

[Products Liability Law Daily Wrap Up, PREEMPTION—TOBACCO PRODUCTS—11th Cir.: Due process, preemption objections in \*Engle\* cases rejected by full appellate court, \(May 25, 2017\)](#)

Products Liability Law Daily Wrap Up

[Click to open document in a browser](#)

By Susan Lasser, J.D.

It was not a violation of the Due Process Clause to give a jury's findings of negligence and strict liability in a class action against tobacco companies preclusive effect in a later individual suit by a class member, according to a decision by the U.S. Court of Appeals for the Eleventh Circuit. The court also held that federal law did not preempt that jury's findings. The appellate court's ruling was the latest in the line of "Engle progeny" decisions following decertification of the class of smokers and their survivors in the Florida class action ([\*Graham v. R.J. Reynolds Tobacco Co.\*](#), May 18, 2017, Pryor, W.).

**Engle class.** In 1996, a Florida appellate court approved certification of a class action lawsuit encompassing an estimated 700,000 Floridians who brought state-law damages claims against the major American tobacco companies for medical conditions caused by their (or their decedents') addiction to nicotine-containing cigarettes. A class-wide trial (Phase I) to determine issues common to the class, including causation, resulted in a jury verdict for the class on all counts. While the Florida Supreme Court in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), decertified the class, it held that the jury findings would have "res judicata effect" in individual cases brought against one or more of the tobacco companies by a former class member. Later, in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), the state high court further determined that affording the Phase I findings res judicata effect was an application of claim preclusion, not issue preclusion. Thus, all that remained to be litigated in individual trials was individual causation, connecting the Engle defendants' addictive cigarettes and the injury sustained by an individual plaintiff, and damages.

**Trial and verdict.** In the current case, the widower and personal representative of the estate of a deceased smoker filed an individual Engle action in the district court alleging that his wife developed lung cancer and died because of her addiction to cigarettes manufactured by R.J. Reynolds Tobacco Company and Philip Morris USA, Inc. He asserted claims of strict liability, breach of warranty, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. Under the Engle framework articulated in *Douglas*, the jury was not asked to find that the cigarettes the decedent smoked were defective or that the tobacco companies were negligent. Rather, the district court treated those findings as having already been established. For the claims of negligence and strict liability, the jury was asked to determine only whether the decedent was a member of the Engle class and whether smoking cigarettes manufactured by the two tobacco companies "was a legal cause" of her injuries. The trial court instructed the jury that, to find legal causation, the decedent's addiction to cigarettes must have "directly and in natural and continuous sequence produced or contributed substantially to producing" her injuries.

The jury found for the widower on the claims of strict liability and negligence, and awarded him \$2.75 million in damages and determined that the decedent was 70 percent at fault, R.J. Reynolds was 20 percent at fault, and Philip Morris was 10 percent at fault. The district court entered judgment against R.J. Reynolds for \$550,000 and against Philip Morris for \$275,000. The tobacco companies' motion for judgment as a matter of law was denied. Another relative later replaced the widower as personal representative of the decedent's estate.

**Eleventh Circuit's prior decisions.** An Eleventh Circuit panel reversed the judgment of the district court, holding that the Engle findings of strict liability and negligence were preempted by federal law [see *Products Liability Law Daily's* April 9, 2015 [analysis](#)]. The appellate court later granted the estate representative's petition for rehearing en banc and vacated the panel opinion [see *Products Liability Law Daily's* January 25, 2016 [analysis](#)]. The appellate court allowed the parties to brief both the preemption issue and the question of whether

giving effect to the jury's findings in *Engle* would "violate the tobacco companies' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution notwithstanding the panel's holding" in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013). In *Walker*, the appellate court held that giving *res judicata* effect to the findings of the jury in *Engle* did not violate the rights of the tobacco companies to due process. Recently, the Florida Supreme Court ruled in *R.J. Reynolds Tobacco Co. v. Marotta*, No. SC16-218 (Fla. April 6, 2017) [see *Products Liability Law Daily's* April 10, 2017 [analysis](#)], that federal law does not preempt "state tort" actions against the tobacco companies and that, even if federal law preempted a ban on the sale of cigarettes, the *Engle* Phase I findings did "not amount to ... a ban" that might conflict with federal law.

**Preclusive effect does not violate due process.** In the current case, the Eleventh Circuit first held that giving full faith and credit to the *Engle* jury findings of negligence and strict liability did not deprive the cigarette manufacturers of property without due process of law. *R.J. Reynolds and Philip Morris* argued that the Due Process Clause mandates that an issue be actually decided in one case before it is given preclusive effect in another. They also asserted that relying on the approved jury findings in individual actions by *Engle* members was an application of issue preclusion and that the Florida courts did not actually decide issues of strict liability and negligence for all class members. According to the companies, by abandoning the "actually decided" requirement, the Florida courts abrogated a fundamental protection against arbitrary deprivations of property in violation of the Due Process Clause.

