Litigator of the Week: Stephen Tillery of Korein Tillery

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Stephen Tillery of Korein Tillery won a remarkable appellate reversal this week, persuading an appeals court to reinstate a $10.1 billion verdict he won against Philip Morris USA Inc. more than a decade ago. The verdict could get tossed once again, but for the time being Tillery is the envy of all the plaintiffs lawyers who have sued Big Tobacco and lost.

In an April 29 ruling, Illinois' Fifth District Appellate Court reinstated a 2003 bench verdict that Philip Morris (now a unit of Altria Group Inc.) deceptively marketed "light" and "low tar" cigarettes to a class of 1.1 million Illinois consumers. The Illinois Supreme Court had tossed the bench verdict in 2005, ruling that Philip Morris couldn't be held liable for using the light and low tar descriptors because the Federal Trade Commission permitted those terms.

It's strange for an intermediate court to undo a high court decision, but this is a very strange case. After the Illinois Supreme Court seemingly killed off the verdict, the FTC publicly stated that in fact it had never authorized Philip Morris to use the terms light and low tar. Because of that development, the Fifth District wrote in Tuesday's decision that Tillery's class of cigarette smokers deserved relief from the prior final judgment. The court made a point of saying that it's reinstating the verdict, rather than sending Tillery back to square one.

The massive bench verdict came in one of nearly two dozen state court class actions over "light" and "low tar" cigarettes that were filed in the late 1990s and early 2000s, after it became clear that smokers compensated for lower tar and nicotine levels by simply smoking more to get their fix.

"This is the only verdict left," Tillery told us, though he added that he's going to trial in January 2015 in another long-running case in Missouri.

The now-retired judge who issued the 2003 verdict concluded that "Philip Morris' motive was evil and the acts showed a reckless disregard for the consumers' rights." Tillery was lead counsel, squaring off against longtime Philip Morris outside counsel George Lombardi of Winston & Strawn.

The state's high court tossed the verdict in December 2005, ruling that the FTC authorized tobacco companies to use the word "light" and similar words in marketing cigarettes, as long the words were accompanied by a disclosure of the tar and nicotine content. In the years that followed, Philip Morris and peers like R.J. Reynolds Tobacco Company defeated most of the other cases. Plaintiffs won on the issue of liability in an identical California case against Philip Morris, but in 2013 a judge refused to award restitution, as we reported here.

The FTC gave Tillery new hope in 2008. In June of that year, the agency submitted an amicus brief in a U.S. Supreme Court case called *Altria Group v. Good*, stating that it never authorized the use of descriptors like "light." And in November 2008, the agency came out against the sort of machine-based testing for tar content that allowed cigarette companies to come up with such labels in the first place. "There should be no confusion: there is no such thing as a safe—or even a safer—cigarette," the FTC commissioner said at the time.

The Supreme Court cited the FTC's amicus brief favorably in the Good decision, and Tillery decided to seize the opportunity to try to reopen the Illinois case. But time wasn't on his side. *Good* came down on December 18, 2008, exactly one year and 362 days after final judgment had been entered for Philip Morris in the Illinois case. In Illinois, a litigant has two years from the entry of final judgment to file for a motion for relief from that judgment. "We had literally 48 hours," Tillery said. "We worked nonstop."

Tillery's work is far from over. But after this week's win, his $10 billion prize is back within reach.