No. __-___

IN THE

Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

MATHILDE MARTIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENNY RAY MARTIN,
Respondent.

On Petition For Writ Of Certiorari To The Florida First District Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

Paul D. Clement
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036

Gregory G. Katsas
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

Eric E. Murphy
JONES DAY
325 John H. McConnell Blvd., Ste. 600
P.O. Box 165017
Columbus, OH 43216

DECEMBER 16, 2011

Counsel for Petitioner

QUESTION PRESENTED

In its traditional formulation, the doctrine of issue preclusion prohibits a party from litigating an issue that was actually decided against it in prior litigation. In this case, the court below precluded litigation of issues that were not necessarily decided in prior litigation, based on its conclusion that a prior jury reasonably could have decided the issues. As a result, respondent obtained a $28.3-million judgment without either proving essential elements of her claims or demonstrating that a prior jury had actually decided those elements in her favor.

The question presented is whether this dramatic and unprecedented departure from traditional preclusion law—to impose liability based on earlier litigation without any assurance that the earlier litigation actually decided the precluded issue—violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The sole plaintiff below was Respondent Mathilde Martin, as personal representative of the estate of Benny Ray Martin.

The original defendants below were Petitioner R. J. Reynolds Tobacco Company, Philip Morris USA, Inc., Lorillard Tobacco Company, Lorillard, Inc., Liggett Group, LLC, and Vector Group Ltd., Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner R. J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which in turn is a wholly owned subsidiary of Reynolds American Inc. ("RAI"), a publicly traded corporation.

Brown & Williamson Holdings, Inc., and Invesco Ltd. hold more than 10% of the stock of RAI. British American Tobacco p.l.c. indirectly holds more than 10% of the stock of RAI through Brown & Williamson Holdings, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINIONS BELOW

The opinion of the Florida First District Court of Appeal (Pet. App. 1a-24a) is reported at 53 So. 3d 1060. The First District's order denying certification and rehearing en banc (Pet. App. 31a) is unreported. The Florida Supreme Court's order denying review (Pet. App. 32a) is reported at 67 So. 3d 1050.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The First District entered a final judgment on December 14, 2010. Pet. App. 1a. It then denied rehearing and refused to certify the case to the Florida Supreme Court. Pet. App. 31a. On July 19, 2011, the Florida Supreme Court declined jurisdiction. Pet. App. 32a. On October 7, 2011, Justice Thomas granted an extension of time to file a petition for certiorari until December 16, 2011. This Court has jurisdiction over the First District's judgment. See, e.g., KPMG LLP v. Cocchi, No. 10-1521, slip op. at 1 (U.S. Nov. 7, 2011); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2852-53 (2011); Clark v. Arizona, 548 U.S. 735, 746-47 (2006).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1, cl. 2.

INTRODUCTION

Throughout Anglo-American legal history, the doctrine of issue preclusion has been limited to issues "'actually litigated and resolved in a valid court determination essential to the prior judgment.'" Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (emphasis added and citation omitted). That rule is uniformly reflected in "all the well considered authorities, ancient and modern," to have considered the question, Burlen v. Shannon, 99 Mass. 200, 203 (1868), and this Court has held that it is constitutionally compelled, Fayerweather v. Ritch, 195 U.S. 276, 299, 307 (1904). The rule could hardly be otherwise: judgments must be entered on actual findings by a jury, not based on speculation about what a jury might or could have found. Absent a determination that the prior litigation actually decided an issue, preclusion law would become a vehicle for depriving a litigant of property without ever having an issue decided against it. The requirement that the prior litigation actually decide the issue is as fundamental as the difference between litigation and relitigation. Thus, absent a showing that some prior jury actually resolved a disputed issue against the defendant, the plaintiff must prove that issue (if it is an element of the claim), and the defendant cannot be barred from contesting it. These fundamental principles have been universally followed for centuries, in state and federal courts throughout the Nation, until now.

This case, like thousands of others pending in the Florida courts, arises from the unprecedented statewide smoker class action in Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006). In Engle, the puta-

tive class raised various tort claims against major cigarette manufacturers, including Petitioner R. J. Reynolds Tobacco Company. During a sprawling, year-long trial of assertedly common issues, the class presented dozens of alternative allegations of defect, negligence, and concealment, many of which applied only to certain cigarette types or time periods. The Engle jury found that each defendant had sold defective cigarettes, committed negligence, and concealed information individually and through a conspiracy. But the jury did not specify, and over the defendants' objection was not asked to specify, which of the alternative theories of defect, negligence, and concealment it had adopted, which it had rejected, and which it had simply not addressed.

On appeal, the Florida Supreme Court decertified the Engle class based on its recognition that common issues did not predominate, and it vacated a class-wide, punitive-damages award as the product of an unlawful trial plan. At the same time, as part of what it deemed a "pragmatic solution" to preserve as much of Engle as possible, the Florida Supreme Court authorized individual actions in which the defect, negligence, concealment, and conspiracy findings would have unspecified "res judicata effect." 945 So. 2d at 1269.

This case is one of the subsequent individual actions envisioned by the Engle court. Respondent Mathilde Martin obtained a $28.3-million judgment against Reynolds for the death of her husband from smoking. Ms. Martin did not attempt to prove the tortious-conduct elements of her claims—for example, that the unfiltered Lucky Strike cigarettes smoked by her husband were defectively or negligently designed

or marketed, or that any statements on which he may have relied were misleading as a result of fraudulent omissions. Nor did Ms. Martin attempt to show that the Engle jury had actually decided those issues in her favor. Nonetheless, based on what it held to be the preclusive effect of the Engle findings, the trial court permitted Ms. Martin to establish liability merely by showing that her husband died from an addiction to smoking. In so doing, the court prevented Reynolds from even contesting any of the tortious-conduct elements of Ms. Martin's claims.

On appeal, the First District found no due-process violation in precluding litigation of critical factual questions that the Engle jury may or may not have resolved. The court held that, for preclusion purposes, it was enough that the Engle jury reasonably could have found that all cigarettes were defectively or negligently designed or marketed, and were the subject of statements that fraudulently omitted material information. But the Engle verdict form contains no such finding, and the First District did not, and could not, dispute that the verdict may have rested on narrower theories that would not encompass the cigarettes smoked by Mr. Martin. The First District made no attempt to reconcile its holding with traditional preclusion or due-process standards. Instead, it entirely ignored Reynolds's due-process argument, and reasoned only that its unprecedented application of issue preclusion was compelled by the "pragmatic solution" of Engle itself. See Pet. App. 11a. The Florida Supreme Court, having authored Engle and suggested the "pragmatic solution," left this decision (and others like it) entirely undisturbed.

For several reasons, this Court should grant certiorari. First, the decision below squarely conflicts with this Court's decision in Fayerweather, and the bedrock due-process principle that it reflects. Fayerweather held, as a matter of due process, that if "testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of res judicata must fail." 195 U.S. at 307. Fayerweather states a due-process rule of the most basic kind, for without it, a defendant could be stripped of its right to put on a defense—and ultimately its property—absent any resolution of disputed issues by any fact-finder.

Second, the decision below abrogates a centuries-old limitation of issue preclusion to questions actually decided by a prior fact-finder. When the Fourteenth Amendment was adopted, "all the well considered authorities, ancient and modern," agreed that a court could not preclude litigation of an issue absent an "inevitable" inference that the issue had been previously decided. Burlen, 99 Mass. at 203. That common-law rule persists to this day. See, e.g., Taylor, 553 U.S. at 892. The First District's extreme and unprecedented departure from it warrants review and "raises a presumption" of a due-process violation. Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994); see Richards v. Jefferson Cnty., 517 U.S. 793, 797 (1996).

Third, the holding below is not some isolated departure from traditional principles, but will infect thousands of cases with constitutional error. The

holding—that Engle automatically establishes the defect, negligence, and concealment elements of all claims by former class members—governs thousands of pending "Engle progeny" cases, which were filed precisely to establish liability without either proving the substantive elements of tort liability or satisfying the traditional standards for issue preclusion. Under the unprecedented preclusion standard adopted below, the Engle defendants already have been subjected to over $375 million in adverse judgments in less than 60 of the thousands of pending cases. Moreover, trial dates are set for nearly 75 more suits for the next year alone. Absent prompt review by this Court, the blatant due-process violation in this case will replicate itself indefinitely.

STATEMENT OF THE CASE

This case arises out of the unprecedented statewide smoker class action in Engle. Despite decertifying that class and conceding that numerous errors occurred in the class-action proceedings, the Florida Supreme Court nonetheless decreed that certain verdict-form findings, made by the Engle jury prior to decertification, would have unspecified "res judicata effect" in individual actions brought by former class members. 945 So. 2d at 1269. Thousands of these individual actions, commonly called "Engle progeny" cases, are now pending in Florida.