The appellate court found, however, that even assuming, without deciding, that the "actually decided" requirement is a fundamental requirement of due process, no violation of due process occurred when the district court gave the *Engle* findings preclusive effect. After reviewing the *Engle* proceedings, the court was satisfied that the *Engle* jury actually decided common elements of the negligence and strict liability of *R.J. Reynolds and Philip Morris*. The Eleventh Circuit was satisfied with the Florida Supreme Court's findings in *Douglas*, and stated that the only way to make sense of the proceedings was that the Florida courts determined that the *Engle* jury actually decided issues common to the class, and the district court did not abrogate a protection against arbitrary deprivations of property in affording the Phase I jury's findings preclusive effect in the current case.

Further, the appellate court noted that the Due Process Clause requires only that "the application of principles of *res judicata* by a state affords the parties notice and an opportunity to be heard so as to avoid an arbitrary deprivation of property." While the Eleventh Circuit recognized that the *Engle* court "defined a novel notion of *res judicata*," it could not say that the substance and application of the doctrine was so unfair as to violate the constitutional guarantee of due process. The court of appeals' review of the record established that the tobacco companies had notice that the *Engle* trial involved common evidence and theories of negligence and strict liability that applied to all cigarettes manufactured by all tobacco companies and sold to all members of the class during the relevant periods. The tobacco companies were given an opportunity to be heard on the common theories in the year-long (Phase I) trial followed by an appeal to the Florida Supreme Court and later individual trials and appeals on the remaining issues of proximate causation, comparative fault, and damages.

Moreover, the appellate court stated that contrary to Judge Tjoflat's dissent of over 200 pages, no tobacco company could be held liable to any smoker without proof at trial that the smoker belonged to the *Engle* class, that she smoked cigarettes manufactured by the tobacco company during the relevant class period, and that smoking was the proximate cause of her injury. Also, every tobacco company must be afforded the opportunity to contest the smokers' pleadings and evidence and to plead and prove the smokers' comparative fault. Even in the current case, the jury reduced the decedent's representative's damages award for the decedent's comparative fault. As such, the record showed that the tobacco companies were afforded the protections mandated by the Due Process Clause. Thus, the Eleventh Circuit concluded that applying Florida law in the trial in the case at bar did not violate the tobacco companies' rights to due process of law.

**Preemption.** The Eleventh Circuit next concluded that the *Engle* jury findings of negligence and strict liability were not preempted by federal law. The tobacco companies argued that the obstacle form of conflict preemption defeated the findings of negligence and strict liability in *Engle*, and that federal law preempted state law claims premised on the theory that all of the cigarettes manufactured by the tobacco companies are inherently

dangerous. The appellate court disagreed, however, concluding that the federal tobacco laws did not preempt state tort claims based on the dangerousness of all the cigarettes manufactured by the tobacco companies. Nor did federal law preempt the Engle jury findings—affording preclusive effect to the Engle jury findings did not frustrate the objectives of federal laws on tobacco.

As for the tobacco companies' argument that by passing legislation that did not ban cigarettes, Congress established a policy of allowing the sale of tobacco products, the Eleventh Circuit found this argument to be contrary to settled law that inaction by Congress cannot serve as justification for finding federal preemption of state law. Moreover, the court said that Florida could employ its police power to regulate cigarette sales and to impose tort liability on cigarette manufacturers. The court declined to presume that Congress established a right to sell cigarettes based on a handful of federal labeling requirements. Finding no "clear and manifest purpose" to displace tort liability based on the dangerousness of all cigarettes manufactured by the tobacco companies, the Eleventh Circuit affirmed the judgments against R.J. Reynolds and Philip Morris.

The case is No. [13-14590](#).

Attorneys: Elizabeth Joan Cabraser (Lief Cabraser Heimann & Bernstein, LLP) for Earl E. Graham. Gregory G. Katsas (Jones Day), Keri Arnold (Arnold & Porter, LLP), and Cecilia M. Bidwell (Shook Hardy & Bacon, LLP) for R.J. Reynolds Tobacco Co. Lauren R. Goldman (Mayer Brown, LLP) for Philip Morris U.S.A., Inc.

Companies: R.J. Reynolds Tobacco Co.; Philip Morris U.S.A., Inc.

Cases: CourtDecisions PreemptionNews TobaccoProductsNews AlabamaNews FloridaNews GeorgiaNews