Products Liability Law Daily Wrap Up, PREEMPTION—TOBACCO PRODUCTS—Fla. App.: Cigarette makers' preemption argument rejected in *Engle*-progeny case, (Aug. 11, 2016)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

State law strict liability and negligence claims in an *Engle*-progeny case that ended in a final judgment for the personal representative of a deceased smoker were not impliedly preempted by federal law. Not only was the cigarette makers' preemption argument without merit, but it was barred by *res judicata* (*Philip Morris USA, Inc. v. Lourie*, August 10, 2016, Khouzam, N.).

Philip Morris USA, Inc., and R.J. Reynolds Tobacco Co. timely appealed the final judgment entered in favor of the representative of the decedent smoker's estate. The cigarette makers argued that federal law implicitly preempted the representative's state law tort claims of strict liability and negligence for the sale of cigarettes because federal law effectively prohibited states from banning cigarette sales and the *Engle* Phase I findings amounted to a ban on selling cigarettes.

Res judicata. The jury findings from the Phase 1 *Engle* trial were given *res judicata* effect by the Florida Supreme Court (*Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006)), which made clear that the findings established the common liability of the tobacco company defendants. The tobacco companies could not argue that they did not engage in conduct sufficient to subject them to liability, including but not limited to: all defendants placed cigarettes on the market that were defective and unreasonably dangerous; all defendants were negligent; and the defendants' cigarettes caused the decedents to develop one or more cigarette-related diseases or medical conditions that resulted in/substantially contributed to their deaths. Thus, because *res judicata* prevented them from relitigating the same cause(s) of action in a second lawsuit, the tobacco companies in the current case could not raise the implied preemption defense as the issue had already been raised and ruled upon in the *Engle* litigation.

While the state supreme court only mentioned the tobacco defendants' "preemption defense" in passing, the court found that it was clear that a preemption defense was before the court and had been rejected in the Phase I findings. Moreover, as the U.S. Supreme Court had denied certiorari, opting not to address the issue, the claim had been finally determined and could not be raised again in *Engle*-progeny cases like the current one.

Further, the court held that the bar to raising the implied preemption defense again did not violate the due process rights of the tobacco company defendants. This argument had been explicitly rejected by the Florida Supreme Court in *Philip Morris USA, Inc. v. Douglas*, 110 So.3d 419 (2013). Tobacco company defendants not only had a full and fair opportunity to raise this defense but actually did raise it in *Engle*.

Implied preemption. The court in the current case also rejected the cigarette makers' implied preemption defense on its merits. Not only did the defendants rely "heavily" on a decision issued by a panel for the U.S. Court of Appeals for the Eleventh Circuit (*Graham v. R.J. Reynolds Tobacco Co.* [see *Products Liability Law Daily*'s April 9, 2015 analysis]) which has since been vacated and rehearing granted en banc (*Graham v. R.J. Reynolds Tobacco Co.*, 811 F.3d 434 (11th Cir. 2016) (vacating the panel opinion and granting rehearing en banc), but the reasoning in the Eleventh Circuit opinion had been rejected recently in *R.J. Reynolds Tobacco Co. v. Marotta*, 182 So. 3d 829 (Fla. 4th DCA 2016) and *Berger v. Philip Morris USA, Inc.*, 3:09-CV-14157 (M.D. Fla. May 5, 2016).

The tobacco companies had argued that federal law implicitly preempted state law tort claims of strict liability and negligence for the sale of cigarettes because federal law effectively prohibited states from banning cigarette

sales and the *Engle* Phase I findings amounted to a ban on selling cigarettes. However, the court found that federal law did not prohibit states from banning cigarette sales. Federal regulation of the industry stopped short of a ban. The Federal Cigarette Labeling and Advertising Act only prevented the states from imposing separate regulations on the labeling and advertising of cigarettes, and the Family Smoking Prevention and Tobacco Control Act granted the U.S. Food and Drug Administration (FDA) authority to regulate cigarettes and prohibited the FDA from banning cigarettes. However, states are not prevented from banning cigarettes—rather, the states' authority to "prohibit[] the sale … of tobacco products" is expressly preserved. In addition, in spite of Congress's knowledge of "the addictive and hazardous properties of cigarettes" and tobacco tort litigation, Congress has never preempted state law remedies. The court reiterated the statement in Berger that "a state's power to regulate matters of health and safety encompasses the power to regulate cigarettes, or even to ban their sale entirely."

Moreover, the court maintained that the *Engle* Phase I findings did not amount to a ban on selling cigarettes, as evidenced by cigarettes being sold throughout Florida. The tobacco companies' contention that the Phase I findings were overly broad also was rejected as well—the court finding the Phase I findings did not lack the specificity suggested by these companies. The tobacco companies were not held liable for simply placing cigarettes on the market or the inherent characteristics of cigarettes, but rather, based on evidence that they had manipulated the nicotine levels in their cigarettes to make them more addictive and had manufactured cigarettes with filters that increased the cigarettes' inherently harmful effects, the companies were found liable for placing cigarettes on the market that were defective and unreasonably dangerous. They also were found liable for failing to exercise a degree of care that a reasonable cigarette manufacturer would exercise under similar circumstances. Thus, the court rejected the companies' characterization of the Phase I liability findings as being based on nothing more than the inherent properties of cigarettes, and their companion argument that the Engle findings operates as a ban on the sale of cigarettes.

The case is No. 2D14-5403.

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Companies: Philip Morris USA, Inc.; Liggett Group, LLC

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