

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY,
FLORIDA

General Jurisdiction Division
CASE NO. 94-08273 CA -22

HOWARD A. ENGLE, MD., et. al.,
Plaintiffs,

v.

RJ REYNOLDS TOBACCO ,et.,al.,
Defendants

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FINAL JUDGMENT AND AMENDED OMNIBUS ORDER

THIS CAUSE having come on to be heard on the Defendants' "**Motion At The Conclusion Of Phase II-B For A New Trial Or Remittitur, To Set Aside The Verdict, And For Entry Of Judgement In Accordance With Defendants' Motions For Directed Verdict, To Grant All Motions For Mistrial previously pending Or Denied, To Decertify The Class. and Alternative Motion For New Trial**", and the Court having been fully advised pursuant to over 190 pages contained in the "Motion", and in addition, having read the 78 page memo in support for a New Trial and Or Remittitur, and in addition having read over the contents of 6 rather voluminous loose leaf volumes submitted by the defense, and several other equally voluminous loose leaf volumes submitted by the plaintiffs, and having reviewed the applicable Law as submitted by both sides, the Court feels it can rule on the issues without further argument, oral or otherwise.

THEREFORE, the Court issues the following: **Omnibus Order**:

To say the least, this has been a most unusual and precedent setting trial. It consumed over TWO YEARS of hard fought trial by batteries of lawyers, required over 150 witnesses, involved thousands of documents and exhibits, and generated over 57,000 pages of testimony. The issues were highly complex and often novel, straining the ingenuity of the attorneys and of the Court.

This Case was brought alleging eight separate counts—**1- Strict Liability, 2- Fraud and Misrepresentation, 3- Conspiracy to Misrepresent and Commit fraud, 4-Breach of Implied Warranty and Merchantability and Fitness, 5- Intentional Infliction of Emotional Distress, 6- Negligence ,7- Equitable Relief, and 8- Breach of Express Warranty.**

The defense filed motions for directed verdict as to each count and the Court will address each count separately. Many of defendants motions, although titled separately, make reference to the same material relating to an individual count, but combining references to separate plaintiffs. The ruling on the efficacy of each count will therefore apply to each plaintiff unless otherwise noted.

The defendants have filed 22 Motions for Directed Verdict, and more than 24 other motions dealing with the issues in this case all of which were deferred and need resolution.

First, it should be noted that the jury in both Phase I and II A found each of the defendants Guilty as to all counts with the exception of count 7 for Equitable relief which the court dismissed previously under the plaintiffs request for Medical Monitoring.

Second, because it may become important in resolving some of the motions, the following is a list of the manufacturer, and their products, each of the plaintiffs class representatives were alleged to have smoked over the years.

MARY FARNAN

- 1.RJ Reynolds-----Camels, Salem, Winston, Winston Lights
- 2.Philip Morris-----Marlboro,
- 3.Brown and Williamson—Viceroy, Raleighs, Tareyton, Carlton, Pall Mall
- 4.Lorillard-----Kent
- 5.American Tobacco-----Lucky Strike

FRANK AMODEO

- 1.RJ Reynolds-----Winston, Camels,
- 2.Philip Morris-----Marlboro, Virginia Slims
- 3.Brown and Williamson—Viceroy,
- 4.American Tobacco-----Lucky Strike

ANGIE DELLA VECCHIA

- 1.RJ Reynolds-----Winston Lights,
- 2.Philip Morris-----Benson & Hedges, Marlboro, Cambridge Lights, Parliament
- 3.Brown and Williamson----Pall Mall, Tareyton,
- 4.Lorillard-----Kent
- 5.American Tobacco-----Lucky Strike

MOTIONS FOR DIRECTED VERDICTS

As to Count I—Strict Liability —

There was more than sufficient evidence at trial to satisfy the legal requirements of this Count and to support the jury verdict that cigarettes manufactured and placed on the market by the defendants were defective in many ways including the fact that the cigarettes contained many carcinogens, nitrosamines, and other deleterious compounds such as carbon monoxide. That levels of nicotine were manipulated, sometime by utilization of ammonia to achieve a desired “free basing effect” of pure nicotine to the brain, and sometime by using a higher nicotine content tobacco called Y-1, and by other means such as manipulation of the levels of tar and nicotine. The evidence more than sufficiently proved that nicotine is an addictive substance which when combined with other deleterious properties, made the cigarette unreasonably dangerous. The evidence also showed some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips so that they were covered by the smoker thereby increasing the amount of the deleterious effect of smoking the cigarette. There was also evidence at trial that some filters being test marketed utilize glass fibers that could produce disease and deleterious effects if inhaled by a smoker. In addition, there was adequate evidence that all three of the class members whose claims were tried in Phase II-A smoked one or more brands manufactured by one of more of the defendants.

The defendants have claimed that this count should have been dismissed as being barred by Section 402A of the restatement of Torts, comment (i). This Court is guided by

Burton v R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D Kan. 1995) quoting Rogers v.

R.J. Reynolds Tobacco Co. 557 N.E. 2nd 1045 (Ind. App. 2 Dist. 1990) which said:

“The reference in comment (i) to tobacco...does not as a matter of law remove all claims of defective tobacco products from the operation of 402A...[footnote 8]; Failing to warn the consumer of certain properties, such as nicotine addiction, in conjunction with its harmful qualities, render the product unreasonably dangerous....Also, a design defect which renders the product more addictive than it could be or addictive when it need not be at all, may render the cigarette unreasonably dangerous in conjunction with its harmful qualities”

The Motion for Directed Verdict as to Count I- Strict Liability ,is DENIED

As to Count II—Fraud and Misrepresentation—

Abundant evidence was adduced at trial to support the legal requirements of this Count and to support the jury verdict of the Count of Fraud and Misrepresentation. From the early years of advertising up until July of 1969, defendants engaged in concerted advertising campaigns extolling the virtues of smoking and making references to the lack of health risks and stressing the alleged benefits of smoking. References were made to Doctors smoking with no ill effects, to Radio and Television stars like Arthur Godfrey, and to sports figures, all of whom smoked and hawked the health benefits of tobacco or lack of health risks. All the while the defendants knew by their own research and the work of others, that cigarettes were carcinogenic and caused cancer and other deadly diseases. Defendants reneged on their promises contained in the Frank Statement of 1954, and never revealed to the public the addictive nature of tobacco-a fact they all recognized but never admitted. Even after 1969, defendants continued campaigns of misinformation about

the dangers of smoking and fostered the myth that there was a continuing controversy about causation in face of the over whelming contrary body of evidence worldwide. Not only was there misinformation supplied by defendants, there was concealment of known information which affected the health of the public at large. Despite a duty not to deceive, and a duty to disclose, the defendants failed to reveal information they knew was contrary to that which they disseminated –information that the defendants had developed through their own research. The concept of duty to disclose and duty not to deceive can be stated in no clearer terms than the words of the Court in Joiner v McCullers, 28 So 2nd 823 (Fla 1947)

“–the rule that fraud cannot be predicated of a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence, does not apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts of conduct, or is accompanied by misrepresentations, or where in addition to a party’s silence there is any statement, or act on his part which tends affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party’s attention from the real facts; then the line is overstepped and the concealment becomes fraud.”

These words are as good today as they were in 1947 and apply directly to the Fraud count and the Conspiracy count below. The only conclusion that can be drawn from such activity is that the defendants intended that the public rely upon that which the defendants generated over extended periods of time and which the defendants knew were false.

Having been exposed over the years to countless advertising exposures, it is reasonable, and the jury so found, that the plaintiffs relied upon the representations made by the defendants.

The Motion for Directed Verdict as to Count II- Fraud and Misrepresentation is DENIED.

As to Count III- Conspiracy to Misrepresent and Commit Fraud,-

The Court finds sufficient and more than adequate evidence to satisfy the legal requirements of this Count and to support the jury verdict that the defendants acted in concert to misinform and deceive. The Council For Tobacco Research and the Tobacco Institute were creatures of a joint effort by the defendants to either hide and/or conceal scientific research, or provide disingenuous and misleading information to the public at large .Evidence was established that these entities were not only funded and supported by the defendants, but were in some cases controlled and manipulated by them. The establishment of the “Special Products” division to allow corporate counsel to be involved and thereby invoke the protection of the “attorney-client” privilege all the while claiming these entities were independent of the defendants, is a prime example of the collusion involved . In addition thereto, representatives met from time to time at conferences and retreats to discuss and share information about the health effects and addictive nature of smoking and reached certain agreements on how to deal with the scientific community, including the Surgeon Generals, and how best to continue the perceived controversy in the

public's eye.

The Motion for Directed Verdict as to Count III- Conspiracy to Misrepresent and Commit Fraud, is DENIED.

As to Count IV—Breach of Implied Warranty of Merchantability and Fitness—

The record reflects sufficient evidence to support the legal requirements of this Count and the jury verdict that each of the three class representatives whose claims went to trial, adequately met the requirement to sustain the count of Implied warranty. The testimony revealed that each smoked and were exposed to the various brands manufactured by the defendants not only by the act of purchasing the products from retailers but also through the promotional activities of the defendants. Specific reference was made in the evidence to the mail- in coupon program whereby the defendants, by direct mail, supplied the plaintiffs with the various brands which they smoked These coupons where found in packs of cigarettes purchased by the plaintiff and were not available without a purchase—therefore were not “free”. Other promotions offered merchandise that was available for redemption with purchased cigarette coupons. Still other promotions distributed free samples without a purchase directly from the manufacturer. The defendants rely upon the holding of Kramer v. Piper Aircraft Corp., 520 So 2nd 37 (Fla. 1988) and Westinghouse Corp., V Ruiz., 537 So 2nd 596_(Fla. 3rd DCA 1988) which stands for the proposition that a no-privity breach of implied warranty, is supplanted by the doctrine of strict liability. However, in this case the Court specifically finds that the

evidence, as referred to above, clearly establishes the requirement of “privity” necessary to sustain a claim for implied warranty. See, i.e. Sheppard v Revlon, Inc., 267 So 2nd 662 (Fla. 3rd DCA 1972)

The motion for Directed Verdict as to Count IV-, Breach of Implied Warranty of Merchantability and Fitness, in so far as it is related to privity, is DENIED.

As to Count V—Intentional infliction of Emotional Distress —,

The evidence in this case supports the legal requirements of this Count and the jury verdict that the plaintiffs not only suffered severe injuries caused by smoking cigarettes but, also suffered extreme mental anguish and disability from the emotional distress directly attributable to the physical injury. In addition thereto the plaintiffs also suffered emotional distress upon the realization of being addicted to the defendants product, a condition that doesn’t necessarily manifest itself in any physical injury. Florida Courts have recognized the principle that there can be emotional distress with or without physical injury or impact. (Metropolitan Life Ins. Co. v. McCarson 467 So nd 277 Fla. 1985) and (Eastern Airlines, Inc. v. King. 557 So 2nd 547 Fla. 1990). Survivors are also entitled to, and so the jury found, a claim for Infliction of Emotional Distress .

