE

by

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As everyone knows, a chain is as strong as its weakest link. Lawyers are reminded of this maxim when a terrible Supreme Court decision is handed down ─ in such a case one court can single-handedly wreak havoc on a nation's legal order.

Few of us may realize that a state *tort* decision, typically not reviewed by the Supremes, can have equally devastating national ramifications. Consider the following hypothetical: an attorney sues Coca-Cola in Tortopia state court. The suit is a class action, the plaintiff class being composed of all Americans who have ever consumed the beverage. The class action claims that Coke contains caffeine, that many Americans are addicted to caffeine, and that many of those same Americans become ill. The trial judge certifies the class and then structures the case so that, to obtain a judgment against Coca-Cola the jury doesn't need to decide whether the company is liable for any injuries. Rather, the jury need "merely" decide whether Coca-Cola should pay punitive damages for marketing a legal product containing an addictive substance. Under this procedure, a Tortopia jury condemns Coca-Cola to pay the class *1800% of its net worth*. The judge orders Coca-Cola to deposit this sum immediately. Tortopia has just put Coke out of business.

This scenario is, essentially, what almost happened in *Liggett et al v Engle. Liggett Group. Inc. et al. v Engle*, 2003 WL 21180319, 28 Fla. L. Weekly D1219, Fl. App. 3rd Dist., May 21, 2003. Thankfully, Florida's intermediate Court of Appeals earlier this year overturned the trial court's verdict in that case.[1] The *Engle* trial court's decisions made a mockery of fundamental principles of law, and provides an ideal example of why a national solution to class action abuse is a worthwhile pursuit.

Round 1: Judge Robert F. Kaye's Trial — "What's Law Got To Do With It?" In May 1994, plaintiffs' lawyers Stanley and Susan Rosenblatt filed a 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 in cigarettes. These three 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 "torts" impugned ranged from "strict liability" to negligence to "intentional infliction of emotional distress" to fraud.

[1]On September 22, 2003, the Court of Appeals panel denied plaintiffs' motion to rehear the case and to certify the ruling to the Florida Supreme Court. The court also denied a motion to rehear the case *en banc*.

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The flaws in this complaint are so apparent that any first year law student could flag them. Here are but a few:

- How can an addiction to nicotine "cause" health problems? Presumably it is the *consumption of cigarettes* that causes health problems. Why don't the class members soothe their addiction by taking other substances (patches, etc.) containing nicotine? Do nicotine patches have a different, inferior kind of nicotine?
- How can those who started smoking before the mandatory warning on cigarette packages be lumped in the same "class" as those who started smoking last year and started coughing last week?
- How can a *national* class be certified? Isn't the common law of torts a state issue?[2]
- How can "strict liability" be maintained when some jurisdictions (like Virginia) don't even recognize it?

One would expect the trial judge to strike several of the causes of action immediately. None of these issues fazed Judge Kaye, who 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 determining whether the tobacco companies were legally liable as alleged.

The *Engle* show trial began. It was rife with irrelevant racially-charged arguments that were offensive and prejudicial to defendants.[3] The Rosenblatts began race-baiting 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. But the Rosenblatts, 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 a strange racial bias was being invented. In cross-examining a defense expert witness, for example, plaintiffs' counsel noted that his résumé included 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. Judge Kaye mildly and ineffectively sustained the defense objections with a 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] that [have] nothing to do with this case. So we'll proceed with that concept in mind. Go ahead.

The Rosenblatts realized that a light tap on the knuckles is like a wink and a nod. Later in the trial, when the tobacco companies pointed out, as of course they were duty bound to do, that sale of their product and all of its contents was 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 many others:

> [Plaintiffs' counsel] "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 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' objection at this point, but of course counsel ignored the ruling and went on: "In this building, in this building, a temple to the law, they were — there were drinking fountains which said 'Whites Only.' I tell my kid about that. He said: "how did you put up with this, daddy?'" Despite the court's ruling sustaining defendants' objections that none of this had anything to do with cigarette smoking, counsel succeeded in completing his argument to the jury. Repeated motions to declare a mistrial were denied. The Miami-Dade jury condemned defendants to pay the plaintiff class $145 billion in punitives, the largest such award in American legal history.

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[2]The class was later restricted, by an appeals court, to Florida residents. However, as will be noted below, even this restricted class was fatally defective.

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

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The law holds, however, that a defendant may not be punished for lawful conduct. *State Farm Insurance v Campbell*, 2003 WL 1791206, at *9. It also holds that selling cigarettes cannot be in and of itself tortious under state tort law because of federal preemption. *FDA v Brown and Williamson Tobacco*, 529 U.S. 120 (2000). Finally, both state[4] and federal law[5] hold that punitives may not be granted without a finding that there is liability — yet no liability to the class was determined by the jury[6].

In spite of the law, 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 alone.