The question presented arises in each of these cases. It is whether the Due Process Clause permits giving preclusive effect only to issues that the Engle jury actually decided, as Reynolds contends, or whether it also permits giving preclusive effect to all issues that the Engle jury reasonably could have decided, as the First District held. Reynolds's position is supported

by this Court's decision in Fayerweather, by centuries of common-law precedent, and by elemental notions of fairness. In contrast, the First District's position is supported, if at all, by nothing more than its understanding of the "pragmatic solution" decreed by the Florida Supreme Court in Engle.

A. The *Engle* Class Action

1. In 1994, the Engle class action was filed against major cigarette manufacturers. The putative class included individuals harmed by their smoking addiction. Defendants challenged class treatment on the ground that common questions did not predominate over individual ones. The trial court certified a nationwide class. On interlocutory appeal, the Third District Court of Appeal upheld the certification, but limited the class to Florida smokers. R. J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996). The Florida Supreme Court denied review. R. J. Reynolds Tobacco Co. v. Engle, 682 So. 2d 1100 (Fla. 1996). As modified, the class consisted of "'all [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.'" Engle, 945 So. 2d at 1256.[1]

The Engle class alleged various tort claims, including strict liability, negligence, fraudulent conceal-

---

[1] Engle thus became the only case to proceed as a class action for claims of personal injuries allegedly caused by smoking. Other state and federal appellate courts have uniformly held that such claims are far too individualized to proceed on a class basis. See, e.g., Philip Morris Inc. v. Angeletti, 752 A.2d 200, 222-23 (Md. 2000) (collecting cases).

ment, and conspiracy to fraudulently conceal. 945 So. 2d at 1256-57 & n.4. The court divided the trial into three phases. During Phase I, the jury would consider supposedly "common issues relating exclusively to the defendants' conduct and the general health effects of smoking." Id. at 1256. During Phase II, the same jury would determine the defendants' liability to three individual class members, award appropriate compensatory damages to those individuals, and calculate the amount of class-wide punitive damages. Id. at 1257. During Phase III, new juries would decide the claims of the remaining hundreds of thousands of class members. Id. at 1258.

2. Phase I was a sprawling, year-long trial addressing whether cigarettes cause certain diseases and are addictive, and the defendants' conduct over more than four decades. For each claim, the class asserted many alternative allegations of wrongdoing. Most of those allegations concerned only particular types of cigarettes or time periods. Thus, although the class at times argued that all cigarettes are defective because of their inherent health and addiction risks, it also disavowed that theory to avoid a preemption objection under FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). See, e.g., Pet. App. 209a ("A major fiction of Defendants' argument is that the Class predicated any claim on the Defendants' sale of cigarettes – a legal product."). And although the class at times argued that the defendants should have disclosed the inherent health and addiction risks of all cigarettes, it also presented narrower concealment theories that applied only to some cigarettes, to avoid the defense (see Pet. App. 401a-03a) that those generic risks were widely known (Pet. App. 224a, 254a-55a, 315a-17a, 393a-95a).

Several narrower allegations of misconduct were asserted for each claim:

Strict Liability. According to the class itself, there were "several alternative" defect allegations. Pet. App. 211a. Many applied only to certain types of cigarettes. For example, the class presented evidence and argument that:

- filtered cigarettes are defective because of misplaced ventilation holes in some brands, loose filter fibers in others, or glass filter fibers in still others (Pet. App. 124a, 218a, 300a-03a, 339a-49a, 363a-64a);
- light or low-tar cigarettes are defective because they cause smokers to increase smoking to "compensate" for the decreased nicotine yield (Pet. App. 246a, 305a-08a, 316a-26a, 331a-33a);
- cigarettes with specific ingredients—such as Y-1 tobacco—are defective (Pet. App. 124a, 218a, 394a-96a); or
- cigarettes made with artificially manipulated levels of nicotine are defective (Pet. App. 124a, 211a, 219a, 303a-04a, 315a-16a, 327a-30a, 337a-39a, 349a, 393a-95a).

Many of the defect allegations, moreover, applied differently over time. For example, the evidence showed that technological innovations significantly lowered cigarette tar yields over the 40-year class period. Pet. App. 333a-36a, 350a-54a, 368a-73a, 396a-400a. Thus, the jury could have thought that certain brands were defective earlier (when they contained higher tar yields) but not later. Or, it could have thought that some brands were defective later (for

failure to incorporate technological improvements) but not earlier.

Negligence. The jury instructions permitted a finding of negligence if a defendant failed to use reasonable care in the "designing, manufacturing, testing, or marketing" of cigarettes. Pet. App. 409a. Thus, any of the design-defect theories mentioned above could have supported a negligent-design theory, and any of the concealment theories mentioned below could have supported a negligent-marketing theory. The class further alleged that the defendants had negligently marketed certain brands of cigarettes to minors, at various times between the 1950s and the 1990s. Pet. App. 155a-56a, 296a-98a, 310a-14a, 382a-84a, 388a-91a, 393a. And the class alleged that the defendants had negligently measured the tar and nicotine levels for "low-tar" (light) cigarettes. Pet. App. 406a-07a.

Concealment. The jury was instructed that fraudulent concealment requires intentional concealment of facts "necessary to make statements by [the] defendants not misleading." Pet. App. 408a. The class asserted that its concealment and conspiracy claims were based on "thousands upon thousands of statements about [cigarettes], the relationship of smoking to disease over periods of years." Pet. App. 380a. Many of those statements involved only certain cigarette types or time periods. For example, the class presented evidence that the defendants concealed that light cigarettes may not be safer than regular cigarettes, because smokers compensate for reduced nicotine by smoking more. Pet. App. 224a, 229a-31a, 246a-47a, 254a-55a, 298a-300a, 305a-08a, 316a-17a, 362a, 386a. Likewise, the class presented evidence that the defendants concealed facts about specific in-

gredients. For example, the class alleged that the defendants failed to disclose their supposed use of ammonia to increase nicotine's addictive effect, but that claim applied to only certain brands of cigarettes at only certain times. Pet. App. 153a-54a, 238a, 316a, 355a-61a, 364a-67a, 386a, 388a, 393a-95a, 403a.

At the end of Phase I, the class persuaded the trial court to adopt a verdict form that did not require the jury to specify which of the many alternative allegations it had accepted or rejected. Pet. App. 191a-207a. Class counsel conceded that there were "many hundreds and hundreds of things" at issue for each claim (Pet. App. 378a), but argued that, "[i]f we're going to start breaking down each of the counts, we're going to have a very, very lengthy verdict form" (Pet. App. 375a). The trial court thus rejected the defendants' repeated objections that the verdict form did not adequately identify what the jury actually decided. Pet. App. 376a-79a.

Accordingly, the Engle jury made only very general findings. For each defendant, it affirmatively answered the following questions:

> Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous?
>
> Did one or more of the Defendants conceal or omit material information, not otherwise known or available, knowing the material was false and misleading [sic], or failed [sic] to disclose a material fact concerning or prov-

> ing the health effects and/or addictive nature of smoking cigarettes? [2]
>
> Did two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment?
>
> Have Plaintiffs proven that one or more of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Pet. App. 193a-94a, 197a-99a, 200a, 204a-05a. The jury findings thus did not determine that all of Reynolds's cigarettes were defective, negligently designed or marketed, or fraudulently sold. Nor did the jury specify which types or brands of cigarettes it thought were defective, much less the specific defect; nor did it identify the specific conduct that it thought was negligent, or the specific statements or kind of statements that it thought contained fraudulent omissions.

The jury further found that smoking can cause some 19 different diseases, and that nicotine is addictive. Pet. App. 191a-92a. It also found that the class was entitled to punitive damages. Pet. App. 206-07a.

---

[2] The concealment interrogatory incoherently asked whether the defendants improperly "conceal[ed]" information they knew was "false and misleading." The defendants unsuccessfully objected to that bewildering question. Pet. App. 272a.

3. The same jury decided Phase II. In Phase II-A, it found that the defendants were liable to three class representatives, and it awarded some $12.7 million in compensatory damages. Engle, 945 So. 2d at 1257. In Phase II-B, the jury awarded $145 billion in punitive damages to the class. Id.

At the end of Phase II, the defendants reasserted directed-verdict motions contending that there was legally insufficient evidence to support the Phase I findings. The trial court rejected that argument in a final Omnibus Order. That order itself stressed the multiplicity and specificity of the class's various defect allegations. Thus, the court found "sufficient evidence" that cigarettes were defective in "many" different ways. Pet. App. 124a. As examples, it cited evidence that "some cigarettes" had filters with ventilation holes in the wrong place, that "some filters" contained glass fibers, and that nicotine levels were manipulated "sometime" through ammonia and "sometime" through high-nicotine tobacco. Id. However, the court did not attempt to identify the actual basis for any of the findings.

4. The defendants appealed before Phase III, and the Third District reversed. Liggett Grp. Inc. v. Engle, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003). It held that the class should never have been certified (id. at 442-50); that the punitive-damages award was premature and excessive (id. at 450-58); and that repeated incendiary statements by class counsel—such as gratuitous comparisons of defendants' conduct to slavery, genocide, and the Holocaust—mandated reversal (id. at 458-66).