The Motion for Directed Verdict as to Count V- Intentional Infliction of Emotional Distress is, Denied.

As to Count 6— Negligence—

The verdict of the jury on the issue of Negligence is well supported by the evidence.

The elements of negligence have certainly been sufficiently proven by the testimony in this case in that any reasonable person or entity, armed with the information the defendants had, should have done that which a reasonable person would have done under like circumstances, or should not have done what a reasonable person would not do under like circumstances.. It is obvious that a reasonable person or entity would not have allowed a condition to exist that he or it knew would injure someone, without taking appropriate measures to prevent it. The defendants according to the testimony, well knew from their own research, that cigarettes were harmful to health and were carcinogenic and addictive. By allowing the sale and distribution of said product under those circumstances without taking reasonable measures to prevent injury, constitutes, in this Courts opinion, and in the opinion of the jury as it turns out,- negligence.

The Motion for Directed Verdict as to Count VI- Negligence,, is DENIED.

As to Count VII—Equitable Relief --

This Count has previously been dismissed by the Court under the heading of Medical Monitoring.

The Motion for Directed Verdict as to Count VII- Equitable Relief, is GRANTED

As to Count VIII--- Breach of Express Warranty –

Evidence adduced at trial more than adequately supports the jury verdict and satisfied the legal requirements of express warranty in that the defendant tobacco

companies for decades prior to July 1969, advertised their products as being safe, free of medical risks, etc, by using such techniques as having “doctors” promoting the products, etc. In some instances making claims that a particular brand is easier and smoother on the throat and less irritating. Subsequent to 1969, the advertising campaign shifted to claims of low tar and nicotine when in truth the defendants knew the tar and nicotine levels were either false or manipulated.

The Motion for Directed Verdict as to Count VIII- Express Warranty, is DENIED.

In addition to the above, the defendants have filed numerous other motions for Directed Verdicts ,which the Court will treat below:

Statute of Repose --

This issue as it relates to the facts of the case, has been resolved up to now by the decision in Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 FLW S12 (case No. SC94544 Opinion filed January 6th, 2000). The Supreme Court reaffirmed the decision in Diamond v E.R. Squibb & Sons, Inc, 366 So 2nd 1221 (Fla 3rd DCA 1979),and held that there is an exception to the Statute of Repose in cases of latent injury in product liability cases.

“Therefore, we hold that in a products liability action where the now-defunct statute of repose is still applicable, the latent injury exception remains viable so that the statute of repose will not extinguish the plaintiff’s cause of action if his or her injuries are latent and

undiscoverable within the repose period.”

This concept has been following by the 2nd District in a recent opinion, *Laschke v Brown and Williamson Tobacco Corporation et. al.* 2000 WL 868251 (FLA. App. 2nd Dist.) in which the Court said:

“ The conspiracy of the defendants has been ongoing since at least December of 1953 and has been continuous through the present. We conclude that, because of the dispute surrounding these allegations, the date of the last act done in furtherance of the conspiracy presents a question of fact not proper for resolution on summary judgement. Therefore, the Laschkes’ claim for conspiracy to commit fraud cannot be said to be barred by the statute of repose as a matter of law on this record.”

The Motion for Directed Verdict on the issue of the Statute of Repose, is DENIED.

Statute of Limitations re: Frank Amodeo

The jury in Phase 11A determined that plaintiff Frank Amodeo knew or should have known on or before May 5, 1990 (4 years prior to the filing of this case) that he was addicted to smoking, and further, that he had cancer reasonably caused by smoking. This finding acts as a bar to Frank Amodeo’s claims for Strict Liability, Implied and Express Warranty, Negligence, and Emotional Distress. It does not however bar the claims under Fraud and Conspiracy pursuant to the holding in Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 FLW S12 (case # SC 94544 January6 2000) which recognizes an exception to the Statute Of Repose in the case of continuing fraud.

The Motion for Directed Verdict on the Statute of Limitations re: Frank

Amodeo is GRANTED as to the Counts of Strict Liability, Implied Warranty, Express Warranty, Negligence ,and Intentional Infliction of Emotional Distress, and DENIED as to the Counts of Fraud and Misrepresentation, and Conspiracy to Misrepresent and Commit Fraud.

Federal Preemption

The seminal case regarding Federal preemption in tobacco cases is Cipollone v. Liggett Group. 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2nd 407 (1992). That case specifically exempted claims of Fraud and Conspiracy to commit Fraud and Misrepresentation from the pre-emption effect of the 1969 Act.

“In the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from long standing rules governing fraud... Petitioner’s fraudulent misrepresentation claims that do arise with respect to advertising and promotions are not pre-empted...such claims are...predicated on...the duty not to deceive.”

The 1969 Act does not pre-empt any claim for acts committed prior to 1969 in any event, and certainly does not pre-empt any acts of fraud or conspiracy committed by the defendants subsequent to 1969. The record in this case is replete with evidence relating to the fraud and conspiracy claims which the jury apparently considered , and believed, in finding the defendants guilty of those counts.

As to the issue of addiction, there seems to be a head on conflict between the issue of “failure to warn” after 1969, and the concept that the defendants had a “duty not to deceive”. Given the merits of those claims, and the realization that the defendants had the

knowledge that nicotine addicts as early as the 50's and 60's and still publically declared, well into the 80's and 90's, that nicotine is not addictive, the record of the trial reflects that the plaintiffs presentation opted for evidence of a "duty not to deceive" which goes directly to the fraud and conspiracy exception under Cipollone ,rather than the "failure to warn" preemption element. Also see Joiner v. McCullers, 28 So 2nd 823 (Fla. 1974).supra.

The motion for Directed Verdict on the grounds of Federal Preemption is DENIED.

Failure to Warn Pre-1969

For guidance the Court relies on the decision in Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995), which definitively rejected the defendants theory that there was no duty to warn because everybody was aware of the dangers of smoking. The defendants position is disingenuous because the defendants for decades had decried the health risks of smoking and publically stated that there was no conclusive proof cigarettes caused disease. At the same time the defendants were aware that nicotine was addictive-----something the general public did NOT know. Also, the defendants were under a duty not to deceive. This concept can be stated in no clearer terms than the words of the Court in Joiner v McCullers, 28 So 2nd 823 (Fla 1947).supra.

The Motion for Directed Verdict for Failure to Warn is DENIED.

Motions for Directed Verdicts on behalf of Council For Tobacco Research and Tobacco Institute

Despite protests by these defendants that the plaintiffs were unable to point to any specific act of either of these defendants to establish plaintiffs claims, the jury, having found these defendants guilty on all counts for which they were charged , apparently found enough in the evidence to conclude that the thousands of pieces of information to which the plaintiffs were exposed over several decades, came from the concerted efforts of the defendants to provide such information to the public. Ironically, the defendants claim the plaintiffs could not possibly have known, and or, relied on the content of such dissemination, while at the same time arguing that the defendants cannot be held liable because over the years everybody knew of the dangers of smoking from other unnamed sources.

Since each of these defendants were acting on behalf of, or in concert with, the other defendants in the case, the jury reasonably could, and apparently did, conclude these defendants were guilty of fraudulent representation, concealment and conspiracy.

The motions for Directed Verdicts as to the Council For Tobacco Research and the Tobacco Institute are DENIED.

Application of Michigan and/or New York Law

This issue has already been decided by Judge Postman in his pre-trial order of January 6th, 1998 and is the law of the case. That order sets the principle that if a plaintiff was in the State of Florida at the time the medical condition was diagnosed and the causal relationship with smoking had manifested itself, and the plaintiff was a resident of Florida

at that time, then the law of Florida would apply regardless of the fact that the plaintiff had resided in another State and smoked prior to the diagnosis.

The Motions for Directed Verdicts on the application of Michigan and/or New York law are DENIED.

Motion for Directed Verdict on the issue of Punitive damages

The jury having heard the evidence submitted during the Phase I trial, definitively determined that the conduct and the behavior of the defendants rose to a level to entitle the plaintiffs to an award of punitive damages. The Court having heard the same testimony and evidence concurs the proofs were clear and convincing.

This motion is DENIED as to ALL defendants

OTHER MOTIONS FILED ON BEHALF OF THE DEFENDANTS MOTIONS IN LIMINE

The defendants in this case have filed numerous other motions, most of which were MOTIONS IN LIMINE or which in some regard related to the presentation of evidence. Most, if not all , were resolved during the evidentiary portion of the trial as the testimony was elicited and were either denied, or sustained in whole or in part or mooted, as the record will reflect, therefore there is no need to rule on those motions here.

MOTIONS FOR MISTRIAL

The Court has carefully considered the Motions for Mistrial in this cause and has

determined that curative instructions to the jury, and/or motions to strike have been granted as requested by the movant, for most of the motions, and in any event the cumulative effect of the alleged error, was **not** in the opinion of the Court, sufficient to have so influenced the jury as to affect the outcome of the case considering the length of the trial, the number of witnesses presented, the quality and quantity of the testimony, the huge amount of documentary evidence, and specifically the substance of the alleged remarks. The jury in this case rendered three verdicts, each based upon a mountain of evidence over a period of two years in three separate trials. The court feels confident, that although some remarks of counsel may have been uncalled for, or subject to objection, they were not so egregious as to require a new trial. THEREFORE:

All Motions for Mistrial which have been previously deferred or not previously denied, are hereby DENIED.

It should be noted here, that at the close of the Phase II B (punitive damages) trial, the defendants filed a plethora of motions, all outlined in a 190 page motion for New trial or Remittitur, to Set Aside the Verdict and for Entry of Judgement based on previous Motions for Directed Verdicts, Mistrial, and for Decertification.

The Court has already ruled upon the Motions for Directed Verdicts and Mistrials herein, however a review of the voluminous **Motion for New trial** reveals far too many alleged assignments of error for the Court to address on a one on one basis. In fact, the motion ostensibly reviews every objection raised during the entire two year, three phase trial and over 57 thousand pages of transcript. As to each of the objections raised during

trial, the Court entered a ruling resolving the issue at the time the objections were made, and sees no reason to reverse itself at this time, nor does the Court feel that just because possibly hundreds of objections were made, that this necessarily resulted in such a cumulative error as to require a new trial. The Court has reviewed the motion and all the alleged errors cited, and has determined that on the merits of each claim, the motion is unsustainable.

Therefore: The Motion for New Trial is DENIED.

This leaves two issues to be resolved by the Court for which the Court feels a comment is appropriate: **Decertification** and **Remittitur**.

DECERTIFICATION

Although, the 3rd District Court of Appeals and the Florida Supreme Court have already addressed the issue of Certification, approving preliminarily the case to proceed as a class action case, see R.J. Reynolds Tobacco Co.,v Engle, 672 So.2nd 39 (Fla.3d DCA 1996) and Review Denied. Fla. S. Ct. Docket No. 88235 10/2/96., the matter is still before the Court for a ruling on Defendants Motion to Decertify, at the close of all the evidence.

