

Cigarette verdict now in high court's hands

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SPRINGFIELD – Former governor James R. Thompson tried to persuade the Illinois Supreme Court Thursday to reverse a \$10.1 billion judgment against Philip Morris Inc. for allegedly defrauding its customers regarding its light cigarettes.

The tobacco giant faces claims that it misled customers with the names of its Marlboro Light and Cambridge Light brands and with labels that said those cigarettes had “lowered” tar and nicotine.

The plaintiffs in a roughly 1.14 million-member class convinced Madison County judge in 2003 that the cigarettes did not, in fact, give smokers less tar and nicotine than regular cigarettes.

But Thompson, the chairman of Chicago-based Winston & Strawn, told the high court in oral arguments Thursday that the claims should never have been certified for a class action in the first place.

Class actions can be certified when common issues dominate over the individual issues of proposed class members.

Thompson argued that the heart of the plaintiffs’ claim – that light cigarette smokers “compensated” to receive the same amount of nicotine from lights as regular cigarettes – is a matter that varies widely from smoker to smoker.

Justice Charles E. Freeman, however, voiced skepticism about Thompson’s claims about individual conduct.

“Your attack seems to be against the whole concept of class actions,” the justice said.

Thompson told him that the approach was in line with every case decided by Illinois reviewing courts regarding the standards for class actions.

And the former governor also disputed that smokers of light cigarettes received anything other than what they paid for.

The plaintiffs allege that smokers covered ventilation holes on the filters, took more puffs and inhaled more deeply in order to receive the same amount of nicotine from Marlboro Lights as they would from the regular version of the cigarette, Marlboro Reds.

“Smokers’ compensation habits, if they are designed to deliberately override the product that Philip Morris promised and delivered, cannot give smokers relief,” Thompson told the court.

Chicago attorney Stephen A. Swedlow, one of the lawyers arguing on behalf of the class, focused mainly on the conduct of Philip Morris instead of the individual smokers.

He argued that the dominant issues in the case dealt with Philip Morris' labeling of its cigarettes, its supposedly deceptive filtration system for those cigarettes and its misleading of the public.

"Philip Morris promised on every package 'lowered tar and nicotine' and intended that to be a lie and measured it and determined that it was a lie," Swedlow told the court.

Joseph A. Power Jr., a name partner in the Chicago firm of Power, Rogers & Smith P.C., also addressed the court, arguing that the tobacco company's disregard for public health justified the large punitive damages in the case.

The case comes on direct appeal from Madison County, where Circuit Judge Nicholas G. Byron entered the \$10.1 verdict against Philip Morris in March 2003.

The award includes \$7.1 billion in compensatory damages for the 1.14 million people who bought Marlboro Lights or Cambridge Lights since 1971. It also includes \$3 billion in punitive damages directed to the State of Illinois.

In its briefs, Philip Morris took issue with almost every aspect of the trial court's ruling.

On the most basic level, the tobacco company argued that its customers were never deceived.

It noted that many of the smokers who were named as plaintiffs or chosen by plaintiff counsel for depositions before the trial continued to smoke light cigarettes even after hearing the allegations of fraud.

The company complied with federal labeling requirements regarding tar and nicotine content and based its claims on a federally mandated machine test for those substances, Philip Morris argued.

And its lawyers pointed to some evidence that the smokers did, in fact, receive less tar and nicotine.

None of the 23 smokers questioned in the case could say for certain whether they received more or less of the substances from light cigarettes, but several said they smoked more light cigarettes than regular ones.

That indicates that the smokers were receiving less nicotine per cigarettes and tried to compensate by smoking more of them, Philip Morris' lawyers argued.

But the plaintiffs pointed to the tobacco company's own internal documents to support their claims.

One 1964 memo circulated among Philip Morris executives discussed the possibility of producing a “health cigarettes” to calm public fears about the link between smoking and cancer.

The document asserted that a cigarette that tasted like a Marlboro Red but was endorsed as a “healthy” cigarette would become the best-selling cigarette brand.

In fact, the resulting cigarette – Marlboro Lights – is the most popular product in the country.

The same report asserted that “the illusion of filtration is as important as the fact of filtration – therefore any en... should be by a radically different method of filtration but need not be any more effective.”

Later, a consortium of cigarette companies determined that the machine tests eventually adopted by the Federal Trade Commission to determine tar and nicotine levels were “not only misleading, but dangerously so.”

Leading medical experts also testified that smokers change their smoking habits in order to draw more nicotine and tar out of light cigarettes.

Philip Morris repeatedly attacked the plaintiffs’ for relying on imagined “average” class members rather than actual class members; the plaintiff experts claimed their findings held true for the vast majority of smokers.

Power’s involvement in the appeal meant that Justice Robert R. Thomas will not take part in the case because of a conflict of interest.

Power represents Thomas in an unrelated libel case against a Kane County newspaper. The West Chicago judge’s absence led to a skirmish a few weeks before the oral argument over whether Power’s firm could remain on the case.

The high court let Power, Rogers & Smith P.C. stay, after Power submitted an affidavit stating that he was hired by trial counsel in the class action before Thomas approached him about the libel suit.

Thomas was not the only one missing from the bench Wednesday.

Justice Philip J. Rarick also did not attend the hearing because of a medical appointment. He likely will leave the court before the justices reach a decision anyway.

Rarick’s term expires in December when he will be replaced by Washington County Circuit Judge Lloyd A. Karmeier, a Republican who won the seat in last weeks’ election.

When Karmeier joins the court, he will have an opportunity to hear tapes of the oral argument, to study the briefs submitted in the case and to vote on the results.

The case is *Price v. Philip Morris, Inc.*, No. 96236.