

Product Regulation & Liability - USA

Engle: a mass tort run amok

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Comment

The Eleventh Circuit's recent decision in *In re Engle Cases* highlights the frustrations that many defendants face in litigating mass tort claims against plaintiff law firms which file hundreds of cases without investigating or properly pleading their cases.⁽¹⁾ Siding with the defendants, the Eleventh Circuit affirmed the lower court's decision to dismiss 750 lawsuits that had been filed with egregious defects.

Facts

On October 31 1994 a Florida state trial court certified a nationwide class action involving smokers and survivors seeking compensatory and punitive damages.⁽²⁾

The trial court divided proceedings into three phases:

- Phase I decided liability and punitive damages for the class;
- Phase II addressed compensatory damages for three individual class representatives as well as punitive damages for the class; and
- Phase III consisted of new juries deciding individual claims for each of the 700,000 class members.⁽³⁾

In Phase I, the jury decided in favour of the class on all counts.⁽⁴⁾ In Phase II, the jury found that class representatives were entitled to compensatory damages and returned a \$145 billion lump-sum punitive damages award for the whole class.⁽⁵⁾ The court entered judgment in favour of the class and ordered the tobacco companies to pay the punitive damages award; the tobacco companies appealed.⁽⁶⁾ The Third District of Florida reversed and ordered the class decertified; the class appealed.⁽⁷⁾

2006 Florida Supreme Court decision

The Florida Supreme Court affirmed the Third District's reversal of the \$145 billion punitive damages award, but reversed the remainder of the decision.⁽⁸⁾ It found that the trial court had not abused its discretion in initially certifying the class action and had properly decided Phase I common liability findings for general causation, addiction to cigarettes, strict liability, fraud by concealment, civil conspiracy concealment, breach of express and implied warranties and negligence.⁽⁹⁾

The Florida Supreme Court, however, ultimately decertified the class for predominance reasons because individual causation and fault apportionment in Phase III required individualised determinations.⁽¹⁰⁾ Additionally, the court allowed class members one year within which to file their own individual lawsuits and gave *res judicata* (ie, final and binding) effect to Phase I findings.⁽¹¹⁾ This opened the floodgates to numerous filings, which eventually led to the Eleventh Circuit's decision.⁽¹²⁾

Failure to investigate

The root of the problem in *Engle* is simple. In 2008, according to the Eleventh Circuit, The Wilner Firm – which filed 4,432 complaints in response to the Florida Supreme Court's 2006 decision – did not fully investigate the cases.⁽¹³⁾ Had it done as it had repeatedly assured the district court and actually stayed in "constant contact" with the plaintiffs, it would have discovered that many of the plaintiffs were dead at the time of filing and some had been dead since the late 1970s.⁽¹⁴⁾

Originally, the firm filed 17 multi-plaintiff complaints in Florida state court and 27 multi-plaintiff complaints in the Middle District of Florida.⁽¹⁵⁾ The defendants removed the state court cases to the Middle District of Florida under the Class Action Fairness Act of 2005.⁽¹⁶⁾ From those combined 44

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multi-plaintiff cases, the district court created individual cases for each of the plaintiffs and ordered the parties to streamline the number of pending cases.⁽¹⁷⁾ The plaintiffs and defendants narrowed the list to 2,700 cases.⁽¹⁸⁾

The district court appointed a special master to oversee disposal of the remaining cases.⁽¹⁹⁾ He concluded: "Counsel knew next to nothing about more than 90% of th[e] action."⁽²⁰⁾ The plaintiffs' counsel lacked "very basic information" necessary to proceed, such as accurate information regarding the number and type of viable claims.⁽²¹⁾ As a result, the court ordered them (over their objections) to submit questionnaires to all plaintiffs in the action.⁽²²⁾ The special master compiled data from the returned questionnaires and – based on his findings, and for reasons explained below – the defendants moved to dismiss each of the 750 cases at issue on appeal.⁽²³⁾ The court granted the motion and, surprisingly, all plaintiffs – even the dead ones – appealed.⁽²⁴⁾

Eleventh Circuit decision

Of the 750 cases before the Eleventh Circuit, plaintiffs' counsel filed 588 lawsuits in the names of plaintiffs who were already dead, 160 loss-of-consortium cases relating to those dead plaintiffs and two wrongful death cases filed beyond Florida's two-year statute of limitations.⁽²⁵⁾

Personal injury claims

The Eleventh Circuit promptly proclaimed "[a]s any lawyer worth his salt knows, a dead person cannot maintain a personal injury claim" and held the district court properly dismissed the 588 personal injury claims brought by already-dead plaintiffs.⁽²⁶⁾ Per Federal Rule of Civil Procedure 17(a), the court could not "understand[]" how a lawyer could make the same "mistake" 588 times.⁽²⁷⁾ The court flatly refused to allow amendment on the grounds that: "[c]ommon sense dictates that a lawyer who files over 500 defective pleadings and who later seeks the court's leave to fix his mistakes must establish that he is entitled to it."⁽²⁸⁾ The court questioned whether the plaintiffs' attorneys had ever undertaken any significant effort to confirm the status of their clients.⁽²⁹⁾