This case was divided into separate phases—the first phase was to determine the common issues of liability, causation and entitlement to punitive damages. The second phase was a trial on the claims of three class representatives involving issues of individual compensatory damages, causation and comparative fault. The third phase involved the

issue of the amount, if any, of punitive damages in the aggregate.

The jury found for the plaintiffs in all three phases generally, and assessed compensatory damages of over **12 million dollars**, and punitive damages in the neighborhood of **145 billion dollars**.

In assessing whether a case should be classified as a “class action” lawsuit, controversy has arisen in product liability cases as compared to mass tort or accident cases. In product liability cases individual issues often outnumber common issues due to the fact that no single event has brought about the injury complained of, nor is there generally any single proximate cause which applies equally to all potential class members. Moreover, affirmative defenses such as Statutes of Limitation, Statutes of Repose and concepts of reliance etc, may depend on facts peculiar to each plaintiffs case.

The Court in Amchem Products, Inc. v Windsor, 117 S.Ct. 2231, speaking about the 1996 revision of Rule 23 noted the committee opinion that mass tort cases are not ordinarily appropriate for class action, but the text of the rule does not categorically exclude mass tort cases from class certification. Since the late 1970's, courts have been certifying such cases in increasing numbers. See Resnick, From “Cases” to “Litigation”, 54 Law & Contemp. Prob.5,17-19 (Summer 1991) (describing trend). (emphasis added).

In trying to determine whether a case should be certified as a class action, a majority of the courts look to three criteria: 1.) tort maturity, 2) efficiency and manageability, and 3) negative value.

TORT MATURITY

Not until torts are classified as “mature” and general causation has become relatively clear, will such cases be candidates for class action treatment. “Manual for Complex Litigation (Third) S 33.26 (1997).

In Costano v. American Tobacco Co. (5th Cir. 1996) decertification was based on an “immature tort”. That case intended to encompass all potential future tobacco related personal injury claims against the Tobacco Industry, whereas the instant case involves only those who have an immediate disease or condition. It should be noted that this Court has denied the plaintiff’s claim for Medical Monitoring precisely to avoid the pitfall of the Castano case and Barnes v. American Tobacco Company, 161 F.3rd. 127 (3rd Cir.1998) The Court refused to allow potential claimants who have not manifested a disease or condition to become a member of the class, therefore this is not an “immature tort” issue.

EFFICIENCY AND MANAGEABILITY

In part, this requirement is designed to evaluate whether the resolution of cases by class action is a viable and judicially economic alternative to individual suits.

The Castano decision to decertify the class action based its ruling on the fact that the lower court has not considered how each claim in the complaint varied under the law of difference states and on the fact that the lower court did not make a finding of whether litigation is manageable in light of these differences. Id. at 739. The Castano court found that there were “extensive manageability problems” which included “difficult choice of law determinations, sub-classing of eight claims with variations in state law, notice to millions of class members, further sub-classing taking account of transient plaintiffs, and the difficult procedure for determining who is nicotine dependent.” Likewise

in Georgine v. Amchem, 83 F.3d 610, 632-33 (3rd Cir. 1996), as well as in Castano, a lack of judicial efficiency also derailed the proposed class.

However the instant case is unlike Georgine or Castano in that, the trial plan has effectively allowed the determination of general issues” en mass”, thereby conserving the Court’s resources by then only requiring Phase II trials to determine individual issues of liability and entitlement particular to each representative member of the class. In the Castano case, the court portended 1) problems involving the manageability issues regarding the notification to a class of millions; 2) sub-classing for transient residents; and 3) problems with superiority requirements due to individual reliance and immaturity of the tort. The Court believes it has successfully addressed and allayed the above concerns of the Castano court.

First, since the immediate class has a much more limited size and involves only Florida residents and Florida law, the Court has been able to effectively notify its potential members without having to concern itself with the variations of state law which were endemic in Castano.

Secondly, unlike Castano, the instant case involves a much smaller population, involving only residents of Florida who had manifested a disease or made a causal connection thereto. Because Florida law is the only law to be applied to determine the rights and liabilities of the parties with respect to the instant action, this Court has been able to create a touchstone which will help determine the “choice of law” analysis for the Plaintiff class, thus the shortcomings of the Castano case in regard to transient residents has been successfully avoided in the instant case. See *infra* Engle Class Order dated

January, 1998.

Thirdly, and again unlike the Castano court which based its decision to decertify on the assumption that at the time of decertification individual reliance *may* come to undermine the superiority requirement for maintaining a class action, the instant action has successfully avoided the problems associated with reliance in class action suits. Although Florida courts have an aversion to class action treatment for breach of contract or fraud claims, it is in limited circumstances, appropriate for class action. See Lance v. Wade, 457 So.2d 1008 (Fla. 1984); see also Broin v. Philip Morris Companies, Inc., 641 So.2d 288.

In addition, since fraud has been shown by the Plaintiffs to be a result of deception and artifice, fraud may, under Florida law, be based upon an omission or non-disclosure. See Taylor v. American Honda Motor Co., Inc., 555 F.Supp.59 (M.D.Fla. 1983). In such instances, the courts have recognized that a fraud class action based on an omission or non-disclosure is appropriate for class actions.

As such, the issue of superiority vis a vis individual reliance is no longer dispositive, as several courts, in similarly situated cases involving omission or non-disclosure ,have found that reliance is not an obstacle to class action. See Keyser v. Commonwealth National Financial Corp. 121 F.R.D. 642 (M.D. Pa. 1988).

At the close of Defendants' case, it has become apparent to this Court that class action treatment is superior to pursuing this matter by individual claims. If Plaintiffs were required to try their cases individually, issues such as reliance, causation, defendants knowledge, intent, or reckless disregard, and defendants' financial capacity, etc., will have to be litigated many of thousands of times. This is more than mere speculation. After

having sat through the enormous complexities involved in this trial, it is self-evident that any trial would have to involve similar proceedings. And if there were to be individual trials, it is inevitable that the common issues of Defendants' conduct would become a predominant aspect of each trial, which could result in conflicting verdicts- thus proving that common issues become the most prominent aspect of this case.

The closest parallel this Court can find to the instant case is asbestos litigation, which is undoubtably one of the most complex of all mass tort litigation. See Ahern v. Fireboard Corporation, 162 F.R.D. 505, 528 (the primary factual and legal issues such as disease causation, product, situs and defendant identification and standard of care have been identified and developed through extensive litigation; despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex.) The same can be said for tobacco litigation since it also has fully developed and resolved issues, and is subject to extensive litigation, thereby, contributing to the delay, high transaction costs, and arbitrary results that have become such a burden to the judicial system, (and providing further argument for the need to resolve these issues through class action litigation).

The Court is also aware that there exist legitimate Seventh Amendment concerns when a multi-phase trial involves separate and distinct issues of general and specific causation. However, the trial plan clearly limited general causation issues to Phase I and there was little to no risk that such issues would be revisited in any subsequent phases. See In re: Dow Corning Corporation, 211 B.R. 545 (E.D. Mich 1997) (In that case the trial court held in regard to separate trial for general causation, the VII Amendment would be a concern if a specific causation/damage jury revisited the issue of general causation in

its deliberations. However, experienced trial judges in conjunction with parties could overcome that pitfall through careful controls over trial processes, and could minimize the danger of allowing a second jury to re-examine findings of first jury).

Likewise, in Cimino v. Raymark Industries, Inc. 151 F.3d 297 (5th Cir. 1998), the court approved a trial plan that adequately individualized and preserved the Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease. Although that court ultimately held that the use of "extrapolation plaintiffs" in that case violated the VII Amendment, the court did find that such a plan can constitutionally divide general and specific causation. See also Jenkins v. Raymark Inds. Inc., 782 F.2d 468 (5th Cir. 1986), (justifying class trial of common issues and individual trials of individual issues of exposure - causation and damages).

Several courts involving matters other than asbestosis have also allowed the separation of general and specific causation. For example in Sterling v. Velsicol Chemical Corp. 855 F.2d 1188, 1200 (6th Cir. 1988), a personal injury suit by individuals living in the neighborhood of a landfill allegedly contaminated by defendant, the Sixth Circuit noted that

"the [trial] court, as is appropriate in this type of mass tort class action litigation, divided its causation analysis into two parts. It was first established that Velsicol was responsible for the contamination and that the particular contaminants were capable of producing injuries of the types allegedly suffered by the plaintiffs. Up to this point in the proceeding, the five representative plaintiffs were acting primarily in their representative capacity to the class as a whole. This enabled the court the determine a kind of generic causation—whether the combination of the chemical contaminants and the plaintiffs' exposure to them had the capacity to cause the harm alleged. This still left the matter of individual proximate cause to be determined. Although such generic and individual causation may appear to be inextricably intertwined, the procedural device

of the class action permitted the court initially to assess the defendant's potential liability for its conduct without regard to the individual components of each plaintiff's injuries. However, from this point forward, it became the responsibility of each individual plaintiff to show that his or her specific injuries damages were proximately caused by ingestion or otherwise using the contaminated water".

See also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1229, 1234 (9th Cir.1996) (in certifying Fed R. Civ P. 23(b)(3) as a class in prescription drug products liability suit, the district court "specifically excluded the individual issues of proximate causation, and compensatory damages";).(Class certification reversed on other grounds, but Fed R. Civ P. 23(c)(4)(A) exclusion of individual issues, essentially approved). See also Watson v. Shell Oil Co., 979 F. 2d 1014 (5th Cir. 1992) (panel affirmed trial plan for determination of liability and punitive damages to be followed by trials on individual issues).

Given the above reasoning, this Court held that in Phase I, the jury was required to determine, among other issues:, 1) whether smoking cigarettes caused the disease(s) in question, 2) resolve general issues of causation, 3) determine the extent of the defendants wrongful conduct, and 4) determine entitlement to punitive damages. The jury returned verdicts in favor of the plaintiff on all those issues.,The same jury in Phase IIA was then asked to: among other issues, 1) determine individual issues of causation for the class representatives, and, 2) determine the representative class members compensatory damages. Again, the jury returned verdicts favorable to the plaintiffs. In Phase IIB, the jury was required to determine the amount of punitive damages to be award in the aggregate against all defendants. The jury, after hearing two years of trial in three stages, returned a multi-billion dollar punitive damage award.

In Phase III, the individual claims of the class members will be tried before different judges and different juries to determine whether the injuries complained of were the result of cigarette smoking or from other causes, and what if any, damages resulted from that activity. The Juries in Phase III will not be concerned with the general causation issues of the previous trials, nor the conduct or behavior of the defendants, or punitive damages, those issues have already been resolved, and subsequent juries may be so instructed.

