

Products Liability Law Daily Wrap Up, TOP STORY—TOBACCO PRODUCTS—11th Cir.: Eleventh Circuit takes breath and breadth away from Engle smokers' suits, (Apr. 9, 2015)

By Susan Lasser, J.D.

Strict liability and negligence claims brought on behalf of a deceased smoker against two cigarette manufacturers were preempted by federal law, the U.S. Court of Appeals for the Eleventh Circuit held, reversing a \$2.75 million jury verdict. The court of appeals concluded that while the State of Florida can enforce duties on cigarette manufacturers to protect the health, safety, and welfare of its citizens, the state cannot enforce a duty, as it has through the *Engle* jury findings, premised on the theory that all cigarettes are inherently defective and that every cigarette sale is an inherently negligent act (*Graham v. R.J. Reynolds Tobacco Co.*, April 8, 2015, Tjoflat, G.).

Background. Faye Graham (Graham) smoked approximately one and a half to two packs of cigarettes a day during her smoking life. She was diagnosed with non-small cell lung cancer and died on November 18, 1993, at age 58. She was survived by her husband, Earl Graham, who brought a wrongful-death suit, as the personal representative of his wife's estate, against the tobacco companies, R.J. Reynolds Tobacco Co. and Philip Morris USA, Inc. in a federal district court in Florida. Among other things, the complaint alleged that Graham was addicted to cigarettes manufactured by the defendant tobacco companies and that the addiction caused her death. The complaint contained seven counts, two of which were a strict-liability claim, based on the fact that "the cigarettes sold and placed on the market by [the defendants] were defective and unreasonably dangerous," and a negligence claim, based on the fact that the defendants were negligent "[w]ith respect to smoking and health and the manufacture, marketing and sale of their cigarettes."

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, including cancer, that were caused by their addiction to nicotine-containing cigarettes. A class-wide trial resulted in a jury verdict for the class on all counts. Subsequently, the Florida Supreme Court decertified the class, but 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 *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). In *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), the Florida Supreme Court 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 were "individual causation"—"the connection between the *Engle* defendant's addictive cigarettes and the injury that an individual plaintiff actually sustained"—and damages.

Graham trial and verdict. On May 13, 2013, the Graham case went to trial, which lasted nine days. The district court first instructed the jury on the requirements of *Engle* class membership: Earl Graham had to prove by a preponderance of evidence that Graham was addicted to cigarettes containing nicotine and that such addiction was a legal cause of her death. If the jury found Graham to be a member of the *Engle* class, the jury was instructed that because one of the *Engle* findings was that the manufacturers were negligent with respect to their manufacture and sale of cigarettes, the jury had to accept that determination. As to the strict liability claim, the jury was instructed that another of the *Engle* findings was that the manufacturers placed cigarettes on the market that were defective and unreasonably dangerous and was a determination that also had to be accepted. The jury was told that on both the negligence and strict liability claims, as to each manufacturer, it had to decide whether smoking that manufacturer's cigarettes was a legal cause of Graham's death. The manufacturers objected, based in part on preemption grounds.

The jury returned a verdict for Graham's husband on both his strict liability and negligence claims, awarding him \$2.75 million in compensatory damages. The jury also determined that Graham was 70 percent responsible for her death, that R.J. Reynolds was 20 percent responsible for her death, and that Phillip Morris was 10 percent responsible for her death. The trial court entered judgment against R.J. Reynolds for \$550,000 and against Phillip Morris for \$275,000 in light of the jury's allocation of fault. The manufacturers renewed their motion for

judgment as a matter of law, arguing that federal law preempted the jury's imposition of tort liability because it would frustrate the congressional objective "to foreclose the removal of tobacco products from the market despite the known health risks and addictive properties." Based on express preemption principles, the trial court denied the motion. The manufacturers appealed.