The plaintiffs' counsel argued that the large volume of clients combined with a short filing deadline supported allowing amendment, but the Eleventh Circuit disagreed.⁽³⁰⁾ Massive numbers of clients and tight deadlines did not excuse their Rule 11 obligations at the time of filing.⁽³¹⁾ Under these facts, the court claimed that if it allowed the plaintiffs' leave to amend:

"we would give lawyers an incentive to tack on unauthorized and uninvestigated claims; for if sheer volume relaxes the requirement that a lawyer investigate the facts alleged in his complaints before filing them, then bulk filing like [plaintiffs' counsel's] becomes self-justifying – a practice we would never accept in a single case would become more palatable the more times it is repeated. We decline to adopt such an approach."⁽³²⁾

Refusal of Rule 15's right to amend was further justified because the plaintiffs' counsel had concealed their 588 'mistakes' by failing to bring them to the district court's attention over a four-year period.⁽³³⁾

Loss-of-consortium claims

The Eleventh Circuit also affirmed dismissal of the 160 loss-of-consortium claims.⁽³⁴⁾ Because the plaintiffs' loss-of-consortium claims were derivative, they failed when the personal injury claims failed.⁽³⁵⁾ Moreover, the plaintiffs' loss-of-consortium claims deserved dismissal on independent grounds because, like the personal injury claims, they resulted from the plaintiffs' counsel's mass filing that sat on the docket "for years" until the court ordered counsel to submit information which they repeatedly refused to provide.⁽³⁶⁾ The plaintiffs did not offer new reasons why they should be allowed to amend and thus "slept on whatever rights they may have had".⁽³⁷⁾

Wrongful death claims

The plaintiffs' counsel's failure to investigate and the resulting years of delay justified denying leave to amend the two wrongful death claims that were barred by the statute of limitations.⁽³⁸⁾ The plaintiffs did not claim to have any new information which they could not have alleged at the time of filing and provided no facts that would entitle them to relief through equitable tolling.⁽³⁹⁾

Comment

In re Engle Cases shows what can happen to cases filed by plaintiffs' lawyers in a mass tort action when the court determines that such cases were filed without sufficient information about the plaintiffs that the attorneys claim to represent. Plaintiffs' counsel must ensure that their cases are properly investigated and claims properly pled to satisfy Rule 11.

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Endnotes

(1) ___ F3d ___, 2014 WL 4435893 (11th Cir September 10 2014)

(2) *Engle v Liggett Group, Inc*, 945 So 2d 1246, 1256 (2006). The tobacco companies filed an interlocutory appeal of the class certification and in 1996 the Third District affirmed the certification, but reduced the class to include only Florida smokers (*Engle*, 945 So 2d at 1256).

- (3) *Id* at 1256-58.
- (4) *Id* at 1256-57.
- (5) *Id* at 1257.
- (6) *Id* at 1257-58.
- (7) *Id* at 1258.
- (8) *Id* at 1254.
- (9) *Id* at 1254-55.
- (10) *Id*.
- (11) *Id* at 1258.
- (12) *Id*.
- (13) *Engle*, 2014 WL 4435893.
- (14) *Id* at *9, *9 n16.
- (15) *Id* at *1.
- (16) *Id* at *4.
- (17) *Id* at *5.
- (18) *Id* at *7.
- (19) *Id*.
- (20) *Id* (internal quotations omitted).
- (21) *Id* at *8.
- (22) *Id* at *9.
- (23) Through various mechanisms not relevant to the Eleventh Circuit's discussion, the special master cut hundreds of more cases from the 2,700 cases originally before him, leaving the remaining 750 cases on appeal as well as a handful of others (*Engle*, 2014 WL 4435893, at *9-10, *9 n14). The district court discussed a myriad of other problems with remaining plaintiffs' cases: wrongful death claims filed by 'survivors' of smokers still living; cases filed as a result of clerical errors; multiple cases filed for the same person; cases filed for people with whom the law firm had no contact; claims already adjudicated by another court; cases filed by people who did not want to file a lawsuit; and claims filed long after the relevant statute of limitations period expired (*id* at *1).
- (24) *Id* at *10, *18.
- (25) *Id* at *1.
- (26) *Id* at *1.
- (27) *Id* at *20.
- (28) *Id*.
- (29) Nor did the plaintiffs' counsel attempt to plead wrongful death instead of the improperly pled personal injury claims (*id*).
- (30) *Id* at *20, *24.
- (31) *Id* at *24.
- (32) *Id*.
- (33) *Id* at *25. As a final blow to plaintiffs, the court refused to allow counsel to correct errors they discovered as a result of the questionnaire ordered by the special master (*id* at *29).
- (34) *Id* at *30.
- (35) *Id*.
- (36) *Id* at *30.
- (37) *Id* (internal quotations omitted).
- (38) *Id* at *31-32.
- (39) *Id* at *31.

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