The Defendants would be permitted to introduce evidence limited to the specifics of the individual plaintiff's circumstances. For example, the Defendants would be permitted to show that the plaintiff has a genetic pre-disposition to the disease, that s/he smoked cigarettes for too short a period of time for symptoms to have been caused by smoking cigarettes, or that the disease was caused by some other activity etc. Future Courts and Judges can, by skillful control of their cases, eliminate the danger of allowing a second jury to re-examine the findings of common issues determined by the first jury in Phases I, IIA and IIB

Parenthetically, the Court is also aware of the due process problems associated with findings of liability for class actions of unspecified size. The Court feels that a statistical finding of the class size preserves the Defendants' due process rights while at the same time preserving Plaintiff's individual rights to trial. Thus any claimants' rights are preserved through this action which otherwise would have precluded tort claimants for their day in court and many claimants who would never live to see their cause litigated nor have the opportunity to receive compensation have had an opportunity for redress.

NEGATIVE VALUE

Finally, we address the issue of whether the case is a “negative value” suit. Negative value suits “permit the plaintiffs to pool claims which would be uneconomical to litigate individually.” See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809. 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); see also Rhone-Poulenc, 51 F.3d 1293 (7th Cir. 1995). Thus since issue of negative value does not inure to either Defendants or Plaintiffs in the instant action, the Court will not find it to be dispositive as to the superiority question. See also Ruiz v. American Tobacco Company, 180 F.R.D. 194.

CONCLUSIONS REGARDING DECERTIFICATION

For the reasons above, the Court record establishes in a clear fashion that there has been resolution of the problems concerning immaturity of tort, efficiency and manageability, and negative value. Thus, decertification is inappropriate in the instant action. The class certification and trial plan calling for trifurcation of the issues is the preferred option in this case.

Therefore: The Motion To Decertify The Class is -DENIED

REMITTITUR

The issue of Remittitur has been reserved for last because it was last in the scheme of things during the trial.

The case as has been stated above, was tried in three stages, the last being a punitive damage phase. The jury returned a multi-**billion** dollar verdict against the

defendants to wit:

| | |
|---|--------------------------|
| Philip Morris, Incorporate | <u>\$ 73,960,000,000</u> |
| RJ Reynolds Tobacco Company ----- | <u>\$ 36,280,000,000</u> |
| Brown & Williamson Tobacco Corporation,----- individually and as successor by merger to the American Tobacco Company. | <u>\$ 17,590,000,000</u> |
| Lorillard Tobacco Company/Lorillard, Inc.----- | <u>\$ 16,250,000,000</u> |
| Liggett Group Inc./Brooke Group Holding, Inc.----- | <u>\$ 790,000,000</u> |
| Council For Tobacco Research----- | <u>\$ 1,105,210</u> |
| Tobacco Institute----- | <u>\$ 278,339</u> |

The defendants have attacked the jury verdict as excessive and unreasonable and have asked for a new trial or in the alternative, a remittitur.

A remittitur is generally controlled by the principle of whether the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct. Arab Termite and Pest Control Of Florida, Inc., et al., v Jenkins Fla., 409 So 2nd 1039 (S.Ct. 1982). In addition thereto, it must be determined whether the award is out of proportion to the defendants net worth or ability to pay without going into bankruptcy or going out of business. see: Bould v Touchette, 349 So 2nd 1181, and Jones v Greely, 25 Fla. 629, 6 So 448 (1889).

The “reasonable proportion” controlling in this type of case must ,of course, be affirmatively supported by the record, or the judge must find that the jury was influenced

by matters outside the record. (Arab Termite supra). Another consideration is the meaning and effect of the term “net worth” as it relates to the imposition of punitive damages. Although net worth can simply be stated as the end result of comparing assets against liabilities, it is not the end-all when determining an award of punitive damages. The jury has the right to determine, when deciding punitive damages, the “financial resources” of a defendant see: Florida standard Jury Instructions (Civ) subparagraph (2) PD 1b (2). Therefore, “net worth” is only one factor in determining the “financial resources” of a defendant.

Before going further, the court feels it necessary dispose of the issue of “outside influence”. The Court has determined that there is **no evidence** that the jury in this case was influenced by any matters outside the record. In fact the Court took special pains to instruct the jury on a daily basis about reading anything, seeing anything or listening to anything from any source whatsoever, be it radio, T.V., newspapers, magazines, the internet or conversation with others, that might have anything to do with the issues or subject matter in this case, and /or which might influence their verdict. The jury was told they must return a verdict based solely on the evidence and testimony adduced in court and on the instructions from the court and from no other source. The jurors were interrogated each day of trial by the Court, (the parties also had equal opportunity to question the jury), as to compliance with this instruction. After carefully evaluating the jury and their responses to the Court’s inquiry, the Court is well satisfied that the jury was **NOT** influenced by any matters outside the record. **Nor**, in this Courts opinion, was the jury

unduly influenced by matters **even experienced at trial**.

This then leaves the issues of whether the punitive damage award is out of proportion to the defendants conduct, or the defendants ability to pay, or both.

CONDUCT OF THE DEFENDANTS

The first major issue to be discussed is whether the **conduct or behavior of the defendants** warrants the \$144.08 billion dollar punitive damage award, and whether the award “shocked the conscience of the Court,” and therefore, whether a remittitur should issue.!!

This Court sat through two years of trial, listened to over 150 witnesses, heard over 57 thousand pages of testimony and conducted hundreds of hearings on legal and evidentiary issues in addition to becoming familiar with the complexity of the issues from the very inception of the filing of the complaint in 1994. The Court truly believes it has more of an understanding of the case than any non- participant, and is in a better position to render such a judgement. Remember, the issues in this case go back to the 30's, 40's and 50's –seventy years or more of conduct by the defendants which led to the complaint in 1994 and which on some issues, continues to the present. That is what makes this case so unusual and unique.

At first blush, a \$144 **BILLION** dollar punitive damage award seems so far outside the comprehension of any reasonably thinking person that one would immediately say it is shocking and not in keeping with rational thought. However, keep in mind the enormity

of the seventy years of behavior and the almost incomprehensible damage that was done to such a huge number of people. There has been testimony in this case that 400 thousand people have died each year from the ill effects of smoking tobacco products, and hundreds of thousands of people contracted diseases and suffered, and still suffer, the horrible effects of those diseases. The enormity of the damage is mind boggling, as is the realization that the ill effects of tobacco smoking was known as far back as the turn of the century!. Health official for years struggled with the concept of causation and sought through the scientific world to bring the matter to the attention of the public. The tobacco industry fought them at every turn, decrying the concept of causation and rallying behind the defense of “free choice”.

The proof of the pudding ,as it were, was in the fact that back in 1953 Dr. Wynder with his mouse painting studies, announced to the public, a link between smoking and cancer. This led to the formation of the “Tobacco Institute Research Committee (TIRC),[later known as the Council for Tobacco Research (CTR)] by the tobacco industry which then resulted in what has been known as the “Frank Statement”in 1954. This was a statement published in 400 newspapers aimed at 43 million Americans, explaining that the tobacco industry recognized the dangers involved in smoking tobacco, and pledged to conduct a concerted research effort to develop a safer product, and to keep the public informed of its research results. The major tobacco companies of the day (the defendants in this case) all signed off on the document (with the exception of Liggett.). TIRC meanwhile, acting as a public relations arm of the tobacco industry, engaged in a concerted effort to refute any claims of health dangers as a result of smoking. A

publication called “Tobacco and Health Research” was created to disseminate false and misleading information regarding the issue of causation. Although the defendant tobacco companies had promised full public disclosure of its findings and research, the defendants, via The Council For Tobacco Research, suppressed reports and attacked research. In 1954, Liggett & Meyers, as it was known then, hired Arthur Little to duplicate Dr. Wynders skin painting tests and he got the same or similar results—but those results were never made public by the defendants.

During the ensuing years, the tobacco industry and the defendants became aware that tobacco smoke contained over 4,000 compounds, and over 40 carcinogens but did not reveal that information to the general public. In fact, the defendants knew about the addictive nature of nicotine as early as the 60's, and in 1972 in a Philip Morris report at a CTR conference a statement was made..”without nicotine there would be no smoking”...and... “cigarettes are a dispenser for a dose of nicotine”.

As a matter of fact, tobacco scientists learned how to manipulate the levels of nicotine in cigarettes by adding ammonia to produce a “freebasing” nicotine which speeded up and enhanced the effect of nicotine on the brain. They also were able to develop the Y-1 strain of a high nicotine content tobacco plant grown in a foreign country. In addition, company scientists were able to devise ways of manipulating tar and nicotine content in cigarettes thus lulling the public into believing there was a “safer” cigarette.

Evidence existed regarding the conspiracy and fraud activities of the companies in the form of a so called “Gentlemens Agreement” not to do independent research., with the idea of suppressing unwanted or damaging research results. Also, under some

circumstances, research results were sent to company offices over-seas in order to prevent discovery.

Another problem area was the setting up of the “Special Project “ unit of CTR, in which attorneys either controlled or had a say in determining which research projects would be undertaken and by whom. The way it was structured allowed the companies to claim an attorney-client privilege whenever necessary. Comment was made on this very subject by Federal Judge Sarokin in Haines v Liggett Group, Inc 140 F.R.D. 681 D.N.J. 1992 who said defendants used the attorney- client privilege to hide documents-never intending to give full disclosure, and he called it a fraud to mislead the public. Judge Sarokin also said in that opinion “.. the tobacco industry may be the king of concealment and disinformation”

In conjunction with CTR, the defendants established the “Tobacco Institute” and used it as a lobbying arm with government agencies to advance certain position strategies such as the “multi-factorial hypothesis”, and the “genetic” defense, to counter-act the series of Surgeon General’s Reports , and the studies of the scientific community.

The record also reflects that in 1994, the C.E.O’s. of the defendant companies went before congress and swore under oath that cigarettes and /or nicotine was not addictive, even though there was evidence as far back as the 60's to the contrary. That position was also voiced by the Vice President of the Tobacco Institute Brennan Dawson in 1994 who said cigarettes are not addictive, nor has it been established scientifically that smoking cigarettes was harmful to health. Dr. Alexander Spears of Lorillard denied before congress that the defendants manipulated nicotine levels. Charles Whitley of TI echoed that denial. However, in 1981,Dr Spears in an article for the 3rd Tobacco Chemists Research

Conference had discussed manipulating nicotine levels. The defendants continued to claim that there is no proof that cigarettes cause harm. This ,in face of the many Surgeon Generals reports and other scientific evidence, over several decades, that spelled out the harm caused by smoking, specifically lung cancer and a long list of other diseases. Throughout the decades since the “Frank Statement”, the evidence revealed that the tobacco industry, specifically these defendants, have followed a line of telling the public that there is no scientific proof of “causation” and no verified link between smoking and disease, when their own research proved otherwise.

