

Litigator of the Week: Gregory Stone of Munger, Tolles & Olson

By Jan Wolfe
September 26, 2013



Capping 16 years of topsy-turvy litigation, Gregory Stone of Munger, Tolles & Olson this week helped Philip Morris USA dodge a major false-advertising class action over "light" cigarettes. The ruling follows a 10-week bench trial, a crucial ballot initiative and a closely watched detour up to the California Supreme Court.

Superior Court Judge Ronald Prager, who sits in San Diego, ruled Tuesday that Philip Morris, a subsidiary of Altria Group Inc., falsely marketed "light," low-tar cigarettes as less harmful and less addictive than regular smokes. Siding with Stone, however, Prager refused to grant restitution and equitable relief to a large class of smokers. Instead, the judge found that Philip Morris didn't owe a cent and tossed the case.

The lead plaintiffs lawyer, Mark Robinson of Robinson Calcagnie Robinson Shapiro Davis, had sought up to \$544 million for the class. Robinson brought the case way back in 1997 on behalf of a smoker named Willard Brown. The lawsuit followed a wave of scientific studies showing that low-tar cigarettes are no healthier than their full-strength counterparts.

Prager certified the case as a class action in 2001, including everyone who bought PM's popular Marlboro Lights brand in California over the previous eight years. The plaintiffs were only seeking restitution and equitable relief, as opposed to typical money damages. But given the size of the class, Philip Morris was on the hook for real money.

Philip Morris caught what seemed like a big break in 2004, when Californians voted in favor of a tort reform measure known as Proposition 64. Bringing California in line with the rest of the country, Prop 64 required plaintiffs in unfair competition cases to show economic injury in order to establish standing. It was unclear, however, whether that "actual injury" requirement applied to all members of a class action—as Stone and other tobacco industry lawyers argued—or just to the lead plaintiffs. Prager sided with Munger on that critical question, reversed course and decertified the class in 2004. Individual inquiries would be needed to determine whether each and every class member could satisfy the standing requirement, Prager ruled.

The case meandered its way to the California Supreme Court, where Munger's Daniel Collins argued for Philip Morris. In a deeply

divided 2009 decision, the court ruled that the standing requirements of Prop 64 only apply to class representatives. In other words, as long as a named plaintiff was duped by Philip Morris' ads, the class could include pretty much anyone who smoked Marlboro Lights during the time period.

With a trial looming, and anticipating a large restitution estimate from the plaintiffs, Stone and his colleagues deposed a random pool of 156 individual class members with the goal of proving that they weren't entitled to money.

"These depositions showed us that many people were pleased with the product," Stone said in an interview. "Many people who bought the cigarettes said they were aware of plaintiffs' theory. And for the people who weren't aware of plaintiffs' theory, once we explained it to them, many of them told us they still would have bought Marlboro Lights."

The case finally went to trial in April. Over three months of arguments and testimony, Robinson tried to portray Philip Morris as the mastermind of a sophisticated campaign to market light cigarettes as a healthier alternative. In hopes of countering that assertion, at one point Stone simply held up a pack of Marlboro Lights and read from the label: "low tar and nicotine." Far from being deceptive, Stone said, the statement was clearly true. Stone also tried to discredit the plaintiffs expert who arrived at the \$544 million restitution figure, arguing that it bore no relation to the real world.

"We said, look at the real world," Stone told us. "After all this information was disclosed in 2001, the market for Marlboro Lights remained the same."

Ultimately, Stone wasn't able to convince Prager that Philip Morris' advertising was truthful. In fact, the judge seemed to find the evidence against the company quite strong.

But Stone won the real battle. Prager found the \$544 million estimate "fatally flawed," noting that "most smokers who learned that Marlboro Lights were no healthier than Marlboro Reds believed Marlboro Lights, without any health advantage, still provided reasonable value for the price they paid." Based on the evidentiary record, "this Court concludes that the restitution value is zero," Prager wrote, entering judgment for Philip Morris.