

[Products Liability Law Daily Wrap Up, TOP STORY—TOBACCO PRODUCTS—11th Cir.: Verdict against Big Tobacco in Engle progeny case withstands constitutional challenge, \(Sept. 7, 2018\)](#)

Products Liability Law Daily Wrap Up

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By Georgia D. Koutouzos, J.D.

The use of the jury's findings in *Engle v. Liggett Group, Inc.* to establish the conduct elements of the tort claims in an *Engle* progeny case against two tobacco manufacturers by a deceased cigarette smoker's daughter was a constitutionally permissible application of *res judicata*, a panel of the U.S. Court of Appeals for the Eleventh Circuit advised, rejecting the tobacco companies' argument that their due process and Seventh Amendment rights had been violated by a Florida federal trial court's order reflecting a jury's multi-million-dollar award to the smoker's daughter. The jury had not been asked or required to reexamine the findings in *Engle*, the panel found, also rejecting the manufacturers' assertion that the damages award should have been apportioned based on the decedent's comparative fault ([*Searcy v. R.J. Reynolds Tobacco Co.*](#), September 5, 2018, Carnes, J.).

A woman who had been a cigarette smoker since age 15 died of lung cancer and chronic obstructive pulmonary disease, after which her daughter sued R.J. Reynolds Tobacco Co. and Phillip Morris, the manufacturers of the cigarettes alleged to have caused her mother's death. Proceeding as a class member under [*Engle v. Liggett Group, Inc.*](#), 945 So. 2d 1246 (Fla. 2006), the decedent's representative asserted both non-intentional tort claims and intentional tort claims against the tobacco companies.

Following a trial, the jury returned a verdict finding for the deceased smoker's estate on all tort claims—negligence, strict liability, fraudulent concealment, and conspiracy to fraudulently conceal. The jury awarded the estate \$6 million in compensatory damages, apportioning 40 percent of fault to the decedent, 30 percent to R.J. Reynolds, and 30 percent to Philip Morris USA.

Phase II of the trial resulted in a jury verdict assessing \$10 million in punitive damages against each tobacco company. The court subsequently ordered that the two manufacturers were jointly and severally liable for the total amount of compensatory damages found by the jury, and that each was liable for the amount of punitive damages assessed against them [see *Products Liability Daily's* September 16, 2013 [analysis](#)]. Ultimately, the trial court reduced the award to \$1 million in compensatory damages owed jointly and severally by the two tobacco companies, and \$1.67 million in punitive damages, owed independently by each manufacturer.

Arguments on appeal. The tobacco companies appealed the trial court's decision, arguing that the lower court violated their due process and Seventh Amendment rights under the U.S. Constitution when it directed the jury to deem the companies' alleged tortious conduct in the present case to have been proven based on the findings of the jury in the *Engle* case. Specifically, the manufacturers contended that the trial court erroneously permitted the decedent's daughter to rely on the *Engle* jury's findings to establish the conduct elements of her intentional tort claims for concealment and conspiracy to conceal. According to the manufacturers, the trial court violated their federal due process rights by allowing the jury to rely on those findings.

In addition, the companies argued that in order to determine whether punitive damages were warranted, the trial court had required the jury to speculate as to the basis for the *Engle* findings; an action that violated the Seventh Amendment's Reexamination Clause. Finally, the manufacturers maintained that the trial court should have applied Florida's comparative fault statute to reduce the damages award based on the percentage of culpability the jury had attributed to the decedent. Alternatively, they argued that the decedent's representative waived her right to contest a reduction in the award.

Due process challenge. Although the tobacco companies maintained that their due process rights were violated by the trial court's instruction giving preclusive effect to the *Engle* jury's findings relating to the negligence, strict liability, and concealment claims in the case at bar, the companies acknowledged that relevant case precedent forecloses a due process challenge to the application of *Engle* findings on negligence and strict liability claims. Specifically, *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) holds that treating the *Engle* jury's findings on negligence and strict liability as res judicata does not violate due process [see *Products Liability Law Daily's* May 25, 2017 [analysis](#).] Based on that precedent, the appellate panel found that the trial court's instruction that the jury had to apply the *Engle* findings in deciding the negligence and strict liability claims did not violate the tobacco companies' due process rights.

As for the issue of whether the use of the *Engle* jury's findings on intentional concealment claims could survive a due process challenge, the panel noted that although the question had been as-yet unanswered during the briefing stage of the instant appeal, a subsequent decision by a sister panel of the Eleventh Circuit in *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018) determined that due process is not violated by applying preclusive effect to the *Engle* jury's concealment findings in a subsequent trial [see *Products Liability Daily's* March 8, 2018 [analysis](#)]. In short, *Burkhart* held that the rationale in *Graham* makes clear that treating as preclusive the *Engle* jury's findings as to the conduct elements of *Engle* progeny plaintiffs' fraudulent concealment and conspiracy claims does not violate due process, the panel explained.

Seventh Amendment challenge. The Reexamination Clause states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Applying that framework to the facts at hand, the appellate panel assumed that the Seventh Amendment applies to a jury's determination to award punitive damages and that depending on the circumstances, the Seventh Amendment could be violated when a second jury is called on to decide punitive damages arising out of a verdict of liability rendered by a previous jury. Nevertheless, the panel found that there was no violation of the Seventh Amendment in the case at bar because the jury neither had been asked nor required to speculate about the *Engle* jury's findings in reaching its decision on punitive damages.

Comparative fault. Florida's comparative fault statute specifically states that "[i]n a negligence action, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault." However, the statute "does not apply ... to any action based upon an intentional tort."

When they filed their appeal, the tobacco companies might have had a colorable argument that the statute required apportionment in cases like this where a jury awards a single amount of damages based on both negligence claims and intentional torts, the panel remarked, noting that the Florida Supreme Court has since held otherwise. Under recent state high court precedent, when an *Engle* progeny case contains both negligence and intentional tort claims, and when the jury has found for the plaintiff on an intentional tort claim, then the compensatory damages award cannot be reduced based on the plaintiff's percentage of fault. Therefore, taken by itself, the statute does not permit apportionment in the instant case, the panel held.

Finally, as to the tobacco companies' argument that the decedent's representative waived any right to unapportioned damages she might have under the statute, the panel found that the decedent's daughter did not waive her statutory right to unapportioned damages and that she was entitled to the full compensatory damages (i.e., post-remittitur) awarded by the trial court. Accordingly, the trial court's decision was affirmed.

The case is No. [13-15258](#).

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

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