

[Products Liability Law Daily Wrap Up, TOP STORY—TOBACCO PRODUCTS—11th Cir.: \\$20.76M punitive damages award reinstated in Engle-progeny case, \(Nov. 28, 2018\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

A smoker's testimony that peer pressure influenced her decision to start smoking and that her choice of cigarette brand and type were based on personal preference was insufficient to rebut an inference of detrimental reliance on the disinformation campaign waged by big tobacco companies to conceal the health hazards of smoking, the U.S. Court of Appeals for the Eleventh Circuit ruled in reversing a Florida district court's decision to grant Philip Morris USA, Inc.'s motion for judgment as a matter of law on the smoker's fraudulent concealment and conspiracy-to-conceal claims and reinstating the jury's \$20.76-million punitive damages award ([Cote v. R.J. Reynolds Tobacco Co.](#), November 26, 2018, Wright, S.).

Procedural background. The smoker, who developed chronic obstructive pulmonary disease (COPD) allegedly as a result of her 40-year addiction to the nicotine in cigarettes, had sued Philip Morris USA, Inc. (PM USA) and a number of other big tobacco companies on theories of negligence, strict liability, fraudulent concealment, and conspiracy-to-conceal. After a trial, the jury returned a verdict for the smoker on all four theories, and found that PM USA was liable to her for \$6.25 million in [compensatory damages](#). Finding that the smoker was 40 percent at fault, the jury reduced her compensatory recovery to \$3.75 million. Based on jury instructions given at the end of the liability trial, the jury also awarded \$20.76 million in [punitive damages](#) on the smoker's fraudulent concealment and conspiracy-to-conceal claims [see *Products Liability Law Daily's* September 19, 2014 [analysis](#) for complete details]. Following the verdict, the trial court rejected PM USA's due process and federal preemption arguments in support of the company's motion for a new trial or remittitur. However, the court did find that the smoker's own testimony regarding peer pressure and personal preferences in her choice of brand and type of cigarettes negated a finding of detrimental reliance—a required element of her intentional tort claims. Based on that finding, the trial court granted PM USA's motion for judgment as a matter of law (JMOL) with respect to the fraudulent concealment and conspiracy-to-conceal claims and vacated the \$20.76 million punitive damages award [see *Products Liability Law Daily's* April 27, 2015 [analysis](#)].

Following a March 17, 2016 decision by the Florida Supreme Court setting forth the legal basis upon which *Engle*-progeny plaintiffs could seek punitive damages with respect to negligence and strict liability claims [see *Products Liability Law Daily's* March 17, 2016 [analysis](#)], the smoker filed a motion for relief from judgment, arguing that the trial court's jury instructions to the contrary constituted an error of law. In response, the trial court determined that an appeal—not the reinstatement of the punitive damages verdict—was the proper way to handle an error of law in jury instructions on punitive damages [see *Products Liability Law Daily's* August 11, 2016 [analysis](#)]. This appeal followed, in which PM USA renewed its JMOL motion based on due process and preemption arguments and the smoker cross-appealed, arguing that the district court erred by granting JMOL in Philip Morris's favor as to fraudulent concealment and conspiracy to fraudulently conceal and by vacating the related punitive damages award.

Due process and preemption claims. Conceding that the Eleventh Circuit's decision in *Graham v. R.J. Reynolds Tobacco Co.* [see *Products Liability Law Daily's* May 25, 2017 [analysis](#)] had unfavorably resolved its arguments that: (1) the use of Phase I findings to prove elements of *Engle*-progeny claims violated due process; and (2) the use of Phase I findings to prove elements of *Engle*-progeny nonintentional tort claims was preempted by federal law, PM USA argued instead that the use of the Phase I findings as to fraudulent concealment and conspiracy claims violated due process because those findings, which were worded in the disjunctive, did not

specify whether the Phase I jury had determined that the tobacco companies had concealed material information about the health effects of cigarettes or the addictive nature of cigarettes.

After PM USA raised this additional due process argument, the Eleventh Circuit held on two separate occasions [see *Products Liability Law Daily's* March 8, 2018 [analysis](#) and September 7, 2018 [analysis](#)] that due process was not violated by giving preclusive effect to the Phase I fraudulent concealment and conspiracy findings in an *Engle*-progeny action. Explaining that it was bound to follow precedent, the Eleventh Circuit held, categorically, that the use of Phase I findings to establish *Engle*-progeny tort claims was constitutionally permissible, and thus, PM USA's arguments were rejected.

Intentional tort claims and punitive damages award. Having established that the Phase I findings, which the jury was required to accept, established that PM USA had engaged in conduct that subjected it to liability for fraudulent concealment and conspiracy to fraudulently conceal, the appellate panel opined that there remained questions as to whether the smoker in this case had relied to her detriment on the material information that the tobacco companies had concealed about the health effects and/or addictive nature of smoking and whether her reliance was a legal cause of her COPD. Recognizing the unique circumstances underlying *Engle*-progeny fraudulent concealment claims, which arose from a long-lived, sustained effort to hide the truth about the health hazards of smoking, the panel rejected the trial court's conclusion that the smoker's testimony was sufficient to overcome any inference of detrimental reliance, adding that the Florida courts had consistently held that *Engle*-progeny plaintiffs were not required to show reliance on a specific statement but, instead, permitted juries in *Engle*-progeny cases to infer reliance based on evidence that a plaintiff had been exposed to the disinformation campaign and had harbored a misapprehension about the health effects and/or addictive nature of smoking.

In the instant case, the jurors had heard evidence about the tobacco industry's sustained and pervasive disinformation campaign, as well as evidence regarding the smoker's: (1) exposure to ads that imparted the notion that smoking "wasn't that bad"; (2) unawareness about the addictive power of nicotine; and (3) impression that the Surgeon General's warning was based on speculation. In addition, the smoker testified that she had made multiple unsuccessful attempts to stop smoking before her COPD diagnosis. Based on this evidence, any reasonable juror could have inferred that the smoker might not have started smoking or would have quit earlier if she had known the true facts about the health effects and/or addictive nature of smoking.

Furthermore, the appeals court found that the smoker's testimony that peer pressure influenced her decision to start smoking and that she chose her cigarette brand and type based on personal preferences did little to rebut the reasonable inference that PM USA's disinformation campaign confused her understanding about the health hazards of smoking to her detriment. Contrary to the trial court's finding, a reasonable juror could have concluded that despite this testimony, the smoker would have decided to quit if she had known the whole truth about the risks of smoking. Finding that the trial court erred in granting PM USA's motion for judgment as a matter of law and its alternative motion for a new trial on the smoker's intentional tort claims, the panel remanded the case to the trial court for entry of judgment in the smoker's favor on her fraudulent concealment and conspiracy to fraudulently conceal claims and for reinstatement of the jury's corresponding punitive damages award.

The case is Nos. [15-15633](#); [16-15957](#).

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Companies: Philip Morris USA, Inc.

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