Immunity of the Tobacco Industry To Class Action Suits and Punitive Damage Awards

Class Actions

For Immunity:

1. Class Actions are not necessary. Many plaintiffs in state-wide class action suits demanded compensation in the form of cessation aid, medical monitoring, document disclosure, and injunctions. The settlement provides these things, and the money to finance them does not fall under the annual cap.

2. We should not risk bankrupting the companies. Bankruptcy would lead to a black market and the rise of new tobacco companies that would be not be legally hampered by a devious past.

3. The public gains more from this immunity than the companies do in the form of the industry's concessions in other areas of the settlement. There is nothing in the settlement that guarantees that class actions will succeed, and no plaintiff has ever won money damages from a tobacco company. Juries can be unpredictable. Surveys show that 50% of American do not want to reward smokers whom they believe should show more personal responsibility for their health.

Against Immunity:

1. Immunity against class actions may not be a constitutionally feasible goal. The federal government has almost never imposed procedural rules on state courts.

2. Immunity legitimizes the industry in a sense. They deserve to be punished through high money damages for the fraud and deceit they have perpetrated for profits at the expense of the public health.

3. Class action suits pose the only real fiscal threat to the industry. Plaintiffs lawyers have little incentive to bring individual lawsuits which lack the financial strength to thoroughly attack the industry in court.

Does Immunity Matter-- Can a Class Action Suit be Won?

1. The absolute right to sue is an illusory one, because it is difficult to win.

--Juries are unpredictable.

--Smoking gun documents may not be admitted into evidence.

--Choice of law conflicts can make (and have made) state-wide class action suits unmanageable and, therefore, unattractive to judges.

--It is impossible to predict how states would apply their version of FRCP 23,

--It is difficult for a class to make "intentional addiction of customers" the cause of action, because addiction varies in intensity and duration in each individual smoker. It is possible to overcome an addiction to nicotine, and juries consider each individual's attempts to quit. Despite these flaws, "intentional addiction" is one of the only causes of action to which the industry can not assert "assumption of the risk" as a defense.

Punitive Damages

Options 1-- Refuse the Settlement's Stance

1. The industry has immunity from punitive damages for past wrongdoing.

--We need to come up with a method for differentiating between past and future conduct. The line will be hazy, especially where conduct is of a continuing nature.

--We need to determine how to handle individual claims pending in district court or on appeal in which punitives have been demanded or awarded. Courts may deem that plaintiffs have a property interest in punitive damage claims, especially where the damages have already been awarded and are being appealed.

Option 2--Accept the Settlement's Grant of Immunity with Qualifications

1. Ensure that punitive damages for future conduct are not subject to the annual cap. OR

2. If punitives, whether for past or future conduct, are subject to the cap:

--prioritize compensatory damages under the deferral system, at least when punitives are based on future conduct

Legal - liabilities/policy

PUNITIVE DAMAGES

Provision: All punitive damages claims resolved as part of overall settlement. No punitive damages in individual tort actions. This provision would not apply to suits for relief arising from future conduct -- "i.e., suits claiming injury or damage caused by conduct taking place after the effective date of the Act."

Observations:

° The purpose of punitive damages is to deter and punish. While the aggregate cap on liability provisions in the agreement are very complex, they appear to limit the amount that ultimately will be paid by the participating companies. If this is true, the agreement has the effect of diminishing the impact of diminishing the interrorem effect of punitive damages -- simply put, if punitive damages are awarded, they would effect only the allocation of the amounts contributed by the companies among damage payments and the other purposes envisioned by the agreement, but apparently would not increase the total amount paid by those companies. Perhaps, punitive damage claims for future conduct should not be subject to the annual aggregate cap.

° Query: given the deferral mechanism in the annual aggregate cap regarding judgments above $1 million, would it make sense to prioritize the payment of claims for large compensatory damage judgments/settlements to ensure that their payment is not delayed by the payment of punitive damage judgments/settlements that use up the available aggregate cap for a given year? It particularly seems odd to allow plaintiffs to collect punitive damages for future conduct if it would delay individuals from collecting compensatory damages for past conduct (conduct for which punitive damages are barred under the agreement).

° There may be difficulty in determining whether suits claiming injury or damage relate to conduct taking place after the effective date of the Act, particularly where the injury or damage is caused by continuing conduct taking place both before and after the effective date.

° There does not appear to be any transitional provisions in the agreement regarding pending individual tort actions. If the agreement were deemed to apply to those actions (which seems likely), and to deprive the plaintiffs of punitive damages, it could raise Fifth Amendment issues. The critical question would be whether the plaintiffs would be viewed as having a property interest in a punitive damage claim that had not finally been resolved. While courts have been reticent to find such interests generally, problems could arise if the agreement were deemed to apply to cases pending on appeal, where a plaintiff, at the time of enactment, already had a judgment that included punitive damages.

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