5. The Florida Supreme Court affirmed in part and reversed in part. It recognized various funda-

mental problems with the Engle trial: first, the trial plan had required an unlawfully premature adjudication of punitive damages (945 So. 2d at 1262-63); second, the $145-billion punitive-damages award—the largest punitive award that any jury has ever rendered—was clearly excessive (id. at 1263-65 & n.8); third, class counsel had made "a series of improper remarks" designed to "incite racial passions" of the jury (id. at 1271-74); and fourth, "problems with the three-phase trial plan negate[d] the continued viability of this class action" (id. at 1267-68).[3]

Despite these numerous problems, the Florida Supreme Court sua sponte adopted what it characterized as a "pragmatic solution" designed to preserve as much of Engle as possible. Id. at 1269. That "pragmatic solution" was to "decertify the class," but nonetheless "retain[] [some of the] Phase I findings," including the defect, negligence, concealment, and conspiracy-to-conceal findings, for use in future litigation. Id. The court thus permitted former class members to file their own "individual damages actions" within a year, and it decreed that the retained findings "will have res judicata effect" in those actions. Id.

The defendants filed a petition for certiorari, which argued that use of the Engle findings in future litigation would violate due process. The class successfully opposed certiorari on the ground that, until the findings were applied in individual cases, the due-process issue was "premature and not ripe for review." Br. in

---

[3] Although this petition raises only a due-process challenge to misuse of the Engle findings, Reynolds reserves its right to challenge other aspects of Engle in other progeny cases.

Opp'n at 1, R. J. Reynolds Tobacco Co. v. Engle, No. 06-1545 (U.S. Aug. 15, 2007).

B. *Engle* Progeny Litigation

In the wake of the Florida Supreme Court's decision, thousands of individual Engle progeny cases were filed. At present, about 8000 plaintiffs have cases pending in the Florida state or federal courts. A dedicated website tracks their progress. See http://info.courtroomview.com/engle-verdict-tracker (last visited Dec. 14, 2011).

In state court, over 50 cases have been tried to verdict. In each case, plaintiffs successfully argued that the Phase I findings establish the tortious-conduct elements of their individual claims. Plaintiffs have prevailed in 36 cases, and have obtained jury verdicts totaling $495 million. See id. After apportionment for the plaintiffs' comparative fault, these verdicts have resulted in pending final judgments against the Engle defendants exceeding $375 million. At present, the state courts try at least two cases per month. Id.

In federal court, trials initially were stayed pending appeals on the permissible use of the Engle findings. Following decisions on that question by the First District here, and by the Eleventh Circuit in Brown v. R. J. Reynolds Tobacco Co., 611 F.3d 1324 (11th Cir. 2010) ("Bernice Brown"), federal trials are scheduled to begin in February 2012.

C. *Martin* and Related Cases

In this Engle progeny case, Mathilde Martin sued Reynolds for the death of her husband from smoking. She asserted strict-liability, negligence, concealment, and conspiracy claims. Mr. Martin, who was born in 1929, regularly smoked only unfiltered Lucky Strike

cigarettes. Pet. App. 279a-86a. Throughout the case, a critical issue was the permissible use of the Engle findings.

1. The trial court ruled that the Phase I findings conclusively established the tortious-conduct elements of Ms. Martin's claims (Pet. App. 25a-27a), despite Reynolds's contention that such use of the findings would violate due process (Pet. App. 70a-74a). The court thus instructed the jury that Reynolds "placed cigarettes on the market that were defective and unreasonably dangerous"; that it "was negligent"; that it "concealed or omitted material information, not otherwise known or available, knowing that material was false or misleading [sic], or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both"; and that it "conspired with other companies to conceal or omit information regarding the health effect[s] of cigarettes or their addictive nature or both." Pet. App. 289a.

On the strict-liability and negligence claims, the court refused to ask the jury whether the cigarettes that Mr. Martin smoked were defectively or negligently designed or marketed, or whether any such defect or negligence caused Mr. Martin's injury. Instead, the jury was asked to determine only whether Mr. Martin was an Engle class member—i.e., whether a cigarette addiction caused his death. Pet. App. 290a-91a. If so, the jury was required to return a plaintiff's verdict, and the only further questions were comparative fault and damages. Pet. App. 291a-92a.

On the concealment and conspiracy claims, the court refused to ask the jury whether any statements

about cigarettes smoked by Mr. Martin fraudulently omitted information. Instead, the jury was asked to determine only whether his death was caused by "the conspiracy" or by "acts proven in furtherance of that conspiracy." Pet. App. 293a. To find such causation, the jury was required to conclude that Mr. Martin had "relied on statements" by the Engle defendants "that omitted material information concerning the health effect[s] of cigarettes or their addictive nature or both." Pet. App. 294a. But the jury was not asked to determine which statements had omitted such information, or whether any such omissions had been done knowingly and with an intent to induce reliance.

The jury returned a plaintiff's verdict. It found that Mr. Martin was a class member, allocated 66% of fault to Reynolds and 34% of fault to Mr. Martin, and awarded Ms. Martin $5 million in compensatory damages. Pet. App. 36a-37a. It also found that the "conspiracy to conceal information" and "actual concealment of information" caused Mr. Martin's death and that punitive damages were warranted. Pet. App. 37a. In a second phase, the jury awarded $25 million in punitive damages. Pet. App. 39a. The trial court again rejected Reynolds's constitutional objection to the misuse of the Engle findings (see Pet. App. 87a-89a), reduced the compensatory award to reflect the comparative-fault finding, and entered judgment for $28.3 million. Pet. App. 29a-30a, 34a-35a.

2. On appeal, Reynolds renewed its argument that the Engle findings could not constitutionally be applied to preclude litigation of issues that the Engle jury may not have resolved against it. Pet. App.

101a-05a. Despite that argument, the First District affirmed.

The First District expressly disagreed with the Eleventh Circuit's earlier decision in Bernice Brown, which had determined the preclusive effect of the Engle findings on an interlocutory appeal. The Eleventh Circuit had held that, under Florida law, issue preclusion extends only to issues that were "actually adjudicated in prior litigation." 611 F.3d at 1334-35. The Eleventh Circuit explained that the Engle findings on their face do not establish that all cigarettes (or the specific cigarettes smoked by any progeny plaintiff) were defectively or negligently designed or marketed, or the subject of statements that included fraudulent omissions. Id. at 1335. The court left open the possibility that progeny plaintiffs could show, to a reasonable degree of certainty, that these issues were "actually adjudicated" in Engle, but it expressed considerable doubt that any plaintiff could do so. Id. at 1336 n.11; id. at 1337 n.1 (Anderson, J., concurring).

The First District rejected that reasoning. In particular, it did "not agree" that "every Engle plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings" to his or her case. Pet. App. 12a. Instead, it held that the Engle findings "establish the conduct elements of the asserted claims" in all progeny cases, "and individual Engle plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits." Pet. App. 15a (emphasis added). The First District reasoned that the Omnibus Order in Engle—which held that the class had presented legally sufficient evidence for the Phase I

findings—established the "evidentiary foundation" of those findings for preclusion purposes. Pet. App. 14a.

The First District made no attempt to justify its ruling under normal standards of issue preclusion or due process. Instead, it entirely ignored Reynolds's arguments on both points, and simply asserted that a contrary ruling "would essentially nullify" Engle. Pet. App. 11a.

Given the conflict between the First District and the Eleventh Circuit, and the thousands of affected cases, Reynolds moved the First District to certify its decision for review by the Florida Supreme Court. The First District refused. Pet. App. 31a. Reynolds then sought discretionary review in the Florida Supreme Court, which "decline[d] to accept jurisdiction." Pet. App. 32a.

3. The question presented here also arose in three other appeals decided by the First District. In these cases, the trial courts gave the Engle findings a similarly broad preclusive effect, and Reynolds challenged those decisions on federal due-process grounds. In all three, the First District issued per curiam affirmances citing the decision below and containing no further reasoning. R. J. Reynolds Tobacco Co. v. Gray, 63 So. 3d 902 (Fla. Dist. Ct. App. 2011); R. J. Reynolds Tobacco Co. v. Hall, 70 So. 3d 642 (Fla. Dist. Ct. App. 2011); Liggett Grp., LLC v. Campbell, 60 So. 3d 1078 (Fla. Dist. Ct. App. 2011). In each case, the Florida Supreme Court denied discretionary review. R. J. Reynolds Tobacco Co. v. Gray, 67 So. 3d 1050 (Fla. 2011); R. J. Reynolds Tobacco Co. v. Hall, 67 So. 3d 1050 (Fla. 2011); R. J. Reynolds Tobacco Co. v. Campbell, 67 So. 3d 1050 (Fla. 2011). In each case,

Reynolds is today filing a petition for certiorari presenting the same question as this petition.

