

[Products Liability Law Daily Wrap Up, PREEMPTION—TOBACCO PRODUCTS—Fla. Sup. Ct.: Florida high court finds no federal preemption of Engle progeny claims, \(Apr. 10, 2017\)](#)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

Answering in the negative a certified question that it modified, the Florida Supreme Court determined that federal law did not implicitly preempt state law tort claims of strict liability and negligence by *Engle* progeny plaintiffs. The question was certified to the state high court by Florida's Fourth District Court of Appeal in an *Engle* suit in which judgment was entered in favor of a decedent smoker's estate. Although the cigarette maker, R.J. Reynolds Tobacco Co. (Reynolds), insisted that *Engle* imposed liability for the sale of ordinary cigarettes containing nicotine, which amounted to a ban on cigarettes, the state high court determined that the record in *Engle* reflected that the claims were grounded in allegations that *Engle* defendants deliberately manufactured their products to increase the likelihood of addiction, despite the defendants' knowledge of the hazards of nicotine, and that *Engle* plaintiffs suffered disease and death as a result of their inability to quit. The court found no preemption and, thus, affirmed the Florida Court of Appeal on this issue. The court, however, quashed the portion of the state appellate court's decision that affirmed the trial court's determination that the jury should be precluded from considering punitive damages, and remanded to the district court for proceedings consistent with the supreme court's opinion (*R.J. Reynolds Tobacco Co. v. Marotta*, April 6, 2017, Labarga, J.).

Engle history. The current case stems from a class action by smokers and their survivors against major tobacco companies for damages allegedly caused by smoking-related injuries in *Engle v. Liggett Group, Inc.* (Engle III), 945 So. 2d 1246 (Fla. 2006). As part of the action, the class sought compensatory damages based on various theories, including strict liability and negligence. After certification of the class in *R.J. Reynolds Tobacco Co. v. Engle* (Engle I), 672 So. 2d 39 (Fla. 3d DCA 1996), the trial court developed a three-phase trial plan. Phase I consisted of a year-long jury trial to determine issues related to liability and entitlement to punitive damages (*Liggett Grp. Inc. v. Engle* (Engle II), 853 So. 2d 434 (Fla. 3d DCA 2003). The jury considered issues common to the entire class, including the tobacco companies' conduct, general causation, and the effects of smoking on health; and it returned a verdict in favor of the class on all counts and determined that the *Engle* defendants' actions entitled the class to punitive damages. In Phase II, the same jury decided the individual causation and damages for the class representatives, as well as the amount of punitive damages to be awarded to the entire class. The jury found that the class representatives were entitled to compensatory damages, and awarded class-wide punitive damages in the amount of \$145 billion. Prior to the start of Phase III, in which different juries were to decide the individual causation and damages for each class member, the class was decertified in Engle III "because individualized issues such as legal causation, comparative fault, and damages predominate[d]." The Florida Supreme Court held that individual class members could initiate individual actions against the *Engle* defendants "within one year of the issuance of [Engle III] with *res judicata* effect given to certain Phase I findings," including: smoking cigarettes causes certain enumerated diseases, including lung cancer; nicotine is addictive; the *Engle* "defendants placed cigarettes on the market that were defective and unreasonably dangerous" and "concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both"; and all of the *Engle* defendants were negligent. The state high court, however, disapproved the use of the Phase I findings relating to intentional infliction of emotional distress, fraud and misrepresentation, and civil conspiracy based on misrepresentation because the nonspecific findings were "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause." Further, the

Florida Supreme Court clarified in [Philip Morris USA, Inc. v. Douglas](#), 110 So. 3d 419 (Fla. 2013), that the "res judicata" effect in *Engle* III was claim preclusion, not issue preclusion.

Current case. The representative for the estate of the smoker in the current case filed an action as an *Engle* progeny plaintiff against Reynolds, an *Engle* defendant, asserting that the smoker's addiction to Reynolds' cigarettes caused his death by lung cancer. Several claims based on the *Engle* Phase I findings were asserted, including strict liability, negligence, concealment, and conspiracy. The jury found Reynolds liable on the strict liability claim, but not on the negligence, concealment, or conspiracy claims. The jury assigned 58 percent of the fault to Reynolds and 42 percent to the smoker, and awarded total compensatory damages of \$6 million (reduced to \$3.48 million to reflect comparative fault findings). Reynolds appealed the final judgment, and the representative cross-appealed the trial court's decision to preclude the jury from considering punitive damages on the product liability claim.

