

[Products Liability Law Daily Wrap Up, TOP STORY—TOBACCO PRODUCTS—U.S.: Cigarette makers petition High Court on due process, preemption issues in \*Engle\*-progeny cases, \(Sept. 19, 2017\)](#)

Products Liability Law Daily Wrap Up

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By Susan Engstrom

Two cigarette manufacturers have asked the U.S. Supreme Court to review two Florida appellate court decisions holding that application of the *Engle* findings to a progeny case did not violate Philip Morris USA Inc.'s due process rights, and that state-law strict liability and negligence claims were not impliedly preempted by federal law. The companies questioned whether due process prohibits plaintiffs from relying on the preclusive effect of the generalized *Engle* jury findings to establish elements of their individual claims, and whether *Engle* progeny plaintiffs' claims for strict liability and negligence are impliedly preempted by federal law ([Philip Morris USA Inc. v. Naugle](#), Docket No. 17-400, and [Philip Morris USA Inc. v. Lourie](#), Docket No. 17-401; petitions for cert. filed September 15, 2017).

**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.

**Naugle case.** In the first *Engle*-progeny case at issue here, a former smoker brought strict liability and negligence claims against Philip Morris, seeking to recover damages for her emphysema. In Phase I of her trial, a jury found that she was an *Engle* class member. In Phase II, the trial court instructed the jury that based on the Phase I verdict, she was entitled to the following *Engle* findings, among others: Philip Morris was negligent, had sold cigarettes that were defective, and had concealed information concerning the health effects or addictive nature of smoking cigarettes. The jury found in favor of the former smoker and awarded her \$57 million in compensatory damages and \$244 million in punitive damages. However, the trial court remitted the total award to \$37 million. The state appeals court ruled that the trial court had correctly applied *Engle*—i.e., that the application of the *Engle* findings to the progeny case did not violate Philip Morris' due process rights. However, the appeals court granted a new trial based on compensatory and punitive damages, after which the jury awarded the former smoker approximately \$11 million [see *Products Liability Law Daily's* October 22, 2013 [analysis](#)].

**Lourie case.** In the second case, which was brought by the husband of a deceased smoker against Philip Morris and R.J. Reynolds Tobacco Company, a Florida appeals court held that state-law strict liability and negligence claims that ended in a final judgment for the plaintiff were not impliedly preempted by federal law [see *Products Liability Law Daily's* August 11, 2016 [analysis](#)]. In addition to finding that the companies' preemption argument was barred by res judicata, the court determined that federal law did not prohibit states from banning cigarette sales. It also found, however, that the *Engle* Phase I findings did not amount to a ban on selling cigarettes, as evidenced by cigarettes being sold throughout Florida.

**Eleventh Circuit case.** After the Florida courts issued their opinions in *Naugle* and *Lourie*, the Eleventh Circuit issued a decision holding that 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, and that federal law did not preempt that jury's findings [see *Products Liability Law Daily's* May 25, 2017 [analysis](#) of *Graham v. R.J. Reynolds Tobacco Co.*].

**Petitions.** In their petitions for review of the *Naugle* and *Lourie* cases, the tobacco companies explained that under longstanding, universal common law principles, plaintiffs seeking to rely on the outcome of a prior proceeding to establish elements of their claims must demonstrate that those elements were "actually litigated and resolved" in their favor in the prior case. According to the petitioners, however, Florida courts have "jettisoned" the "actually decided" requirement. In *Douglas*, for example, the state supreme court held that members of the class of Florida smokers prospectively decertified in *Engle* could rely on the generalized findings rendered by the class action jury before certification to establish the tortious conduct elements of their claims, without demonstrating that the *Engle* jury actually decided that the defendants had engaged in tortious conduct relevant to their individual smoking histories.

The petitioners also assert that Florida courts and the Eleventh Circuit have disregarded previously well-recognized principles of implied preemption by permitting plaintiffs to rely on the *Engle* strict liability and negligence findings, which may rest on a determination that all cigarettes produced by the *Engle* defendants were defective. According to the petitioners, this is a theory of liability that directly conflicts with federal statutes resting on the collective premise that cigarettes will continue to be sold in the United States.

The petitioners noted that they have filed another petition, *R.J. Reynolds Tobacco Co. v. Graham*, Docket No. 17-415, filed September 15, 2017, asking the High Court to review the Eleventh Circuit's decision in *Graham*, which presented due process and implied preemption questions directly at issue in this case. According to the tobacco companies, the *Graham* petition is the "ideal vehicle" for the U.S. Supreme Court to consider these issues.

**Questions presented.** The questions presented to the High Court by the tobacco makers are: (1) when there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation; and (2) whether strict liability and negligence claims based on the findings by the class action jury in *Engle* are preempted by federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States.

The cases are Docket Nos. [17-400](#) and [17-401](#).

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Companies: Philip Morris USA Inc.; R.J. Reynolds Tobacco Co.

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