4. Since the decision below, the Fourth District Court of Appeal has also addressed the permissible use of the Engle findings in progeny litigation. R. J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011) ("Jimmie Brown"). The Fourth District agreed with the First District that the Engle findings establish all wrongful-conduct elements in all progeny suits. Id. at 715. Like the First District in the decision below, the Fourth District did not dispute that those findings could have rested on allegations that would not apply to the individual progeny plaintiff. Indeed, quoting Richards v. Jefferson County, 517 U.S. 793, 797 (1996), for the proposition that "'extreme applications of the doctrine of res judicata'" may be unconstitutional, the Fourth District said "we are concerned the preclusive effect of the Engle findings violates Tobacco's due process rights." Jimmie Brown, 70 So. 3d at 716; see id. at 720 (May, C.J., concurring) (noting same concern). Yet despite that concern, the Fourth District felt itself "compelled" by Engle to rule for the plaintiffs. 70 So. 3d at 716. Like the First District, the Fourth District also refused to certify its decision for review by the Florida Supreme Court.

REASONS FOR GRANTING THE PETITION

In their conduct of Engle progeny litigation, the Florida state courts are engaged in serial due-process violations that threaten the defendants with literally billions of dollars of liability. In none of these cases has any plaintiff undertaken to prove the tortious-conduct elements of his or her individual claims. Nor has any plaintiff undertaken to show, based on the

Engle findings and trial record, that the Engle jury resolved those specific elements in his or her favor. And no such showing would be possible: given the generality of the Engle findings, and the number of alternative allegations of defect, negligence, and concealment presented during the year-long Phase I trial, it is impossible to determine which allegations the Engle jury accepted, which it rejected, and which it simply did not reach. Neither the First District here, nor the Fourth District in Jimmie Brown, disputed that critical point. Given all of this, it is hardly surprising that every federal judge to have considered the question has held that the Engle findings cannot be used to establish individual elements in progeny cases, either as a matter of Florida law, see Bernice Brown, 611 F.3d at 1333-37; Merlob v. Philip Morris Inc., No. 08-60074-CIV-UNGARO, slip op. at 7-8 (S.D. Fla. Aug. 8, 2008), or as a matter of due process, see Brown v. R. J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328, 1344-46 (M.D. Fla. 2008); Burr v. Philip Morris, USA, No. 8:07-cv-1429-T-23MSS, slip op. at 1 (M.D. Fla. Aug. 28, 2008).

In rejecting this uniform federal precedent, the Florida state courts have made no attempt to justify their rulings under traditional preclusion or due-process standards. Instead, they have asserted only that their rulings are compelled by Engle. Pet. App. 11a; Jimmie Brown, 70 So. 3d at 716. The defendants disagree, and have argued in the state courts that Engle's unelaborated reference to "res judicata" (945 So. 2d at 1269) must be understood as a directive to apply, not depart from, settled preclusion standards. In any event, the more fundamental point is that the decision below, whether understood as a

faithful or unfaithful application of Engle, cannot be reconciled with federal due-process standards.

In its traditional formulation, issue preclusion (also known as direct or collateral estoppel) "'bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.'" Taylor, 553 U.S. at 892 (emphasis added and citation omitted). In this case, by contrast, the First District adopted a dramatically different preclusion standard. Rather than asking whether the Engle findings actually rest on allegations that would apply to Mr. Martin, it asked whether such allegations were supported by sufficient evidence to withstand a directed-verdict motion. Pet. App. 14a-15a ("evidentiary foundation" of findings established by denial of directed verdict). Moreover, it reached that holding despite the presence of alternative theories that would not apply to Mr. Martin and that were themselves supported by sufficient evidence, at least according to the Omnibus Order cited by the First District. Pet. App. 124a. In effect, the First District extended preclusion to any issue that the Engle jury reasonably could have resolved against the defendants. Pet. App. 14a-15a. Such a ruling would be remarkable even in a case where a verdict could have rested on two alternative theories of liability; in a case where the verdict could have rested on dozens if not hundreds of alternative theories, it is nothing short of stunning.

The Court should grant certiorari to consider whether this extreme and unprecedented expansion of issue preclusion comports with due process.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES PLACING DUE-PROCESS LIMITS ON RES JUDICATA

The Court should grant certiorari because the decision below conflicts with its due-process cases.

A. This Court has long held that preclusion law is "subject to due process limitations," Taylor, 553 U.S. at 891, and that "extreme applications" of preclusion law "may be inconsistent with a federal right that is 'fundamental in character,'" Richards, 517 U.S. at 797 (citation omitted).

In Fayerweather, this Court held that the Due Process Clause bars preclusion of issues that may not have been resolved in prior litigation. The plaintiffs sought shares of an estate based on the asserted invalidity of releases that they had signed. 195 U.S. at 297-98. Applying issue preclusion, the federal circuit court dismissed their suit on the ground that a state court had already found the releases valid. Id. at 298-99. This Court's jurisdiction turned on whether the circuit court's decision "involve[d] the application of the Constitution." Id. at 297. The Court held that the decision involved application of the Due Process Clause, which it said prohibits a court from treating a prior judgment as a "conclusive determination" of a fact if it was "made without any finding of the fundamental fact." Id. at 299.

Turning to the merits of the due-process question, the Court held that "where the evidence is that testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of

res judicata must fail." Id. at 307. Applying that standard, the Court concluded that preclusion was appropriate in the case, but only because "[n]othing [could] be clearer from this record than that the question of the validity of the releases was not only before the state courts, but was considered and determined by them." Id. at 308 (emphasis added).

B. Modern standards reinforce this traditional rule. The Court has identified three factors to gauge whether state procedure comports with the "fundamental fairness" required by due process: (1) "the private interest that will be affected"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

These factors confirm that courts cannot preclude litigation of issues that a prior jury may not have decided. First, the private interest is a defendant's property. See Philip Morris USA v. Williams, 549 U.S. 346, 349, 353 (2007) (an award of punitive damages not supported by proper liability findings "would amount to a 'taking' of property without due process," including the opportunity "'to present every available defense'" (citation omitted)). Second, the risk of erroneous deprivation is substantial: preclusion in these circumstances "might well prevent a hearing or a determination on the merits even though there had not been a hearing or determination in the first case." Happy Elevator No. 2 v. Osage Constr. Co., 209 F.2d

459, 461 (10th Cir. 1954). Finally, any countervailing interests would be minimal, for where a "general verdict is opaque, there should be no reliance or sense of repose growing out of the disposition of individual issues." 18 Charles A. Wright, et al., Federal Practice & Procedure § 4420, at 536 (2d ed. 2002).

C. The preclusion rule adopted in this case sharply conflicts with this Court's decisions. Under Fayerweather, if a prior verdict could have rested on "distinct issues," the verdict cannot preclude litigation of any one of those issues. 195 U.S. at 307. But under the decision below, preclusion would apply so long as sufficient evidence existed to support the allegations at issue, no matter how many "distinct" alternatives are present, and no matter which of them the jury actually rested on. Pet. App. 14a-15a. The preclusion rule adopted below thus imposes liability merely because the plaintiff has adduced sufficient evidence to get to a jury. But liability determinations have always rested on actual jury findings, not on what a reasonable jury could or could not have found. In holding to the contrary, the decision below violates both the traditional due-process rule of Fayerweather and the modern due-process standards of Mathews.

Moreover, the result in this case cannot possibly be sustained under the proper constitutional standard. As shown in detail above (see supra at 9-11), for each of the claims at issue, the Engle jury could have rested on one or more of a large number of distinct alternative allegations that simply did not apply to the unfiltered Lucky Strike cigarettes smoked by Mr. Martin. For example, on the strict-liability claim, the defect finding could have rested on allegations that applied only to filtered or light cigarettes. Pet. App.

124a, 218a, 246a, 300a-03a, 305a-08a, 316a-26a, 331a-33a, 339a-49a, 363a-64a. The negligence finding could have rested on similarly narrow allegations, or on evidence of youth-marketing campaigns alleged to have occurred decades after Mr. Martin had become an adult. Pet. App. 155a-56a, 296a-98a, 310a-14a, 382a-84a, 388a-91a, 393a. And the concealment and conspiracy findings could have rested on extended allegations that the defendants concealed that "light" cigarettes were not safer than other cigarettes due to smoker "compensation." Pet. App. 224a, 229a-31a, 246a-47a, 254a-55a, 298a-300a, 305a-08a, 316a-17a, 362a, 386a.

In its reasoning and result, the decision below conflicts with Fayerweather and Mathews by extending issue preclusion to alternative allegations that may or may not underlie a verdict. Review in this Court is therefore warranted.