Evidence at trial was replete with the history of denials by the defendants about the health effects of tobacco. Trial evidence outlined the techniques of billion dollar advertising campaigns to sell their products to the public in general and youth in particular. Many documents from the defendant’s files revealed reports, conferences, discussion and memo’s dealing with youth and gender marketing and strategies to deny such practices..

Over-all, the entire two year trial record was full of examples of deceit, denials contrary to research results, efforts to conceal or suppress information, collusion among defendants to insulate themselves collectively from public and the scientific and public health communities criticism of the industry, and either outright misrepresentation, or failure to acknowledge that which was proven and obvious.

As a result of years and years of such activity , the public was led astray and confused by the seeming conflict in the evidence about the harmful effect of tobacco, and kept in ignorance about the addictive nature of nicotine, and suffered untold misery and harm, including death, from the diseases, i.e.: cancer, emphysema, heart and circulatory

problems, etc, all resulting from the use of the product .

If one really examined the entire record in detail of the decades of abuses committed by the defendants upon an ill informed and unsuspecting public, one could say it was that concerted behavior on the part of the Defendants, over so many years, affecting so many people, that “shocks the conscience of the Court”, not the award itself.

In Phase I of the trial, the jury , having heard the testimony concerning the behavior and conduct of the defendants, decided that punitive damages were indeed appropriate in this case, and in Phase IIA the jury set those punitive damages as outlined herein.

Therefore:

As to the first issue-behavior of the defendants-, this Court has no problem accepting the rational of the jury who heard all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is **NOT SHOCKED** either by the fact that an award was made, nor by the amount of the award rendered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

ABILITY TO PAY

THE PLAINTIFFS POSITION

Dealing next with the issue of **ability to pay**, the testimony on the plaintiffs side came from two experts who testified about the “financial worth” of each of the defendants, utilizing certain criteria they felt were in compliance with generally accepted standards of persons

who evaluate businesses. Although there was controversy about the method used to make the calculations, Mr.Cherner testified that based on a projected figure that one percent of market share was worth \$1.5 billion, then each defendants “worth” can be calculated by the percentage of market share attributable to that defendant. Those calculations resulted in the following: (estimated values).

| | <u>MARKET SHARE %</u> | <u>MARKET SHARE VALUE \$</u> |
|-----------------------------|-----------------------|------------------------------|
| <u>Phillip Morris</u> | 49.3 | 73.95B |
| R.J.Reynolds..... | 24.12..... | 36.18B |
| Brown & Williamson..... | 14.0..... | 21.B |
| Lorillard..... | 10.7..... | 16.05B |
| Liggett..... | 1.2..... | 1.8B |

In addition to the above, the plaintiffs experts opined that net worth is not an accurate measure of a company’s value. Net worth is reflected in a balance sheet , sometimes called book value, but the true worth of a company is based on net worth(book value/ balance sheet), *plus* intangibles, which in this case includes good will and trademark. In that event, the resulting values as calculated by the testimony, are fairly close to the figures above: (Philip Morris . \$80B, RJR..\$36B, B&W ..\$22B, Lorillard.. \$17B, and Liggett..\$1.8B.).

JOSEPH CHERNER

Plaintiffs expert Mr.Cherner indicated that his calculations are based on the only available comparables in the industry-the purchase by Philip Morris of 3 Liggett brands,

which he then used to extrapolate the value of the other defendant companies. He therefore opined that since this was a Philip Morris estimate of another tobacco companies brand worth, therefore it is a more accurate indication of true worth of a company.(\$300 M for .2% of 1% of market share , which makes each 1% of market share worth \$1.5 billion) see chart above..

Mr. Cherner, in his testimony made several points . He said, for example, that RJR net worth is not the true value of the company -it is only stockholders equity, and RJR's worth is \$37.5 B or 5 times what RJR reports on it's 10K. He said according to the way Philip Morris determined value in the purchase of the Liggett brands, Philip Morris brands are valued at \$75 Billion , and RJR is worth \$37.5 billion, and he would use the same formula to value B&W and Lorillard, because Philip Morris would be in a better position to know better than anyone in the world what cigarette brands are worth. He also said that when Philip Morris valued its own brands at \$75B it is valuing its brands including the legal liability it faces from this day forward.

Mr. Cherner also said that the defendants, in order to pay the \$250 billion MSA /FSA obligation, simply raised prices 4.5 cents a cigarette and generated \$21 billion , and if by raising prices there was a decrease in consumption by 10%, they would still raise \$19 billion per year forever.

In another opinion, Mr. Cherner testified that Lorillard's valuation of market share would most likely be identical, and if not very similar, to Philip Morris's valuation of market share to-wit,;\$15-16 billion dollars, even taking into account adjustments for assets and liabilities.

He also said that although Lorillard does not have \$15 B in the bank, that does not mean by any stretch of the imagination, that Lorillard cannot take place in a punitive damage award that collectively would come to \$250 Or \$300 billion.

As for the MSA and the FSA, Mr. Cherner agrees that the \$250 billion is to be paid out over a period of years-however he also acknowledges that the defendants have been able to make payments of up to \$10 billion dollars or more, adjusted for inflation, per year since the institution of the "Agreements".

When asked by the defense about how much Philip Morris can pay in punitive damages, Mr. Cherner said since Philip Morris has 50% of the market share, it should pay 50% of the punitive damage award.

With reference to RJR, Mr. Cherner said there is a confusion about calling shareholder equity net worth. If assets were valued at market prices and the liabilities were valued at market prices, then shareholder equity may mean the same thing as net worth, however very often assets are not valued at market level—for example one may have a building valued on the books for one million dollars, that is presently worth \$100 million, but still the book shows a value of only one million. So most often, assets minus liabilities does not equal stockholders equity. Mr. Cherner also said that it is misleading to the jury to say that RJR has a net worth of \$7 billion dollars. It implies that is the value of the company, but it is not. It is the stockholders equity figure and is not net worth.

In regard to Liggett, under cross examination, Mr. Cherner opined that with reference to the MSA and the FSA and the ability of the defendants to raise \$20 billion dollars a year in extra income by increasing prices ,...", this amounts to a present value of between a \$200

billion and a \$400 billion dollar settlement. So if we're trying to value what \$20 billion dollars a year would be worth in a punitive damage award, it would be worth a present value of an award of anywhere between \$200 billion and \$400 billion dollars. That's what a punitive damage would be worth under that scenario. He also said he was aware that Liggett has paid zero or a negligible amount under the MSA.

Concerning Brown and Williamson, Mr. Cherner said B&W was the only one of the defendants that was not doing well after the MSA—losing some market share from about 14% to around 11.6% currently. B&W operating income has also declined but still shows a net income of \$215 million.. He also was unaware that B&W has received a negative one billion rating from organization such as Smith Barney or Credit Suisse.

PROFESSOR GEORGE MUNDSTOCK

The other plaintiffs expert, Professor Mundstock in essence echoed Mr. Cherner's views on whether financial statements reflect true value. He said there are three types of financial statements—an asset account, a liability account and an equity account. A balance sheet is just a snapshot in time and does not represent an appraisal or evaluation. Intangibles go into determining overall value—this is called intangible value—such as trademarks. Most of the time intangibles are not listed in the books. Generally speaking book value therefore, does not necessarily reflect market value.

He also said there is such a concept as market capitalization—the value of what a company thinks its stock is worth, however, the stock market value of the company doesn't fully reflect their ability to pay.

The real value of a business to an owner, he said, is the value of the cash they can pull out of a business and still keep going, and then figure out at current interest rates, what that future cash is worth— that's called capitalized earnings approach or present value approach or discounted earning approach. Prof. Mundstock said he used this type of approach because he did not have adequate comparables to work with. According to Prof. Mundstock, because there were no comparables he could work with, he took his best guess of what kinds of excess cash the business would throw off; he figured out what someone would be willing to pay for that cash today and said that must be what the business is worth. He said he made those calculations based on information provided during the trial and reviewed some tax returns.

As regards Philip Morris, Professor said the parent company Philip Morris Companies Inc, has several subsidiaries, one is called Philip Morris USA, another is called Philip Morris International.. Philip Morris stock which is traded on the stock exchange is held by the parent Philip Morris Companies Inc. The problem is then, how to value Philip Morris USA? According to Prof. Mundstock, a good part of Philip Morris USA profitability is because it owns some famous trademarks such as Marlboro, and Marlboro is sold internationally, and advertising in the USA sells Marlboro Internationally, and vice-versa—a sort of synergy exists with the sister corporation Philip Morris International which affects the value of Philip Morris USA. In his mind, Prof Mundstock said, to ignore the fact that Marlboro is a multi-national trademark in a related corporation is to ignore the tremendous value of Philip Morris' worldwide business and the tremendous value they have in the U.S. because Marlboro is an internationally promoted and marketed product.

Because it was almost impossible to separate out Philip Morris USA from the whole picture, Prof. Mundstock said he used the cash flow method and Philip Morris's numbers, not on the separate company, but using the numbers Philip Morris allocated to tobacco on their public statement, he evaluated their tobacco business and came up with the figure of \$118.5 billion dollars for the tobacco business of Philip Morris Companies Inc. He said he, kept in mind the ability of the parent corporation's to generate future excess cash flow, and then he figured the present value.

Referring to net sales of the defendant tobacco companies since the master settlement Agreement, Prof. Mundstock said the defendants sold between 435 billion and 475 billion cigarettes and raised the price by about 4.5 cents a cigarette. Therefore as far as net sales are concerned the figures show in 1999, Philip Morris net sales were up 28%—RJR net sales up 32.4%—B&W net sales up 19.4%—Lorillards market share increased 15%, and Liggetts operating income was up 41%. In the first part of 2000, both Philip Morris and RJR was ahead of 1999. The reason he said, is that the price went up more than consumption went down.

Professor Mundstock, then explained the meaning of "leveraged buyout" saying a company can buy out another company using money borrowed from a bank or sometimes multiple sources based on the value of the purchased company.

In addition to the above, using a standard of Philip Morris's purchase of the three Liggett brands , Professor Mundstock calculated the market share of the defendant companies and assigned a monetary value to the companies and came up with figures closely matching those found by Mr. Cherner. Again, Prof. Mundstock said in order to

determine the value of a company you must add the value of the intangibles to the “book” value to get a true value.

On cross examination , Prof. Mundstock said Philip Morris USA value of \$6.4 billion dollars on its financial statement is its “book net worth” or stockholders equity. He also said his evaluation of \$118.4 billion dollars is for Philip Morris USA and Philip Morris International combined (the tobacco business of Philip Morris), and represents what those businesses could be sold for today.

He also admits he has never been paid to evaluate a business, other than for tax purposes. He is not a CPA. or an economist , nor does he have a MBA .

Prof. Mundstock admits the defendants don't have on hand, the amount of money he valued the companies at, but he said, they could borrow the money, probably over a 6 month period, in the capital market.