The Florida District Court of Appeal affirmed the trial court's ruling, and specifically rejected the tobacco company's argument that "because Congress has expressly sanctioned the sale of cigarettes, and because the practical effect of the *Engle* progeny litigation is to establish that all cigarettes are inherently dangerous and defective, strict liability and negligence claims are implicitly preempted by federal law allowing the sale of cigarettes" [see *Products Liability Law Daily's* January 7, 2016 [analysis](#)]. The district court concluded that only state law claims related to the advertisement and promotion of cigarettes are preempted, but strict liability and negligence claims are not. However, the district court noted that the U.S. Court of Appeals for the Eleventh Circuit reached the opposite conclusion in *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261 (11th Cir. 2015), reh'g en banc granted, opinion vacated, 811 F.3d 434 (11th Cir. 2016), which held that *Engle* progeny product liability claims are implicitly preempted by federal law.

The Florida District Court of Appeal underlying the current case disagreed with the Eleventh Circuit's reasoning that *Engle* imposed a common law duty on cigarette makers, and that duty operated as a ban on cigarettes, thereby conflicting with Congress's purpose and objective of regulating, not banning, cigarettes. It held that because *Engle* progeny cases did not support a conclusion that strict product liability claims amounted to a ban on the sale of cigarettes, and because federal tobacco laws expressly preserved a state's ability to regulate tobacco in ways other than manufacturing and labeling, it found no conflict between the applicable state and federal laws. Thus, the district court ruled that the trial court did not err in rejecting Reynolds' argument that negligence and strict liability claims were preempted by federal law.

Certified question. Nonetheless, in acknowledgment of the *Graham* holding, the district court certified the following question to the Florida Supreme Court: "Whether federal law implicitly preempts state law tort claims of strict liability and negligence by *Engle* progeny plaintiffs based on the sale of cigarettes." Because it concluded that *Engle* did not impose liability based solely on the sale of cigarettes, the Florida high court rephrased the certified question as: "Whether federal law implicitly preempts state law tort claims of strict liability and negligence by *Engle* progeny plaintiffs."

Florida high court ruling. In answering the certified question, the court considered (1) whether and to what extent federal law preempts state law tort claims against tobacco companies; and (2) whether *Engle* Phase I findings are based on the inherent characteristics of cigarettes such that these findings amount to a functional ban. As to the first, the court examined Congress's objectives in regulating tobacco products, and whether those objectives were impeded by the imposition of tort liability for injury caused by cigarettes. The court found that overall, the history of federal tobacco legislation showed that Congress sought to create a balanced regulatory scheme. The court held that permitting *Engle* progeny plaintiffs to bring state law strict liability and negligence claims against *Engle* defendants did not conflict with Congress's objectives. While Congress did expressly preempt state and local regulations pertaining to the labeling and advertising of cigarettes, there was no indication that Congress had a "clear and manifest purpose" to insulate the tobacco industry from state tort liability, according to the state high court. Thus, strict liability and negligence claims, as brought by the estate representative in the current case, did not interfere with the regulation of advertising and promotion of cigarettes and, therefore, did not clearly conflict with congressional objectives. The court said this was consistent with

congressional intent as evidenced by Congress's explicitly stated purpose of the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA) (to establish uniform labeling and advertising requirements by preventing states from imposing their own requirements), and also with the inclusion of "savings clauses" in the legislation that preserved product liability actions under state law. The court concluded that the inclusion of the savings clauses was indicative of Congress's general intent to preserve state law tort remedies against cigarette manufacturers.

As to the basis of the Engle Phase I findings, the Florida high court found that even if Congress intended to prevent the states from banning cigarettes, it was clear that tort liability such as that in *Engle* did not amount to a ban. Reynolds' argument was based on its assertion that *Engle* imposed liability for the sale of "ordinary" cigarettes containing nicotine. However, the court observed that Reynolds conceded that federal law does not preempt all product liability claims against cigarette manufacturers (such as those based on a theory of defect narrower than the inherent dangerousness of all cigarettes). As such, on the critical question of whether *Engle* defendants' liability was based solely on the inherent dangers of cigarettes, the Florida Supreme Court held that it was not. According to the court, several aspects of *Engle*—including the class complaint, the verdict form instructions, and the Phase I jury findings—indicated that the inherent characteristics of all cigarettes did not form the sole basis for liability. Rather, the case was premised on the allegation that the *Engle* defendants intentionally increased the amount of nicotine in their products to ensure that consumers became addicted.

The case is No. [SC16-218](#).

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Companies: R.J. Reynolds Tobacco Co.

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