II. THE DECISION BELOW CONFLICTS WITH A COMMON-LAW RULE UNIVERSALLY FOLLOWED BY STATE AND FEDERAL COURTS

The decision below sharply deviates not only from Fayerweather itself, but also from the background common-law rule that Fayerweather incorporated into the Due Process Clause. Under the common law, the limitation of preclusion to issues actually decided by a prior jury is as solid as bedrock: it has been universally followed for centuries, and, despite exhaustive research on this point, we have found no case in the history of Anglo-American jurisprudence departing from this rule outside the context of Engle progeny litigation. The Florida courts' sharp departure from that rule, justified neither in Engle itself nor in

the progeny decisions that purport to apply Engle, independently warrants this Court's review.

A. "Because the basic procedural protections of the common law have been regarded as so fundamental," the "abrogation of a well-established common-law protection . . . raises a presumption" of a due-process violation. Oberg, 512 U.S. at 430; see, e.g., In re Winship, 397 U.S. 358, 361-62 (1970); Tumey v. Ohio, 273 U.S. 510, 523-24 (1927); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276-77 (1856). Thus, in the "very few" cases "in which a party has complained of [the] denial" of such a common-law protection, the Court has granted certiorari to determine whether the departure comports with minimum due-process standards. Oberg, 512 U.S. at 430; see, e.g., Richards, 517 U.S. at 798; In re Oliver, 333 U.S. 257, 266-73 (1948).

Such departures often do violate due process. In Oberg, for example, this Court held that "Oregon's abrogation of a well-established common-law protection"—judicial review of punitive-damage awards, which was conducted everywhere except in Oregon—violated due process. 512 U.S. at 430. Likewise, in Oliver, the Court held that secret contempt proceedings violate due process, because it could not "find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." 333 U.S. at 266. And in Richards, it held that courts could not constitutionally apply preclusion against non-parties to the prior judgment, based on the "'historic tradition that everyone should have his own day in court.'" 517 U.S. at 798 (citation omitted).

B. The common-law protection at issue here is just as firmly established. For centuries, courts have refused to apply issue preclusion where a verdict from a prior suit could have rested on an issue other than the one for which preclusion is sought. That rule originated with early English authorities, which held that a judgment is not "evidence" of "any matter to be inferred by argument from [it]." Duchess of Kingston's Case (H.L. 1776), in 2 Smith, A Selection of Leading Cases on Various Branches of the Law 425 (1840); see 2 Coke, The First Part of the Institutes of the Laws of England; or, a Commentary on Littleton ¶ 352a (London, W. Clarke 1817) ("Every estoppell . . . must be certaine to every intent, and not . . . be taken by argument or inference.").

When the Fourteenth Amendment was adopted, American courts followed this rule. See, e.g., Russell v. Place, 94 U.S. 606, 608-10 (1876); Packet Co. v. Sickles, 72 U.S. 580, 591-93 (1867). At that time, "according to all the well considered authorities, ancient and modern," the "inference" that an issue was decided by prior litigation had to "be inevitable, or it [could not] be drawn." Burlen, 99 Mass. at 203; see Steam-Gauge & Lantern Co. v. Meyrose, 27 F. 213, 213 (C.C.E.D. Mo. 1886) (Brewer, J.) ("doctrine is affirmed by a multitude of courts"); 1 Simon Greenleaf, Treatise on the Law of Evidence § 528, at 676-77 (3d ed. 1846) ("general rule" of the Duchess of Kingston's Case "has been repeatedly confirmed and followed, without qualification").

This Court's decision in Sickles provides a good example. There, in the first case, the plaintiffs alleged that the defendants had breached two contracts, but the verdict did not identify which contract the jury

found to have been breached. 72 U.S. at 591-92. In the second case, the plaintiffs sought to preclude the defendant from arguing that it did not make the first contract. The Court refused to apply issue preclusion because, given the alternative theories in the prior case, the evidence "failed to show that the contract in controversy in the present suit was necessarily determined in the former." Id. at 592.

State courts likewise held that a verdict cannot preclude litigation on a specific issue if it could have rested on alternative grounds. In those circumstances, where "it be doubtful upon which of several points the verdict was founded, it will not be an estoppel as to either." People v. Frank, 28 Cal. 507, 516 (1865). Put another way, "a verdict will not be an estoppel merely because the testimony in the first suit was sufficient to establish a particular fact"; instead, "[i]t must appear that was the very fact on which the verdict was given, and no other." Long v. Baugas, 24 N.C. 290, 295 (1842) (emphases added); Lentz v. Wallace, 17 Pa. 412, 1851 WL 5887, at *4 (1851) (no preclusion where "record of the former judgment does not show upon which ground the recovery was obtained").[4]

---

[4] Old authorities on this point are legion. See, e.g., Strauss v. Meertief, 64 Ala. 299, 311 (1879); Solly v. Clayton, 12 Colo. 30, 38-40 (1888); Dickinson v. Hayes, 31 Conn. 417, 423-25 (1863); Evans v. Birge, 11 Ga. 265, 272-75 (1852); Kitson v. Farwell, 132 Ill. 327, 339-41 (1890); Dygert v. Dygert, 4 Ind. App. 276, 280-81 (1892); Lindley v. Snell, 80 Iowa 103, 109-10 (1890); Hill v. Morse, 61 Me. 541, 543 (1873); Augir v. Ryan, 63 Minn. 373, 376 (1896); Greene v. Merchants' & Planters' Bank, 73 Miss. 542, 549-50 (1895); Dickey v. Heim, 48 Mo. App. 114, 119-20 (1892); Kleinschmidt v. Binzel, 14 Mont. 31, 55-61 (1894); Hearn

"Modern practice is consistent with these earlier authorities." Oberg, 512 U.S. at 426. The traditional rule has been followed uniformly by the federal courts of appeals[5] and state appellate courts.[6] Thus, under modern as well as ancient precedents, if a prior "'judgment might have been based upon one or more of several grounds, but does not expressly rely upon

---

v. Boston & Me. R.R., 67 N.H. 320, 321-23 (1892); Bell v. Merrifield, 109 N.Y. 202, 211-14 (1888); Fahey v. Esterley Harvesting Mach. Co., 3 N.D. 220, 221-24 (1893); Lore's Lessee v. Truman, 10 Ohio St. 45, 53-56 (1859); Cook v. Burnley, 45 Tex. 97, 115-17 (1876); Aiken v. Peck, 22 Vt. 255, 260 (1850); Chrisman's Adm'x v. Harman, 70 Va. 494, 499-501 (1877); Wentworth v. Racine Cnty., 99 Wis. 26, 32 (1898).

[5] See, e.g., SEC v. Monarch Funding Corp., 192 F.3d 295, 309 (2d Cir. 1999); United States v. Rigas, 605 F.3d 194, 217-19 (3d Cir. 2010); Haywood v. Ball, 634 F.2d 740, 743 (4th Cir. 1980); United States v. Patterson, 827 F.2d 184, 187-90 (7th Cir. 1987); Chew v. Gates, 27 F.3d 1432, 1438 (9th Cir. 1994); Dodge v. Cotter Corp., 203 F.3d 1190, 1198-99 (10th Cir. 2000); Lary v. Ansari, 817 F.2d 1521, 1524-25 (11th Cir. 1987).

[6] See, e.g., Moody v. Rambo, 727 So. 2d 116, 118 (Ala. Civ. App. 1998); JeToCo Corp. v. Hailey Sales Co., 596 S.W.2d 703, 706-07 (Ark. 1980); Brake v. Beech Aircraft Corp., 229 Cal. Rptr. 336, 343 (Cal. Ct. App. 1986); Dowling v. Finley Assocs., 727 A.2d 1245, 1251-53 (Conn. 1999); Major v. Inner City Prop. Mgmt., Inc., 653 A.2d 379, 382-83 (D.C. 1995); Herzog v. Lexington Twp., 657 N.E.2d 926, 931 (Ill. 1995); Conn. Indem. Co. v. Bowman, 652 N.E.2d 880, 883 (Ind. Ct. App. 1995); Day v. Crowley, 172 N.E.2d 251, 254 (Mass. 1961); People v. Gates, 452 N.W.2d 627, 631-32 (Mich. 1990); Parker v. MVBA Harvestore Sys., 491 N.W.2d 904, 906 (Minn. Ct. App. 1992); In re Breuer's Income Tax, 190 S.W.2d 248, 250 (Mo. 1945); Manard v. Hardware Mut. Cas. Co., 207 N.Y.S.2d 807, 809 (N.Y. App. Div. 1960); Buckeye Union Ins. Co. v. New England Ins. Co., 720 N.E.2d 495, 501 (Ohio 1999); Nealis v. Baird, 996 P.2d 438, 458-59 (Okla. 1999); Lee v. U.S. Fid. & Guar. Co., 538 P.2d 359, 361 (Or. 1975).

any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged.'" Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 480 (1969) (citation omitted); see Ashe v. Swenson, 397 U.S. 436, 444 (1970) (issue preclusion does not apply when "'rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration'" (citation omitted)).

