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Fla. Justices Asked to Reinstate \$145 Billion Award in Tobacco Suit

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Plaintiffs attorneys Stanley and Susan Rosenblatt got their final chance Wednesday at saving a \$145 billion verdict they won against cigarette makers as part of their decade-long crusade against the tobacco industry.

The Miami plaintiffs lawyers asked the Florida Supreme Court to reinstate the punitive damages verdict and re-establish the class of injured smokers in *Engle v. Liggett Group*.

The Rosenblatts represented the class of 700,000 Florida smokers that was unanimously decertified in May 2003 by a three-judge panel of the state's 3rd District Court of Appeal. At trial, they had argued that the smokers were victims of an industrywide fraud and conspiracy to cover up the harmful effects of smoking.

On Wednesday, the Rosenblatts contended in *Engle* that the 3rd DCA's reversal of the huge 2000 verdict in Miami-Dade County Circuit Court and decertification of the class would leave the hundreds of thousands of injured smokers without a legal remedy or further recourse in the Florida courts.

Susan Rosenblatt argued that the appellate panel that reversed the verdict never addressed the extent of the harm and the "reprehensibility" of the actions of the defendants. She also said the appellate panel's decision to preclude punitive damages based on a 1997 settlement between tobacco companies and the state of Florida was "ludicrous" because the cases are so different.

Susan Rosenblatt told the justices that her clients would be willing to accept less in punitive damages as long as they can retain the class. "If the court feels the verdict is too high and is excessive ... the court can and should reduce the verdict," she said. "The people deserve to have a remedy and without this, there really is no remedy."

Justice Harry Lee Anstead asked Elliott Scherker, a shareholder at Greenberg Traurig in Miami who represents the tobacco companies, about the ramifications of the high court affirming the lower court's reversal.

Scherker said there is no harm in requiring each plaintiff to try his or her case individually because the final phase of the originally established three-phase trial would require the individual plaintiffs to prove their claim on the class action award.

He criticized the original decision by the 3rd DCA in 1996 to certify the class. "This case exemplifies the chaos that can result from an improperly certified class action," Scherker said.

If the high court upholds the 3rd DCA's reversal of the verdict and class certification, the future for individual smokers seeking to sue cigarette makers in Florida appears bleak. Most attorneys reject individual cases because of the expense, difficulty, low odds of success and small financial return.

By decertifying the *Engle* class, it would be nearly impossible to find enough legal representation for 700,000 plaintiffs in Florida and to try each case on its own merits. Many observers believe it would severely limit future tobacco litigation in the state.

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The Rosenblatts originally brought the suit against the cigarette companies in 1994 on behalf of all smokers nationwide. Led by Florida pediatrician Howard Engle and five other plaintiffs, *Engle v. Liggett Group* alleged that Florida smokers were addicted to nicotine and unable to quit smoking, thus developing illnesses ranging from cancer to heart disease. That class was later limited to 700,000 smokers in Florida by the 3rd DCA.

After a two-year, multipart trial before Circuit Judge Robert Kaye, a jury delivered its giant punitive damages verdict in 2000 against the defendants, which included Liggett Group, Philip Morris, Lorillard, Brown & Williamson and R.J. Reynolds. It was the largest verdict in U.S. history.

But in May of last year, a panel of the 3rd DCA, including one judge who was on the panel that initially certified the *Engle* class, unanimously decertified the class on the grounds that the claim of each member of the class was too unique to be tried collectively. In doing so, the panel, consisting of Judges David Gersten, David Levy and Mario Goderich, vacated the record \$145 billion award. The panel said the punitive damages were excessive and would bankrupt the companies.

The Rosenblatts petitioned the Supreme Court for review, arguing that the 3rd DCA's unanimous decision conflicted with rulings in other Florida appellate districts. The high court accepted the case, leading to Wednesday's oral arguments.

At Wednesday's hearing, Stanley Rosenblatt characterized the appellate panel's reversal of its own previous ruling as a "flip-flop," and suggested that it was inappropriate for a panel that did not comprise the full court to ignore its own precedents.

Justice Anstead expressed concerns regarding the 2003 3rd DCA panel's authority to say the court had erred in certifying the class in the first place. He wondered aloud whether the panel was really saying in essence that the court changed its mind once the judges had the benefit of looking at other appellate decisions that went another way.

Chief Justice Barbara J. Pariente seemed skeptical that decertifying the class and requiring each plaintiff to bring an individual suit against the tobacco companies would be in the best interests of the Florida courts and its citizens. She asked how trying 700,000 plaintiffs individually would be an efficient way for the judiciary to handle the matter.

Scherker said that was a difficult question to answer. But he contended that deciding 700,000 claims as part of the third phase of the class action or having 700,000 trials "from scratch" are "equally bad" options.

In an interview, Edward L. Sweda Jr., senior attorney for the Tobacco Products Liability Group, a tobacco industry watchdog based in Boston that has closely followed the *Engle* case, warned that if the Supreme Court upholds the 3rd DCA, it would be unfair to the individual plaintiffs throughout Florida.

"Is that justice?" Sweda asked. "Is that a viable remedy for people who relied reasonably on these certifications? In the vast majority of instances, there's no remedy at all. To affirm that ruling means thousands have courthouse doors slammed in their faces."

Scherker had a different view. "We believe the 3rd District got it right in decertifying the class and its ruling," Scherker said in an interview after Wednesday's arguments concluded.

Stanley Rosenblatt did not return calls for comment.

Justice Raoul G. Cantero III recused himself from the case because a lawyer at his former firm, Adorno & Yoss, defended one of the tobacco companies named in the suit.

The high court's decision is expected sometime in the first half of next year.