

## [Products Liability Law Daily Wrap Up, SUPREME COURT—TOBACCO PRODUCTS—U.S.: R.J. Reynolds asks High Court for due process relief in another Engle-related petition, \(Nov. 3, 2017\)](#)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

The cigarette manufacturer, R.J. Reynolds Tobacco Company, has petitioned the U.S. Supreme Court to review a \$13 million verdict in favor of the daughter of a deceased smoker after a Florida jury found it liable for the decedent's illness and death. The cigarette maker complains that for the daughter to rely on the outcome of the prior *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) proceeding to establish the elements of her claim, she must demonstrate that those elements were "actually litigated and resolved" in her favor in the prior case (*R.J. Reynolds Tobacco Co. v. Turner*, petition for cert. filed October 30, 2017).

The decedent smoked cigarettes manufactured by R.J. Reynolds and died of chronic obstructive pulmonary disease (COPD) after decades of smoking cigarettes. Her daughter, who was the personal representative of the decedent's estate, brought suit against the cigarette maker. The case eventually went to a jury, which found that the decedent was addicted to cigarettes containing nicotine and that the addiction was a legal cause of her COPD/emphysema [see Products Liability Law Daily's April 25, 2016 [analysis](#)]. In particular, the jury found that smoking cigarettes manufactured by R.J. Reynolds was a legal cause of the decedent's COPD/emphysema and death. Also, the jury determined that the decedent reasonably relied to her detriment on statements (of material fact) made in furtherance of R.J. Reynolds' agreement to conceal or omit material information not otherwise known or available to her concerning the health effects and/or addictive nature of smoking cigarettes; and that this reliance was a legal cause of her COPD/emphysema and death. The jury found that R.J. Reynolds was 80 percent at fault concerning the legal cause of the decedent's disease and death, and that the decedent was 20 percent liable for her own illness and death.

**Damages.** The jury then awarded \$1.5 million each to the decedent's daughter and son for their loss of parental companionship, instruction, and guidance, and their mental pain and suffering as a result of their mother's COPD/emphysema and death. A day later, the jury decided that \$10 million in punitive damages should be assessed.

**Petition.** R.J. Reynolds poses the following question to the Supreme Court, noting that the question is one posed in another of the tobacco company's petitions, *R.J. Reynolds Tobacco Co. v. Graham*, Docket No. 17-415: "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?"

R.J. Reynolds notes that in the current case, as well as "thousands of similar cases," the Florida courts have tossed aside the "actually decided" requirement pursuant to the Florida Supreme Court's Engle decision, under which members of the class of Florida smokers prospectively decertified in Engle can rely on generalized findings rendered by the class action jury before decertification 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 the plaintiffs' individual smoking history. One such finding is that defendant cigarette manufacturers "placed cigarettes on the market that were defective and unreasonably dangerous."

In addition, the petition points to the U.S. Court of Appeals for the Eleventh Circuit's recent decision in *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc), petition for cert. pending, No. 17-415 (docketed Sept. 19, 2017), having held that full faith and credit requirements obligate federal courts to give equally broad preclusive effect to the Engle jury's findings. R.J. Reynolds states that its Graham petition presents

the same question as in the current case: whether due process prohibits courts from relying on the generalized, non-plaintiff-specific Engle jury findings to conclusively establish elements of individual plaintiffs' claims. As such, R.J. Reynolds advises the court to hold the current petition pending the disposition of the Graham petition and then dispose of the current petition consistent with its ruling in Graham.

**Reasons for granting the petition.** R.J. Reynolds argues that although the High Court has denied several petitions raising a due process challenge to the preclusive effect given to the Engle findings, those petitions predated the Eleventh Circuit's "divided en banc decision in Graham." Because both the Florida Supreme Court (in *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419 (Fla.), cert. denied, 134 S. Ct. 332 (2013)) and the en banc Eleventh Circuit have addressed the due process issue, the cigarette maker posits that the question presented is ripe for review in Graham. In particular, the manufacturer contends that relieving the plaintiffs of the burden of establishing essential elements of their tort claims deprives the Engle defendants of their due process rights, and the U.S. Supreme Court "is the only forum that can provide Reynolds with relief from the unconstitutional procedures that have now been endorsed by both the Florida Supreme Court and the en banc Eleventh Circuit." According to R.J. Reynolds, the two decisions "empower progeny plaintiffs to deprive Reynolds of its property without any assurance that any factfinder has found critical elements of their claims...." In the current case, the trial court allowed the daughter to rely on the Engle Phase I jury findings to establish that the R.J. Reynolds cigarettes her mother smoked were defective without requiring her to establish that the Phase I jury had actually decided that issue in her favor, the petition asserts. Further, the Engle findings do not indicate whether the jury found a defect in one or another type or brand of R.J. Reynolds cigarettes and not in others, or in one or some time periods but not others. R.J. Reynolds contends that it could be that the Engle jury found that the cigarette maker's cigarettes smoked by the decedent in the case at bar were not defective, or were defective only in certain design configurations or time periods not applicable to the decedent's individual smoking history. According to the petition, the Engle jury's generalized findings make it impossible to know whether they apply to the decedent given her particular smoking history.

**Other Engle-related petitions.** Currently, there are five tobacco company petitions before the High Court. In addition to the current and Graham petitions, the following have presented the same or similar questions: *R.J. Reynolds Tobacco Co. v. Block* (Docket No. 17-443, filed September 25, 2017); *Philip Morris USA Inc. v. Naugle* (Docket No. 17-400, filed September 15, 2017); and *Philip Morris USA Inc. v. Lourie* (Docket No. 17-401, filed September 15, 2017) [see *Products Liability Law Daily's* September 19, 2017 [analysis](#)]. All petitions ask that the Supreme Court hold the others pending resolution of the Graham petition. According to the tobacco companies, the Graham petition is the "ideal vehicle" for the Supreme Court to consider the issues raised in all five petitions. The questions presented in Graham 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?
2. If the Engle jury's findings are deemed to establish that all cigarettes are inherently defective, are claims based on those findings preempted by the many federal statutes that manifested Congress' intent that cigarettes continue to be lawfully sold in the United States?

The case is Docket No. [17-638](#).

Attorneys: Jeffrey S. Bucholtz (King & Spalding LLP) for R.J. Reynolds Tobacco Co.

Companies: R.J. Reynolds Tobacco Co.

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