C. The First District's decision thus marks an unprecedented departure from a centuries-old rule. Rather than ask itself whether the Engle jury decided the precise facts for which Ms. Martin sought preclusion, the First District instead asked the very different question whether the testimony in the first suit was sufficient to establish those facts. As explained above, the First District held that, for preclusion purposes, the Omnibus Order established the "evidentiary foundation" of the Phase I findings. Pet. App. 14a. But in denying a directed-verdict motion, that order did not resolve what alternative allegations the Engle jury actually decided; it simply concluded that a "reasonable jury could render a verdict" for the class—the Florida standard for directed-verdict motions. Howell v. Winkle, 866 So. 2d 192, 195 (Fla. Dist. Ct. App. 2004) (emphasis added). And, in so doing, it specifically found sufficient evidence based on allegations having no possible application to Mr. Martin, such as allegations limited to filtered cigarettes. Pet. App. 124a. Thus, rather than providing a legitimate basis for preclusion, the Omnibus Order does exactly the opposite: it demonstrates that the Engle judgment might have rested on one or more of several alternative grounds and that,

as a result, issue preclusion cannot apply. The First District's dramatic departure from that rule warrants this Court's review.

III. THE QUESTION PRESENTED GOVERNS THOUSANDS OF PENDING CASES

Lastly, the Court should grant certiorari because of the important and recurring nature of the question presented, the need for its immediate resolution, and the absence of any better vehicle to resolve it.

The decision below impacts pending Engle progeny cases brought by about 8000 plaintiffs. In each of those cases tried to verdict so far, Florida trial courts have issued preclusion rulings akin to those made here. Moreover, the First District and the Fourth District have now squarely held that the Engle findings establish all tortious-conduct elements of all Engle progeny claims, absent any inquiry into whether those findings rest on allegations relevant to the individual plaintiff. Under Florida law, that holding "bind[s] all Florida trial courts," Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992), which are now trying at least two new Engle progeny cases each month, and which are scheduled to try 75 Engle progeny cases in the next year. Without this Court's prompt review, the due-process violation that occurred in this case will repeat itself indefinitely. And the massive liability imposed on the Engle defendants—which currently stands at over $375 in adverse judgments—will likewise steadily increase as Engle progeny trials continue with no end in sight. Those considerations amply justify this Court's review. See, e.g., Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992); United States v. Centennial Sav. Bank FSB, 499 U.S. 573, 578 n.3 (1991).

Furthermore, there is no better vehicle in sight for resolving this question. In every progeny case tried to date, the defendants have raised strenuous due-process objections to use of the Engle findings to establish elements of progeny claims. Yet the state courts have uniformly concluded that Engle itself compels this result, and they have therefore either ignored the due-process objection entirely, as did the decision below, or else brushed it aside as foreclosed by Engle, as did the Fourth District (Jimmie Brown, 70 So. 3d at 716). Moreover, despite the obvious importance of the question presented, the District Courts of Appeal have repeatedly refused to certify their decisions for review by the Florida Supreme Court, and the Florida Supreme Court has refused on four separate occasions to exercise discretionary jurisdiction to determine whether the lower state courts have properly construed its own Engle decision to effect a revolution in the law of issue preclusion and due process. For all of these reasons, the prospects for meaningful further percolation in the Florida state courts are at best remote.

In federal court, the two district judges to have addressed the due-process question presented here have agreed with Reynolds's position. See Bernice Brown, 576 F. Supp. 2d at 1344-46; Burr, No. 8:07-cv-1429-T-23MSS, slip op. at 1. But because the Eleventh Circuit agreed with Reynolds's position on state-law grounds and reserved the due-process question, Bernice Brown, 611 F.3d at 1334, federal district courts are only now beginning to reconsider whether the preclusion standard adopted below (which binds the federal courts as to questions of state law) is consistent with federal due process. One district court has held oral argument on that question, in the context of

a pretrial conference under Federal Rule of Civil Procedure 16(c), but has not yet rendered any decision. Waggoner v. R. J. Reynolds Tobacco Co., No. 3:09-cv-10367 (M.D. Fla.) (argued Sept. 7, 2011). Given the early stages of the federal cases, the timeline for the question presented reaching this Court through the Eleventh Circuit is likely measured in years rather than months—even assuming that plaintiffs, were they not to prevail in the Eleventh Circuit, would seek review in this Court at all. Moreover, given the clarity of the ongoing due-process violations in the state courts, the number of state trials that will occur before any federal case could reach this Court, and the massive aggregate liability to which Reynolds and its fellow defendants would be subjected in the interim, we submit that the better course is to resolve the due-process question now, rather than at some unknown point in the distant future.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Paul D. Clement
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036

Gregory G. Katsas
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

Eric E. Murphy
JONES DAY
325 John H. McConnell
Blvd., Ste. 600
P.O. Box 165017
Columbus, OH 43216

Counsel for Petitioner

DECEMBER 16, 2011

APPENDIX

APPENDIX A

R.J. REYNOLDS TOBACCO COMPANY, Appellant,
v.
Matilde C. MARTIN, as Personal Representative of the Estate of Benny R. Martin, as surviving spouse and on behalf of the estate, Appellee.

No. 1D09–4934.

District Court of Appeal of Florida,
First District.

Dec. 14, 2010.

Rehearing Denied Feb. 11, 2011.

Charles F. Beall, Jr., and Larry Hill of Moore, Hill & Westmoreland, P.A., Pensacola, for Appellant.

Gregory G. Katsas of Jones Day, Washington, D.C., pro hac vice, for Appellant.

M. Stephen Turner, and David K. Miller of Broad and Cassel, Tallahassee, and Robert M. Loehr and Matt Schultz of Levin, Papantonio, Thomas, Mitchell, Eschsner & Proctor, P.A., Pensacola, for Appellee.

MARSTILLER, J.*

This is the first so-called "Engle progeny" case to reach a district court of appeal following the Florida Supreme Court's decision in Engle v. Liggett Group,

* Judge Bradford L. Thomas heard oral argument in this case. After Judge Thomas recused himself, Judge T. Kent Wetherell, II, was assigned to the panel to replace Judge Thomas. Judge Wetherell has considered the record and briefs submitted in this case and the video recording of the oral argument held July 20, 2010.

Inc., 945 So.2d 1246 (Fla.2006). Engle began as a smokers' class action lawsuit filed in 1994 against cigarette companies and tobacco industry organizations seeking damages for smoking-related illnesses and deaths. The class included all Florida "'citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.'" Id. at 1256. The tobacco company defendants included the appellant in this case, R.J. Reynolds Tobacco Company ("RJR"). In Engle, the supreme court decertified the class, but allowed certain jury findings from the class action to have res judicata effect in any subsequent lawsuits by individual class members seeking damages from the defendants. RJR appeals from a final judgment in one such action, seeking reversal of the compensatory and punitive damage awards.

RJR primarily contends that the trial court gave the findings approved in Engle overly broad preclusive effect and thus relieved the plaintiff below, Matilde Martin, of her burden to prove legal causation on her negligence and strict liability claims. RJR also asserts Mrs. Martin failed to prove the reliance element of her fraudulent concealment claim, and that the punitive damage award is excessive and unconstitutional. For the reasons that follow, we find the trial court correctly applied Engle and Mrs. Martin produced sufficient independent evidence to prove RJR's liability for her husband's death. We conclude further the punitive damage award is neither excessive nor violative of RJR's due process rights.

I. BACKGROUND

A. Engle v. Liggett Group, Inc.

The trial proceedings in the Engle class action were divided into three phases. In Phase I the jury was to consider "common issues relating exclusively to the defendants' conduct and the general health effects of smoking" and the class's entitlement to punitive damages. Phase II would determine whether the three class representatives received compensatory damages and the amount of class punitive damages if entitlement was established. Engle, 945 So.2d at 1256–57. Liability to and compensatory damages for each of the estimated 700,000 class members would be decided in Phase III. Id. at 1258. Phase I concluded with a verdict finding the evidence sufficient to prove strict product liability; fraud and misrepresentation; fraud by concealment; civil conspiracy by misrepresentation and concealment; breach of implied warranty; breach of express warranty; negligence; and intentional infliction of emotional distress. Id. at 1255. The jury also found the class entitled to punitive damages. Id. at 1256–57. In Phase II, the jury awarded $12.7 million in compensatory damages to the class representatives and $145 billion in punitive damages to the entire class. Id. at 1257. Before Phase III proceedings began, the defendants appealed the verdicts.

The appeal went first to the Third District Court of Appeal sub nom. Liggett Group, Inc. v. Engle, 853 So.2d 434 (Fla. 3d DCA 2003), then to the Florida Supreme Court which made the following rulings pertinent to the case before us. First, the court vacated the punitive damage award because, with no

compensatory damage award to the class for comparison, the court could not determine whether the punitive damages were unconstitutionally excessive. 945 So.2d at 1264–65, 1276. Second, the court decertified the class for Phase III, finding class treatment infeasible "because individualized issues such as legal causation, comparative fault, and damages predominate," and allowed class members to file individual lawsuits within one year of the court's mandate. Id. at 1268, 1277. Third, the court "retain[ed] the jury's Phase I findings other than those on the fraud and intentional infliction of emotion [sic] distress claims, which involved highly individualized determinations," and gave these "common core findings . . . res judicata effect" in any subsequent individual actions by class members. Id. at 1269.