Preemption. The court of appeals held that Graham's husband's claims were preempted by federal law. The court considered the matter under the subcategory of conflict preemption—obstacle preemption—and noted that it had to first ascertain the nature of the federal interest. The court observed that Congress has enacted at least seven statutes regulating tobacco products in the past fifty years and has the constitutional authority to ban cigarettes. Yet, in spite of ever-growing scientific research over a 50-year period documenting the health risks associated with smoking—findings that have prompted legislative action—Congress has never banned cigarettes. The court found the Federal Cigarette Labeling and Advertising Act (the Labeling Act) instructive in that it encapsulated the competing interests that Congress sought to reconcile in regulating cigarettes: on the one hand, Congress has recognized that smoking can cause serious physical harm, even death; and on the other hand, Congress has acknowledged the important role tobacco production and manufacturing plays in the national economy. The court stated that Congress has carefully calibrated these policy considerations by promoting full disclosure to consumers about the risks of tobacco products, thereby allowing free but informed choice, but no ban. Regulation of cigarettes rests on the assumption that they will still be sold and that consumers will maintain a "right to choose to smoke or not to smoke." Moreover, federal legislation in 2009 granted the Food and Drug Administration (FDA) regulatory authority over cigarettes, but prohibited the FDA from "banning all cigarettes" or "requiring the reduction of nicotine yields of a tobacco product to zero."

Turning to how these federal objectives interact with state law, the court noted that successful tort actions, including strict liability and negligence claims, are premised on the existence of a legal duty; and that these duties "can stand as just as much of an obstacle to the purposes and objectives of Congress as a state statute or administrative regulation."

The court found that the legal duties underpinning Graham's strict-liability and negligence claims, as based on the *Engle* findings, impermissibly stood as an obstacle to the achievement of federal objectives—*i.e.*, regulating, but not banning, the sale of cigarettes. The court concluded that three aspects of the *Engle* litigation compelled its conclusion that *Engle* strict-liability and negligence claims have imposed a duty on all cigarette manufacturers that they breached every time they placed a cigarette on the market, and that such a duty operated as a ban on cigarettes.

First, the court said that the *Engle* class definition did not distinguish among types of smokers, types of cigarette manufacturers, or types of cigarettes, but rather applied across the board. As such, the class definition created a "brandless" cigarette, one produced by all defendants and smoked by all plaintiffs at all times throughout the class period. Second, the Eleventh Circuit found that the *Engle* Phase I findings, given claim-preclusive effect by *Douglas*, concerned conduct common to the class. This approach reinforced the brandless nature of the *Engle* litigation because it was impossible to determine which pieces of brand-specific evidence the Phase I jury found relevant in reaching the conclusion that all defendants had breached duties owed to the class. According to the court, to avoid a due process violation, the Phase I findings had to turn on the only common conduct presented at trial—that the defendants produced, and the plaintiffs smoked, cigarettes containing nicotine that were addictive and caused disease. Finally, the court said that a causation instruction in the *Douglas* case removed the need to litigate brand-specific defects in *Engle*-progeny trials altogether. Progeny plaintiffs did not have to show how specific conduct of a specific defendant caused their injuries.

Therefore, the court concluded that brand-specific defects were not determined during Phase I; and they did not have to be determined during *Engle*-progeny trials, either. Further, the class definition did not distinguish among plaintiffs who smoked different brands at different times—all addicted smokers were the same; so, too, were all cigarettes, according to the *Engle* scheme. The court of appeals determined that as a result of this interplay between the Florida Supreme Court's interpretations of the *Engle* findings and the strictures of due process, the necessary basis for Graham's *Engle*-progeny strict liability and negligence claims was that all cigarettes sold during the class period were defective as a matter of law. The court found that the duties imposed by the state law claims as hinged to the *Engle* findings, which the appellate court found have been interpreted by the Florida courts "to possess unprecedented breadth, conflicted with the clear purpose of Congress—regulating, not

banning cigarettes. The court of appeals, therefore, ruled Graham's husband's claims were preempted by federal law.

The case is No. 13-14590.

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

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