As to how he reached the figure of \$118.4 billion for Philip Morris tobacco business, Prof. Mundstock said he based it on present value of future excess cash, and that is based on the condition of the company in 1999 being fairly stable for the future years. He also said the cost of future litigation would directly impact future excess cash, as would sales and regulations. In making his calculations he did not take into consideration the size of the Engle class, nor the projected size of any compensatory award

Philip Morris's income statement shows for the year ending 1999, the net earnings, or profit reported was \$ 2.99 billion dollars-40 times less than the \$118.4 billion dollars figure used earlier, but that \$118.4 billion is spread over 25 years, according to Prof. Mundstock.

Professor Mundstock when questioned about the two methods of evaluating business

said he preferred the valuing of trademarks plus book value over valuing by trademark value alone (the Philip Morris-Liggett deal) -but he did both just as a check.

As to Brown and Williamson, he does not agree with B&W figures showing that B&W is in poor financial condition—income was up 20% in 1999 from 1998 because they raised prices to meet the MSA obligation. He did admit that B&W market share was down by one or two percentage points,- but also said there has not been any negative analysts reports since the FSA for B&W. In fact the analysts reports since the FSA have predicted a 2 or 3 % growth in the industry adjusted for inflation-this would offset any loss of 2-3 percentage points in the last year. Decreasing profits would portend trouble unless you are measuring profits using financial accounting numbers.. Professor Mundstock said he realizes that dealing with competition in either premium brands or generic could affect the ability to raise prices and therefore market share would suffer-but he also said he would rather have 1% of a very profitable market, than 100% of market share for a product that doesn't sell. He also said his previous calculation of B&W's worth at \$9.9 billion dollars was wrong and it is actually \$22 billion.

Considering Lorillard, Prof. Mundstock points out that Lorillard on their financial statements shows the obligations to the MSA as they are due, which is proper-but they also show the companies other obligations, even though they are not due.

It is important to note here that when questioned on cross examination, Professor Mundstock said using the method he feels more comfortable with ,book value plus intangibles, the value of Lorillard would be about \$12.5 billion rather than the 16 billion using the market share method of Mr. Cherner. He also agreed that according to Lorillards figures

their shareholder equity is around \$921 million. In order to raise \$12.5 they would have to sell off an interest in the equity of the assets since they don't own any stocks. His best guesstimate is Lorillard could raise \$10 Billion (adjusting the \$12.5 Billion equity for commission and expenses) by borrowing against, or selling the equity interest. Professor Mundstock also said that if it was structured as a sale, then Lorillard would be out of business.

Regarding RJR on cross examination, Professor Mundstock said, he previously testified that using the market share method, he would value RJR at \$36 billion dollars, but by using the method he prefers, the value would be \$19.6 Billion. The assets verses liability snapshot on the financial statement is not truly reflective of the company's financial picture. RJR sold off Japan tobacco and paid off billions in debt, but also bought back billions of their own stock without having to pay dividends. Currently, Prof. Mundstock agreed that after paying out all that money RJR no longer had a cushion and this was reflected in a currant ratio of less than 1 which is a low ratio and means the company is not very liquid in the short term.

Professor Mundstock did say when questioned, that if RJR would be required to pay \$36 billion today, it would be out of business., or for that matter \$19.6 Billion.

Regarding Liggett, Prof. Mundstock valued Liggett at \$1.8 billion but said under the more preferred method the value would be \$.9 billion . He also said that because Liggett has changed so much after the sale of three of its brands to Philip Morris, it was hard to figure what the future for Liggett will be. Although Liggetts books show cash or cash equivalent on hand to be less than \$3 million, and currant assets to be about \$81 million,

Prof. Mundstock opined that in an industry that generates the kind of cash flow that the tobacco industry can generate, low numbers of cash on hand are less telling indicators of a company liquidity. He also said that even if a parent company of Liggett has outstanding some senior priority notes, those notes don't pledge Liggetts assets , only the parents stock, which doesn't affects Liggetts ability to go to the financial market for a loan. He also notes that even if Liggetts market share is down from 2.5% in 1995 to 1.2% in 1999, and unit volume has decreased by 50% from 1995 to 1999 to 5.2 billion cigarettes sold, Liggetts operating income is up 40%

On Re-direct examination Professor Mundstock said that a company like Philip Morris which claims to have a net worth of \$6.4 billion, but can pay \$368 Billion in a proposed settlement agreement, can do so is for two reasons: one-the \$6.4 billion is not their true value, and two- because the payment are over time. These companies are cash cows, he said, and can throw off considerable cash flow over a period of time. They pride themselves on their cash flow and ability to generate cash.

Plaintiff experts also offered an opinion regarding ability to pay, saying that if the tobacco companies originally offered the U.S. Government 367 Billion dollars in a settlement in 1997,(which was rejected), and then, in 1998 agreed to pay the Master Settlement Agreement 250 Billion, even if over a period of years, this is an indicator of, at the very least, a present ability to pay a considerable amount against a punitive damage award. It was noted that the defendant tobacco companies ,under the MSA agreed to pay approximately 20 Billion dollars a year over the next 25 years or so, and in order to make those payments, the companies raised the price of cigarettes approximately \$1 a pack. Considering the

defendants sell about 20 billion packs a year, this can amount to about 20 Billion dollars each year!!...most of the money, according to the testimony, therefore has come from the pocket of the consumer, and not from the pocket of the defendants.

THE DEFENDANTS POSITION

On the defense side of the case it is interesting to note that none of the defendants produce an "expert" witness. The Court would have welcomed and indeed, would have valued the opinions of a defendants financial expert, and/or corporate financial officer. This would have been a great help in resolving, not only for the Court, but also the Jury, the financial condition of the various defendants companies. However, the defendants relied instead, upon the testimony of the company C.E.O to discuss the company's financial position.

The following is a summary of that testimony.

MICHAEL SZYMANCZYK (Philip Morris)

Michael Szymanczyk, C.E.O. of Philip Morris basically testified that Philip Morris could not pay \$127 Billion to the State on a settlement date in a single payment-that's why they had to raise prices to make the long term payment.. He claims that Philip Morris made \$41 billion in the last 25 years, but will have to pay the settlement \$93 billion in the next 25 years. According to him Philip Morris's net worth is \$6.4 billion and if they had to pay that amount in punitive damages, the company would be out of business. Mr. Szymanczyk said valuing Philip Morris at \$75 billion is wrong-it is more like \$3.75 Billion. If someone offered \$75 billion

to buy Philip Morris, he would recommend the board of directors to accept the deal. He also said that to properly value a company one has to consider potential litigation liabilities which in the case of Philip Morris is quite substantial, and that would offset potential earnings. Philip Morris, he said, tried but could not borrow any significant amount of money. He did admit the future outlook is good for the company. He further said current net worth of the company reflects the value of the Marlboro trademark because it reflects earnings that come from that trademark.

NICK BROOKS (B&W)

Mr. Nick Brooks, C.E.O. of Brown and Williamson Tobacco Co, testified about B&W's financial condition and said the company's net worth was \$642 million, and has a market share of slightly under 12%. Lorillard has about 10%, RJR about 22 or 23%, and Philip Morris about 50 or 52% of market share. He also said that while B&W had a 12% market share, it only has 6% of the industry profit. Mr. Brooks said that B&W has been hurt more by the MSA and FSA than the other manufacturers. So far B&W has, according to Mr. Brooks, paid out \$2.1 Billion in payments under the settlements. In discussing B&W's financial condition since 1996, Mr. Brooks said they made a profit of \$295 million in 1996, \$10 million in 1997, registered a loss of \$482 million in 1998, and in 1999 realized a profit of \$216 million. In the last 4 years Mr. Brooks said the company made only 1 cent per pack sold. Under the FSA, B&W lost 17 cents a pack because of the way Florida calculates their rate of payment. Currently, according to Mr. Brooks, the economic picture shows a gradual decline for B&W in market share. As to industry profits, Mr. Brooks testified that B&W has

6%, Lorillard 14%,RJR 17% and Philip Morris 63%.

When asked by defense counsel whether B&W could continue to raise prices to pay for significant punitive damages, Mr. Brooks replied “ clearly not”-.that would accelerate the businesses decline. In fact he said the company had to lower prices to be competitive.

On the issue of company valuation, Mr. Brooks said two entities, Morgan Stanley Dean Witter and Credit Suisse attempted to value the company and Morgan Stanley found a negative value of one billion dollars, and Credit Suisse found and even higher negative value. There also was a negative report from a Dutch firm ABN-Amro ,which said B&W was declining because of competition and could face bankruptcy by the year 2012.

On cross examination Mr. Brooks said the company is faced with “hundreds or thousand s”of lawsuits but to date has not paid a dime to a single plaintiff.

Mr. Brooks says the value of B&W today reflected on its net worth statement is \$894 million. He does say that there are other ways of determining the value of a company other than assets minus liabilities-for example a future cash flow method. According to Mr. Brooks, if B&W loses 1.5 to 2 points additional share points, the company would go “under water”.

Mr. Brooks also said that B&W has \$2.4 billion due from affiliates with current liabilities of \$1.9 billion. B&W also has a credit-borrowing arrangement with BATUS Holding company which owes B&W \$1.2 Billion coupled with \$678 Million owed to B&W from foreign affiliates.

B.A.T. (British American Tobacco Co.), according to Mr. Brooks made two capital contributions to B&W—one in 1994 to support the purchase by B&W of American Tobacco CO, (about \$1 billion) and another to allow B&W to enter the MSA (about \$459 million).

That capital investment is not like a loan and doesn't have to be paid back, Brooks said, but B&W has to pay dividends on the funds. Mr. Brooks also said it was unlikely that B.A.T. would help finance a punitive damage claim-and said B&W has only \$25 million in cash

ANDREW SCHINDLER (RJR)

Mr. Schindler testified that over the last 16 years RJR has raised prices \$2.50-\$2.75 per thousand, but in 1998 the price increase was \$21 per thousand . He said RJR has shown a decline of 36% in volume from 1990 to 1999 . For example he said the decline in volume from 1996 to 1999 was from 119 billion cigarettes to 96 billion.. He expects a further decline in 2000 of between 2% and 4%. As to market share, RJR had 26.9% in 1996-and so far in 2000, 23.5%. A share point represents about 4 billion cigarettes. Mr. Schindler said that there are no funds available to pay for the MSA or FSA obligations therefore RJR had to raise prices.

He said with reference to the balance sheet, RJR showed currant assets at the end of last year or \$2.468 billion, and liabilities of \$3.068 billion, and cash on hand of \$600 million.. RJR, also lists good will at \$7.563 billion but claims they cannot sell off good will as a separate asset. Continuing to testify, Mr. Schindler said income from continuing operations last year totaled \$195 million—while net income showed \$2.3 billion reflecting a sale of the international operation. He went on to say that RJR has made cash payments to the MSA and FSA of \$768 million in 1998, \$1.6 billion in 1999, and estimates that for year 2000 the payment will be \$1.2 billion. RJR also faces a substantial number of lawsuit with a potential large financial risk factor.