As a result, Engle class members opting to sue individually do not have to prove up the following matters found by the Phase I jury ("Engle findings"): (1) [generic causation] that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer, pregnancy complications, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer; (2) [addiction/dependence] that cigarettes containing nicotine are addictive or dependence producing; (3) [strict liability] that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) [fraud by concealment] the defendants concealed or omitted material information, not otherwise known or

available, knowing the material was false or misleading, or failed to disclose a material fact, concerning or proving the health effects or addictive nature, or both, of smoking cigarettes; (5) [civil conspiracy-concealment] that the defendants agreed to conceal or omit information regarding the health effects of cigarette smoking or the addictive nature of cigarettes intending that smokers and the public would rely to their detriment; (6) [breach of implied warranty] that the tobacco company defendants sold or supplied cigarettes that were defective; (7) [breach of express warranty] that the tobacco company defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by the defendants; and (8) [negligence] the tobacco company defendants failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances. Id. at 1276–77. The supreme court noted, however, that the Phase I jury did not consider whether class members relied on the defendants' statements or omissions or whether class members were injured by the defendants' conduct. Therefore Phase I yielded no determination as to the defendants' liability to any individual class member. Id. at 1263.

B. Martin v. R.J. Reynolds Tobacco Co.

Benny Martin was a long time smoker of Lucky Strike, a brand of cigarettes manufactured and sold by RJR, who contracted lung cancer and died in 1995.[1] His widow sued RJR as an Engle class

[1] Mr. Martin primarily smoked Lucky Strike, but he also smoked Camel, another RJR brand.

member seeking damages for her husband's death.[2] A jury trial proceeded on five claims: strict liability; fraud by concealment; conspiracy to commit fraud; negligence; and punitive damages. The parties filed a Joint Pretrial Memorandum admitting several facts which required no proof at trial, including that every Lucky Strike Benny Martin smoked contained nicotine, nicotine in cigarettes is addictive, and smoking cigarettes causes lung cancer.

The trial judge instructed the jury, in pertinent part, as follows:

> This action has been brought as a part of a case known as the Engle class action. The first issue for your determination . . . is whether Benny Martin was a member of the Engle class. Certain findings from that action are binding upon you, the Court and the parties. The findings may not be denied or questioned, and they must carry the same weight they would have if you had determined them yourselves. The established findings are: Finding one, is that cigarettes are addictive. Finding two, is that cigarettes cause lung cancer.
>
> If you find that Benny Martin is a member of the Engle class, certain other findings are binding upon you, the Court and the parties. The findings may not be denied or questioned, and they must carry the same

[2] Also named as defendants were Philip Morris USA, Inc.; Lorillard Tobacco Company; Lorillard, Inc.; Liggett Group, LLC; and Vector Group Ltd., Inc. By joint stipulation early in the litigation, they all were dismissed from the lawsuit with prejudice.

weight they would have if you had determined them yourselves. Those established findings are: Finding three, is that R.J. Reynolds Tobacco Company was negligent. Finding four, is that R.J. Reynolds Tobacco Company placed cigarettes on the market that were defective and unreasonably dangerous. Finding five, is that R.J. Reynolds Tobacco Company conspired with other companies to conceal or omit information regarding the health effect [sic] of cigarettes or their addictive nature or both. Those companies include Phillip Morris, Leggett, Lorillard, Brown & Williamson Tobacco Corporation, individually, and as successors to the American Tobacco Company, the Council for Tobacco Research, USA, Inc., and the Tobacco Institute. Finding six, is that R.J. Reynolds Tobacco Company, in furtherance of that conspiracy, concealed or omitted material information, not otherwise known or available, knowing that material was false or misleading, or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both.

* * *

The findings that I have described to you do not establish that R.J. Reynolds Tobacco Company is liable to Mrs. Martin, nor do they establish whether Benny Martin was injured by R.J. Reynolds Tobacco Company's conduct or the degree, if any, to which R.J. Reynolds Tobacco Company's product was the sole or

contributing cause of Benny Martin's death. The findings establish only what they expressly state, and you must not speculate or guess as to the basis for the findings.

* * *

The first issue for your determination . . . is whether Benny Martin was a member of the Engle class. In order to be a member of the Engle class, the plaintiff must prove that Benny Martin was addicted to R.J. Reynolds cigarettes containing nicotine, and, if so, that his addiction was the legal cause of his death . . . . Addiction is a legal cause of death if it directly and in a natural and continuous sequence produces or contributes substantially to producing such death . . . so that it can reasonably be said that, but for the addiction to cigarettes containing nicotine, the death would not have occurred.

* * *

The next issue for your determination is whether the conspiracy to withhold health information or information regarding addiction and the acts proven in furtherance of that conspiracy were a legal cause of the death of Benny Martin. In order to be a legal cause of death, plaintiff must show that Benny Martin relied on statements by either R.J. Reynolds Tobacco Company or any of the other companies involved in the conspiracy that omitted material information concerning the health effect [sic] of cigarettes or their addictive nature or both made at any time during or after December 1953. . . . Benny

> Martin's reliance on such statements to his detriment is a legal cause of loss if it directly and in natural and continuous sequence produces or contributes substantially to such loss, so that it can reasonably be said that, but for Benny Martin's reliance, the loss would not have occurred.
>
> * * *
>
> Punitive damages are warranted if you find by clear and convincing evidence that . . . one, the conduct causing loss to the plaintiff was so gross and flagrant as to show a reckless disregard of human life or of the safety of persons exposed to the effects of such conduct; or, two, the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; or, three, the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public; or, four, the conduct showed such reckless indifference to the rights of others as to be equivalent to an intentional violation of those rights.

The jury found that addiction to RJR cigarettes was a legal cause of Mr. Martin's death; RJR's conspiracy to conceal and actual concealment of information was a legal cause of Mr. Martin's death; RJR and Mr. Martin are respectively 66% and 34% responsible for Mr. Martin's death; and punitive damages are warranted. The jury awarded Mrs. Martin $5 million in compensatory damages, which the court later reduced to $3.3 million based on the jury's apportionment of fault, and $25 million in

punitive damages. The trial court accordingly entered a Final Judgment for Mrs. Martin.

II. ANALYSIS

A. Application of Engle

The crux of this appeal is the extent to which an Engle class member can rely upon the findings from the class action when she individually pursues one or more Engle defendants for damages. RJR contends the Engle Phase I jury findings in the class action establish nothing relevant to any individual class member's action for damages, and thus the trial court applied Engle too broadly in Mrs Martin's case. In RJR's view, the findings given res judicata effect by the supreme court facially prove only that RJR at some point manufactured and sold an unspecified brand of cigarette containing an undefined defect; RJR committed one or more unspecified negligent acts; RJR on some occasion concealed unspecified information about the health effects of smoking and the addictive nature of smoking; and RJR and several other entities agreed to conceal said unspecified information. Thus, RJR argues, notwithstanding the Engle findings Mrs. Martin was required to prove Lucky Strike brand cigarettes contained a specific defect rendering the brand unreasonably dangerous; RJR violated a duty of care it owed to Mr. Martin; RJR concealed particular information which, had it been disclosed, would have led Mr. Martin to avoid contracting lung cancer; and RJR was part of a conspiracy to conceal the specified information.

We disagree with RJR's characterization of the Engle findings. RJR attempts to diminish the preclusive effect of the findings by claiming, based on the Phase I verdict form, that the findings "facially"

prove nothing specifically relevant to Mr. Martin's claims. In so doing, RJR urges an application of the supreme court's decision that would essentially nullify it. We decline the invitation. See Hoffman v. Jones, 280 So.2d 431, 434 (Fla.1973) (district courts of appeal do not have the prerogative to overrule Florida Supreme Court precedent). See also, Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1335, (11th Cir.2010) ("The Phase I approved findings . . . do establish some facts that are relevant to this litigation. Otherwise, the Florida Supreme Court's statement in [Engle] that the Phase I approved findings were to have 'res judicata effect' in trials involving former class members would be meaningless."). No matter the wording of the findings on the Phase I verdict form, the jury considered and determined specific matters related to the defendants' conduct. Because the findings are common to all class members, Mrs. Martin, under the supreme court's holding in Engle, was entitled to rely on them in her damages action against RJR. The question is to what extent could Mrs. Martin use the Engle findings to establish the elements of her claims?