The defendants appealed to Florida's Third District Court of Appeals.

Round 2: The District Court of Appeals Stops the Madness. On May 21, 2003, in a scathing repudiation of Judge Kaye and of the *Engle* plaintiffs' counsel, a unanimous panel overturned the punitive award and ordered a decertification of the *Engle* class. The Court of Appeals gave numerous reasons for its ruling. Here, in a nutshell, are the four most important ones:

1. The Class Must Be Decertified. The Court of Appeals noted that the basic (though not the only) problem in a suit against tobacco companies is one of legal causation — how could defendants be responsible for dangers voluntarily assumed by smokers? To determine whether the cause of an individual smoker's illness is, say, fraud (one of the torts 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 was not one to allow "reservations" to get the better of him. The Court of Appeals demurred. The fundamental issue litigated required individual determination. No class action could lie in such circumstances.

2. 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 being punished. *Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *9. Since there was no finding that any tort had been committed against the class, punitive damages were premature.

Judge Kaye had not found this to be an insuperable problem. The Rosenblatts claimed that the judge had implicitly "extrapolated" from the damages suffered by the three named class representatives to infer what the compensatory damages for the entire class would be, thereby authorizing the calculation of punitives. The Court of Appeals pointed out that wrongdoing is insufficient for liability unless there is proximate causation, as mentioned above. Any "extrapolation" of damages, if indeed it did occur, was therefore illegal. It was illegitimate to conclude that the entire class was identical, writ large, to the three plaintiffs (who had been hand-picked by the Rosenblatts). Extrapolation from these three individuals to 700,000 Floridians, then granting them punitives, requires an irrefutable presumption that the 700,000 suffered injuries comparable to those suffered by the representatives. This would have established a new low for junk science, and would have been directly contrary to the Supreme Court's holdings on punitive awards.

3. In Any Case the Punitive 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. *See, e.g., Arab*

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[4]*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).

[5] *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.)

[6]Even this was farcical. The six named plaintiffs received over 12 million in compensatories, even though the statute of limitations had clearly run against one of them.

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Termite & Pest Control v Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982). The combined net worth of all defendants was $8.3 billion, less than 6% of the punitive award. No reported Florida decision had ever granted punitives exceeding net worth, let alone eighteen times net worth. The Court of Appeals laconically observed that "awarding the GDP of several European countries was an error," *Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *21.

4. Plaintiffs' Counsel Engaged in Inappropriate Conduct Mandating Reversal. The Court of Appeals described in detail the Rosenblatts' race-baiting and Judge Kaye's cowardly refusal to suppress it. As the Court of Appeals noted, Stanley 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 sharply alluded to Judge Kaye's warning to the Rosenblatts, during the trial, that race baiting might generate a detrimental result on appeal. *Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *14. That he merely warned the Rosenblatts that a higher court might enforce the Rule of Law is eloquent testimony to the judge's own indifference to do so.

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 adverse judgment. The Rosenblatts personally vouched to the jury that a huge award would not bankrupt defendants, since payments could be made in installments. But the Rosenblatts knew that the law did not provide for such payments. Contrary to the Rosenblatts' representations to the jury, Judge Kaye ordered defendants to pay $145 billion immediately into the court registry. Again, Judge Kaye's feeble mismanagement of the case directly contributed to this travesty of justice.

Stanley Rosenblatt's behavior merited judicial discipline. He told the jury that "I wanted to punch" one witness. About 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 expressly forbids an attorney's expressing personal opinions about a case, or attacking the integrity of counsel without producing evidence. *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). In the face of the Rosenblatts' 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." *Liggett Group Inc. v. Engle*, 2003 WL 21180319 at *23, fn. 44. 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. Lemming-like juries, race-baiting lawyers and lawless judges do not Due Process make.

Epilogue. The Rosenblatts' past "victory" in a secondhand smoke case garnered $46 million in lawyers' fees for them, and not a penny in compensation for their flight attendant clients. Perhaps they were hoping for a repeat performance in *Engle*. The law, and the Florida court of appeals, thankfully has foiled them.

Coincidentally, on the day of the appellate reversal in *Engle*, the House Judiciary Committee reported favorably on the *Class Action Fairness Act of 2003*. That bill, passed by the House on June 12, would constrain state courts from handling national class actions. Subject to a few exceptions, if the amount in controversy exceeds $5 million and a substantial percentage of the class plaintiffs are citizens of a state different from any defendant, federal courts have discretion to remove a case from state jurisdiction. It appears that the Act would have prevented the travesty that almost occurred in *Engle*. The future of such reform, however, is regretfully up in the air as this paper goes to press, because on October 22, proponents of the bill came up short, 59-39, in a vote to end a filibuster in the Senate. In the absence of a last minute compromise on the bill, America will have to rely upon the state judiciary to police class action abuses. Such a scenario bodes poorly for consumers, businesses and our economy.

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