Concerning RJR stock, Mr. Shindler said the company bought back 6,370,656 shares of stock at a cost of 125 million when the stock was at \$15-\$16 a share. The stock was priced at about \$31 a share the previous June. Since RJR didn't have to pay the \$3.10 dividend they were able to save that cost and the stock to them was then worth \$15-\$16 a share.

Regarding the MSA and other settlements, Mr. Shindler said RJR is obligated to pay for the first 25 years, about \$63.5B depending upon the number of cigarettes they sell and the size of the industry. Under the FSA, the company is obligated to pay \$ 4.2B. Under cross examination by the plaintiff, Mr. Shindler admitted writing a letter to stockholders in which he painted a rosy picture of the company's future. In the letter he discussed how in 1999 RJR sold the international business for \$8 billion and substantially reduced the company debt to about \$2 billion, so that at the end of 1999, RJR had a debt of \$2 billion with cash and equity of \$1.2 billion and \$7.1 billion respectively. The letter also said the leverage ratio is low and the cash flow was strong, and the strong balance sheet and cash flow allowed RJR to pay out nearly half of cash net income as dividends and simultaneously allowed RJR to repurchase stock shares.

BENNET LEBOW (Liggett)

Mr. Lebow testified that he sold three brands to Philip Morris because he had to or go out of business. The \$300 million he received was used to pay off debts. According to Mr. Lebow, Liggett would not have paid \$300 million for the brands but Philip Morris would because they owned the international brands and had the structure to exploit the brands

He said it was not appropriate to value Liggett based on the Philip Morris sale because Liggett deals mostly in discount brands not premium. Right now Liggett does not have a willing buyer because of the potential of all the litigation it faces.

Regarding the MSA, Mr. Lebow said Liggett is not paying because they don't have enough volume-however by that time Liggett had already agreed with 41 other states to pay 30% of its earnings. He said since Liggett sells discount brands it does not compete with the major premium brands. Liggett is in competition with 20 other discount brands who are not part of the settlements and do not have to pay such an obligation. Liggett has no obligation to the MSA unless its market share exceeds a base share of 125% of its 1997 market share or approximately 1.65% of the total cigarettes sold in the U.S.

Liggett is building a new plant which will produce 5.5 billion cigarettes a year which is financed by currant sales.

With reference to financial worth. Mr. Lebow said GAAP accounting and fair market value will give you higher or lower numbers—a company can have a net capital deficiency of \$488 million, but be valued at \$100 million.

On cross examination by one other defendant, Mr. Lebow testified that at the time of the MSA Liggett raise prices part way even though they were not obligated to do so under the MSA criteria, and consequently Liggett made money unless its market share goes up above 1.67M. Mr. Lebow said Liggett is now doing well because of the fact that he could raise prices to go along with the other defendants and doesn't have to make MSA payment at Liggetts currant level Liggetts stock today sells at \$17, up from \$5 in 1996. Liggett has 20 Million shares of stock. Mr. Lebow testified that when valuing a company, look at the

multiple of earnings and cash flow. a reasonable multiple of earning for a profitable company without significant liabilities is 5 to 5.5. earnings. A large foreseeable debt and a declining market can affect multiple earnings. Mr. Lebow conceded that Philip Morris has multiple earnings of less than zero according to the stock market-but he also said that he didn't think the MSA obligation for Philip Morris had any significance to the stock market. Mr. Lebow said that Philip Morris raised prices, and the money to pay the MSA is coming from the smokers and not out to Philip Morris's pocket. He also said that because of addiction, there not much of a limit on raising prices-maybe as much as \$4 to \$5.. According to Mr. Lebow, Philip Morris can easily raise prices to pay a punitive damage award-Liggett cannot..

MARTIN ORLOWSKY (Lorillard)

According to Mr. Orlowsky Lorillard has 10% of the market, down .75% from the previous year. In fact in the last 15 yrs Lorillard's market share was between 7 and 10%, however sales are decreasing and Lorillard sales are down 6% from 1999. One reason is that competition is selling cheaper and Lorillard cannot lower prices because of the MSA obligation. In overall ranking with the other defendants. Mr. Orlowsky says Lorillard is #4 out of 5 with 9 to 10% of the Florida market and Florida is 5% of Lorillards sales.

Mr. Orlowsky says financial reports are important because it tells the financial position of the company at a given point in time. It reflects assets minus liabilities to determine net worth. For the year 1999, Lorillards balance sheet showed assets at \$2.208.7 billion and liabilities of \$1.287.5 billion, resulting in a net worth of \$921,205.million.

Mr. Orlowsky further said that the company does not have the net worth money to pay

out a debt, and to pay out the entire net worth, Lorillard would have to sell off all assets, pay all debts, and in essence, sell the business. Lorillard cannot borrow additional money—Mr. Orłowsky said he contacted a bank for a loan but was rejected. If any new obligations were imposed on the company, such as a large punitive damage award, Mr. Orłowsky said Lorillard would go out of business. He also said that the most accurate way to determine what a company can pay today is its net worth—not based on future income.

Mr. Orłowsky opined that what Philip Morris paid for three Liggett brands has nothing to do with the value of Lorillard and should not be used in valuing Lorillard. He said that in 1995 Lorillard offered Brown and Williamson \$35.9 million for a little over 1% of the market share for 3 or 4 B&W brands, and based on about \$36 million for 1% market share Lorillard would be worth \$360 million using Mr. Cherner's method. However that is only 1/3 of the net worth reflected on Lorillard's current balance sheet.

With reference to the MSA, Mr. Orłowsky said Lorillard's obligation for the first 25 years is \$25- \$30 billion. Annual payments are between \$1.3 and \$1.5 billion, and Lorillard has paid \$1.7 billion to date.

On another note, Mr. Orłowsky said Lorillard's total advertising budget in 1998 was \$43 million, but in 1999 it dropped to \$18 due to the MSA. This however resulted in a savings of \$25 million because of the billboard restrictions of the agreement and that money is now being used for magazine advertising. He also said that in 1999 Lorillard spent \$7.7 million to advertise cigarettes and \$8.4 million for youth prevention. He did say in a deposition however, that the company spent \$12 Million for youth prevention and \$250 million for advertising and promotion in 1999. Lumping advertising and promotion reveals that youth

prevention is only 5%-6% of Lorillard's budget. According to Mr. Orlowsky, at the time of the settlements, if business stayed constant, Lorillard could afford the payments without going out of business. Lorillard knew they would have to raise prices to make the payments-in effect they mortgaged the business. The difference between the Government proposed settlement and the MSA was that under the Government proposal, punitive damages would be capped which would have allowed the companies to stay in business with some degree of stability because it eliminated lawsuit liability even if it cost \$100billion dollars more than the MSA.

Mr. Orlowsky said that in 1999 Lorillard took in less than \$4 Billion in sales revenue which included \$600 million in Federal excise taxes—therefore revenue was not all profit. However if punitive damages exceed net worth, Lorillard will go out of business.

On examination, Mr. Orlowsky admitted that Lorillard has not yet had to pay any judgement in a lawsuit involving smoking and health. He also admitted that net income rose about 85% from 1998 to 1999 (\$352 million to \$652 Million) and revenue increased 41%.

In 1997 Lorillard paid dividends to Lowes (parent), of \$100 million, in 1998 \$450 million and in 1999 \$300 million. In 1999 Lorillard retained what was left in 1999 after paying Lowes \$300 as part of assets and used the money to buy \$759 million of marketable securities.

According to Mr. Orlowsky, Lorillards net worth is \$921 million.

SUMMARY

This then was a summary of the financial testimony of the C.E.O.'s of the various

defendants. They also spent hours, and in some cases days, discussing how their individual company has changed attitudes and procedure and how each company has implemented anti-youth smoking programs costing millions of dollars. It should be noted, if not stated already, that despite the huge obligations the individual defendants have under the MSA and the FSA, those payments, amounting to 22 billion dollars or more, have been made by the defendants after raising the price of cigarettes sufficiently to generate such sums, and without having to make any outlay of monies from their own pockets. The consumer or smoking public has so far, because of the price increase, been the source of funds for those huge payments.

That means that despite the shift in market share or profit margins as a result of the price increase, the tobacco companies were in no worse financial shape than they were before the MSA or FSA for all intent and purposes.

One thing the C.E.O's. did say was that they no longer challenge the Surgeon General's, Public Health or Scientific Communities position on generic causation and the ill effects of tobacco, and have now embarked, via the Internet, on a concentrated effort to educate the public about the good qualities of the industry and their individual company, and the dangers of youth smoking.

ISSUES

The question to be answered therefor, is whether the amount of the punitive damage award, considered in the light of the evidence of (1) the behavior of the defendants, and (2) the ability of the defendants to pay, is unreasonable.

As to the first issue-behavior of the defendants-, this Court has no problem accepting

the rational of the jury who heard all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is **NOT SHOCKED** either by the fact that an award was made, nor by the amount of the award rendered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

The second issue-ability to pay-, gives the Court far more difficulty in making a determination.

The testimony at trial on this issue ranged from the low end, the suggested punitive damage award figures by the various defendants, to the high end, the estimated total worth of the defendant companies which at least one plaintiffs expert said, could exceed 200 Billion dollars. Although the individual C.E.O.'s. testified that if an award, in the amount of, or exceeding the defendants estimated individual "net worth," was rendered by the jury, it would put them out of business, these comments were mere "naked statements" without any proof or evidence submitted that such a condition would result. It seems to this Court that not only does the defendant have the burden of proving it's net worth, it also has the burden to show, with proof, that it will go out of business if a punitive damage award reaches a certain level. It is not the burden of the plaintiffs to establish that the defendants have the financial ability to pay a specific punitive damage award. Denis Rety v. Arthur Green and Southern Commodity Corp., 546 So. 2nd 410 (Fla. 3rd DCA 1989). A mere statement to the effect that in a C.E.O.'s opinion, a company will go out of business or be bankrupt, is not sufficient without more. Remember, the defendants, although they had listed several financial expert witnesses in their pre-trial documents, declined to call any of them, nor did they see fit to call

any company financial officer or consultant . This record, therefore, is devoid of such proof. Conversely, the Plaintiffs experts did not present any proof that if a punitive damage award was the same or close to the experts estimated total worth figures, the Defendants would not got out of business. However. as explained in the “Rety” case, this is not the Plaintiffs burden.

The Court is then left with a seemingly impossible task, trying to determine at what level a punitive damage award will put any of the defendants out of business. There are no figures which have been submitted as proof, that will aid the Court—only conjecture and supposition. It is easy for a C.E.O. to say that a company will go out of business if it has to pay a certain amount of money—but will it **really** go out of business.? Some of the testimony in this case was to the effect that in the world of high finance, there are many ways to leverage large loans or financial support to bail out a company in trouble and keep that company from going under. Plaintiffs experts explored that avenue, and even though some of the defendant C.E.O.’s testified that they tried to obtain loans from one or more banks or financial institutions and were unsuccessful, there was no **proof** of that submitted. The language of Inter Union of Operating Engineers v. Lassiter, 295 So.2nd 634 (Fla 4th DCA 1974) rev’d on Other grounds 314 So 2nd 761 (Fla 1975) is some what helpful in this regard.

“.... the term (financial resources) gives the trial judge a more *liberal standard* to determine whether a given proffer of evidence is relevant and material. For instance, there could well be, and properly so, proof as to income, cash flow, expenses, anticipated income, anticipated diminution of income, anticipated casualties...these items, among others of like moment, would be receivable **in addition** to net worth figures under the scope of *financial resources*. All of this material, including the reflection of net worth, goes to make up a defendants financial resources which the jury is entitled to consider in assessing

punitive damages as commanded in Florida Standard Jury Instruction 6.12" “ (emphasis added.)

What really needs to be determined then is what is the meaning of “net worth”. Most commonly “net worth” is referred to as the difference between assets and liabilities, however this can be misleading because, as the evidence in this trial pointed out, a “net worth” statement or report is only a snapshot of a moment in time and not an indicator of true worth or value. If what the courts are really interested in is whether a particular defendant has the capability of paying a large punitive damage award, then it is more than reasonable to look to that defendant's **actual** worth or value, and not a “snapshot in time”. The financial experts in this case testified that in valuing a company one must take into consideration many things other than “net worth”. The financial resources of a company then is the best indicator of the condition of a company in determining its true value or worth. There was ample testimony in this case of the “financial resources” available to these companies to enable the experts to reach opinions as to each defendant's actual worth,; ergo; a defendant's ability to pay beyond a bare recitation of current net worth!.

The experts testified, for example, that although Philip Morris declared a net worth of only \$6.4 Billion dollars, the company's true value or worth was in the neighborhood of \$75 Billion dollars when the company's “financial resources” were taken into consideration. There is obviously a huge gap between the two figures which then confuses the issue of when a company such as Philip Morris will have to go into bankruptcy in order to pay a punitive damage award.

It should be noted here that this Court is mindful of the line of cases that involve the

issue of whether punitive damages that will result in bankruptcy or putting a defendant out of business, should be allowed, Arab Termite \$ Pest Control v. Jenkins 409 So. 2nd 1039 (Fla_1982), Brooks v. Rios 707 So 2nd 374 (Fla 3rd DCA 1998) and Hockensmith v. Waxler, 524_So 2nd 714 (Fla 2nd DCA 1988),to name a few, However, none of these cases involve the kind of situation we find ourselves facing in this class action lawsuit. In those cases there was either unrebutted evidence of net worth, or the lack of evidence of net worth. What we have in the instant case, is a conflict in the evidence of net worth and actual worth. That is to say, a conflict in what a company claims its net worth is, and what an opposing expert says the company's net worth **really** is. Without a clear delineation or resolution of that conflict, it is hardly possible to determine the fine line of bankruptcy or "going out of business" without indulging in the purest of speculation.

The jury heard all of this evidence—they were exposed to the same testimonial conflicts about whether a company will go "bankrupt" or "go out of business" as the Court heard. In fact the jury was informed of their duty, in deciding this case, that they must award an amount of money without financially destroying or bankrupting the defendant. (see Jury Instructions Phase IIB page 10.). Was the jury in any less or better a position to make that determination than the Court, given the testimony and evidence presented?. The law, as we know, dictates that the Court shall not allow a verdict that will financially destroy or bankrupt a defendant. In this case who is to say what will or will not bankrupt a defendant or put them out of business?-the evidence certainly is not dispositive of that issue—therefore that decision will have to be made on speculation and conjecture in this particular case since there is no definable threshold available.

If one takes the defendants position that the threshold on this issue is the “current net worth”, then by implication, the Court must reject the testimony of the experts, accept at face value the position of the defendants, and disregard all testimony to the contrary. If that be the case, then there was no need for the Plaintiffs expert witnesses to testify that they disagree with the defendants figures. Under that scenario, the Court would disregard the Plaintiffs experts testimony that the true “current net worth” must include financial resources, and accept the defendants position at face value . This would be not only unfair, but also erroneous. This is one step this Court declines to take. There was, in this Courts opinion, insufficient evidence presented at trial, to determine that one or more of the defendants will go out of business or into bankruptcy just because they **say** they will. That’s almost akin to asking a defendant who has just been convicted of a crime , how much of a sentence he feels he would like to serve without it having an adverse effect on him.

The Jury heard all of the testimony and saw all the evidence from both sides, and more important, the Jury heard the arguments of counsel at the close of the case before they rendered their verdict. If the jury heard what the Court heard, and there is insufficient evidence to establish that one or more defendant will go out of business or go into bankruptcy, and if the Jury would have to speculate on that threshold issue, just as the Court would have to speculate, then in the absence of sufficient proof, how can, or even why should the Court overrule the Jury verdict and grant a remittitur?

There is also the issue of what punitive damages is all about. Succinctly, punitive damages should punish a defendant and act as a deterrent to future behavior. Punishment in this context means to cause some “hurt’ to the defendant (in this case monetary hurt),

that will send him or it a message. If a monetary sanction was imposed that caused no "hurt" then the purpose of the punitive award is negated. Continuing with this thought, and harking back to what has been said about the way the defendants have financed their obligations under the MSA and the FSA, if a punitive damage award was imposed upon the defendants that they could satisfy by simply raising the price of their products, then what has been accomplished in this case

This Court is not of the opinion that just because we are talking about vast sums of money, that there automatically has to be a remittitur. This Court after very careful consideration, in good conscience really could not set a figure ,or a level, at which a remittitur could be set without indulging in the sheerest of speculation. To do so would be nothing more than engaging in an arbitrary exercise, given the state of the evidence or lack thereof.. To remit to the level that the defendants have espoused (their net worth statement) would be wrong as explained above. The Court feels it best to consider the level found by the jury who ,as the court has said many times herein, heard the same testimony and evidence as the Court.

It should be noted here that this Court has carefully considered the criteria dictated in F.S.A. Sec 768.74(5) and has determined that:

1. This jury after sitting for two solid years in trial, did not evince any prejudice, passion or corruption in rendering its verdict. The jury had to render three separate verdicts in this cause—each one was derived after an enormous amount of evidence was presented, and in this Courts opinion, each verdict comported with the evidence adduced at trial.

2. Again, after sitting for two solid years in trial, it is inconceivable that this jury ignored or misconceived the evidence or the merits of the case. The Court observed the jury

taking careful notes during the trial---in fact filling several notepads in most cases, and being attentive throughout.

3. In reaching its verdict in this case, the jury was exposed to a great deal of testimony regarding the activities, and the financial condition of the various defendants. The evidence of financial condition was discussed by two Plaintiffs experts, and at least five C.E.O.'s of the defendant companies. It was highly complex, but did cover a range of amounts and economic theories from which the jury could make a decision.

4. This was a class action case, in which the issue of punitive damages was determined in the aggregate for the entire class which, the evidence indicated, could be as high as several hundred thousand people. Although the compensatory damage claim was tried for only three class representatives, the awards amounted to approximately 12.7 million dollars. Extrapolating that figure to the overall size of the class results in an extraordinarily high figure, therefore, one can say there is a reasonable relationship to damages proved and the injuries suffered, but more important, the award is in keeping with the degree of the wrongful conduct without sending the defendant into bankruptcy.

5. In the Courts opinion, the amount of the jury verdict is within the parameters of the evidence at trial--within the limits of the highs and the lows, albeit on the high side, but when the enormity of the facts and issues of this case are considered, the award cannot be said to be unreasonable.

Therefore; Defendant's Motion for Remittitur or New Trial, is DENIED.

WHEREFORE, IT IS ORDERED AND ADJUDGED as follows:

1. Class Representative Mary Farnan shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard

Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$2,850,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

2. Class Representative Frank Amodeo shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$5,831,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

3. Class Representative Ralph Della Vecchia, as surviving spouse of Angie Della Vecchia, deceased, shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$1,500,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

4. James Della Vecchia, as surviving minor son of Angie Della Vecchia, deceased, shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$2,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

5. The Estate of Angie Della Vecchia shall recover from Defendants Philip Morris

Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of \$523,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

6. The Florida Class shall recover from Defendant Philip Morris, Incorporated the sum of \$73,960,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

7. The Florida Class shall recover from Defendant R.J. Reynolds Tobacco Company the sum of \$36,280,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

8. The Florida Class shall recover from Defendant Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, the sum of \$17,590,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

9. The Florida Class shall recover from Defendant Lorillard Tobacco Company/Lorillard, Inc., the sum of \$16,250,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

10. The Florida Class shall recover from Defendant Liggett Group, Inc./Brooke Group Holding, Inc., the sum of \$790,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

11. The Florida Class shall recover from Defendant Council for Tobacco Research,

the sum of \$1,195,210 that shall bear interest at the rate of 10% a year, for which let execution issue.

12. The Florida Class shall recover from Defendant Tobacco Institute, the sum of \$278,339 that shall bear interest at the rate of 10% a year, for which let execution issue.

In addition thereto pursuant to the Jury Verdict on Punitive Damages, the Court awards the following.

| | |
|--|---------------------------------|
| Philip Morris, Incorporate..... | <u>\$ 73,960,000,000</u> |
| RJ Reynolds Tobacco Company ----- | <u>\$ 36,280,000,000</u> |
| Brown & Williamson Tobacco Corporation,----- individually and as successor by merger to the American Tobacco Company. | <u>\$ 17,590,000,000</u> |
| Lorillard Tobacco Company/Lorillard, Inc.----- | <u>\$ 16,250,000,000</u> |
| Liggett Group Inc./Brooke Group Holding, Inc.----- | <u>\$ 790,000,000</u> |
| Council For Tobacco Research----- | <u>\$ 1,105,210</u> |
| Tobacco Institute----- | <u>\$ 278,339</u> |

That shall bear interest at the rate of 10% a year.

FOR WHICH LET EXECUTION ISSUE.

True copies of the written Verdicts in Phases I, II and II-B are attached hereto.

All sums payable to the Florida Class shall be paid to the Registry of the Dade County Circuit Court and will be maintained for the benefit of the Florida Class.

This Court reserves jurisdiction to award attorneys fees to Class Counsel, Stanley

and Susan Rosenblatt and to award costs.

This Court further reserves jurisdiction to enforce the terms of this Final Judgment Nunc Pro Tunc, to supervise the maintenance and disposition of the punitive damage fund to class members and to enter any further Orders and conduct further proceedings pursuant to the Mandate of the Third District Court of Appeal of Florida.

DONE AND ORDERED at Miami, Dade County Florida this 6th Day of **NOVEMBER** in the year **2000**.

JUDGE ROBERT P. KAYE
CIRCUIT JUDGE

cc: All Counsel of Record