In support of its argument, RJR points out the Eleventh Circuit's decision in Brown v. R.J. Reynolds Tobacco Co., supra, an interlocutory appeal in an Engle progeny lawsuit pending in the United States District Court, Middle District of Florida. The plaintiff in Brown appealed a pretrial order ruling that "the Engle Phase I findings may not be used to establish any element of an individual Engle plaintiff's claim." Brown v. R.J. Reynolds Tobacco Co., 576 F.Supp.2d 1328, 1347–48 (M.D.Fla.2008). The Eleventh Circuit vacated the order, reasoning

that the Florida Supreme Court's decision in Engle must be given the same preclusive effect in federal courts it would have in state courts. Brown, 611 F.3d at 1331. The court then explained what it believes are the scope of the preclusive effect of Engle and the burden individual plaintiffs in federal court must carry in proving applicability of the Engle findings to their claims. It determined the supreme court, in giving the Phase I findings res judicata effect in subsequent lawsuits by Engle class members, necessarily meant issue preclusion rather than claim preclusion—both of which are included in the concept of "res judicata"—because "factual issues and not causes of action were decided in Phase I." Id. at 1333. Then, relying on Gordon v. Gordon, 59 So.2d 40 (Fla.1952), and Seaboard Coast Line R.R. Co. v. Industrial Contracting Co., 260 So.2d 860 (Fla. 4th DCA 1972), the court concluded individual Engle plaintiffs may only use the Phase I findings to establish elements of their claims in federal court if they can demonstrate with a "reasonable degree of certainty" which facts were "actually adjudicated." Brown, 611 F.3d at 1334–35. This they can do by pointing to relevant parts of the class action trial transcript. Id. at 1335.

While we generally agree with the Eleventh Circuit's analysis of issue preclusion versus claim preclusion, we find it unnecessary to distinguish between the two or to define what the supreme court meant by "res judicata" to conclude the factual determinations made by the Phase I jury cannot be relitigated by RJR and the other Engle defendants. More importantly, we do not agree every Engle plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings. Such a

requirement undercuts the supreme court's ruling. The Phase I jury determined "common issues relating exclusively to the defendants' conduct . . ." but not "whether any class members relied on Tobacco's misrepresentations or were injured by Tobacco's conduct." Engle, 945 So.2d at 1256 (emphasis added). The common issues, which the jury decided in favor of the class, were the "conduct" elements of the claims asserted by the class, and not simply, as characterized by the Eleventh Circuit, a collection of facts relevant to those elements.

As pertinent to Mrs. Martin's claims, the class plaintiffs, to prove strict product liability, had to "'establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of a proximate causal connection between such condition and the user's injuries or damage.'" Siemens Energy & Automation, Inc. v. Medina, 719 So.2d 312, 315 (Fla. 3d DCA 1998) (quoting West v. Caterpillar Tractor Co., 336 So.2d 80, 87 (Fla. 1976)). To prevail on the fraud by concealment claim, the plaintiffs had to prove the tobacco companies concealed or failed to disclose a material fact; the companies knew or should have known the material fact should be disclosed; the companies knew their concealment of or failure to disclose the material fact would induce the plaintiffs to act; the tobacco companies had a duty to disclose the material fact; and the plaintiffs detrimentally relied on the misinformation. See Friedman v. Am. Guardian Warranty Servs., Inc., 837 So.2d 1165, 1166 (Fla. 4th DCA 2003); Gutter v. Wunker, 631 So.2d 1117, 1118 (Fla. 4th DCA 1994). See generally 21 Patrick John McGinley, Fla. Prac., Elements of an Action, § 17:1

(2009–2010 ed.). The civil conspiracy claim required proof that the class defendants agreed to do an unlawful act or to do a lawful act by unlawful means, an overt act was done to further the conspiracy, and the plaintiffs were damaged as a result of the conspiracy. See Charles v. Fla. Foreclosure Placement Ctr., 988 So.2d 1157, 1159–60 (Fla. 3d DCA 2008). And the four elements of the negligence claim were "[a] duty . . . requiring the [class defendants] to conform to a certain standard of conduct, for the protection of others against unreasonable risks[;]" a breach of that duty by the defendants; a "causal connection between the [defendants'] conduct and the [plaintiffs'] resulting injury . . . commonly known as . . . 'proximate cause[;]" and damage to the plaintiffs. Curd v. Mosaic Fertilizer, L.L.C., 39 So.3d 1216, 1227 (Fla.2010) (quoting Clay Elec. Coop., Inc. v. Johnson, 873 So.2d 1182, 1185 (Fla.2003)).

The Final Judgment and Amended Omnibus Order entered in the Engle class action sets out the evidentiary foundation for the Phase I jury's findings on these claims, and demonstrates that the verdict is conclusive as to the conduct elements of the claims. The order reflects that Lucky Strike, the brand Mr. Martin primarily smoked, was one of the sixteen cigarette brands named by the class representatives and that the Phase I jury findings encompassed all the brands. Engle v. RJ Reynolds Tobacco Co., No. 94–08273, 2000 WL 33534572, at *1 (Fla.Cir.Ct. Nov. 6, 2000). The evidence supporting the strict liability finding showed the tobacco companies' cigarettes contain carcinogens, nitrosamines, and carbon dioxide, among other ingredients harmful to health which, when combined with the nicotine

cigarettes also contain, make the product unreasonably dangerous. Id. at *2. The jury based its findings on the fraud by concealment and conspiracy claims on evidence showing RJR and its co-conspirators agreed to conceal their own scientific research results revealing that cigarettes cause cancer and other diseases and that the nicotine in tobacco is addictive. There also was evidence the defendants had taken on the duty to disclose by promising to share their research results with the public. The evidence further showed that not only did the defendants conceal information about the dangers of smoking they also enticed people to keep smoking by creating a controversy over whether smoking indeed had deleterious health effects. Id. at *2–3. And on the negligence claim, the jury determined the defendants owed all class members a duty to prevent injury from cigarettes the defendants knew to be harmful, and they breached their duty by selling cigarettes dangerous to health without taking reasonable measures to prevent injury to smokers. Id. at *4.

As does the Eleventh Circuit, we interpret the supreme court's ruling in Engle to mean individual class plaintiffs, when pursuing RJR and the other class defendants for damages, can rely on the Phase I jury's factual findings. But unlike the Eleventh Circuit, we conclude the Phase I findings establish the conduct elements of the asserted claims, and individual Engle plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits, assuming they assert the same claims raised in the class action. For that reason, we find the trial court in Mrs. Martin's case correctly construed Engle and

instructed the jury accordingly on the preclusive effect of the Phase I findings.

B. Evidence of Causation and Detrimental Reliance

As a corollary to its argument on the preclusive effect of Engle, RJR asserts the trial court did not require Mrs. Martin to prove legal causation on her negligence and strict liability claims. On the contrary, the trial court instructed the jury that

> The first issue for your determination . . . is whether Benny Martin was a member of the Engle class. In order to be a member of the Engle class, the plaintiff must prove that Benny Martin was addicted to R.J. Reynolds cigarettes containing nicotine, and, if so, that his addiction was the legal cause of his death . . . . Addiction is a legal cause of death if it directly and in a natural and continuous sequence produces or contributes substantially to producing such death . . . so that it can reasonably be said that, but for the addiction to cigarettes containing nicotine, the death would not have occurred.

RJR stipulated pretrial that nicotine in cigarettes is addictive and smoking cigarettes causes lung cancer. RJR further stipulated that Mr. Martin smoked Lucky Strike cigarettes, every Lucky Strike cigarette he smoked contained nicotine, and Mr. Martin did not smoke any brand of cigarettes other than Lucky Strike and Camel (another RJR brand). At trial Mrs. Martin produced evidence showing that: Mr. Martin started smoking at age 14 and by age 23 was smoking two packs of non-filtered Lucky Strike cigarettes every day; he tried unsuccessfully several times over the years to quit smoking and was

distraught over it; Mr. Martin was diagnosed by a physician as being addicted to nicotine; his treating pulmonologist determined his decades of smoking caused him to contract lung cancer which in turn caused his death. The record thus demonstrates Mrs. Martin was required to prove legal causation, and she produced sufficient evidence for a jury to find that Mr. Martin's addiction to RJR's cigarettes was the legal cause of his death.

RJR also argues that Mrs. Martin failed to prove the reliance element of her fraudulent concealment claim because she put on no direct evidence showing Mr. Martin relied on information put out by the tobacco companies omitting scientific findings on the harmful effects of smoking. But the record contains abundant evidence from which the jury could infer Mr. Martin's reliance on pervasive misleading advertising campaigns for the Lucky Strike brand in particular and for cigarettes in general, and on the false controversy created by the tobacco industry during the years he smoked aimed at creating doubt among smokers that cigarettes were hazardous to health. Cf. Bullock v. Philip Morris USA, Inc., 159 Cal.App.4th 655, 71 Cal.Rptr.3d 775, 792 (2008) (plaintiff was not required to prove actual reliance on tobacco company's specific misrepresentation where there was evidence that the company sustained a broad-based public campaign for many years disseminating misleading information and creating a controversy over the adverse health effects of smoking intending that current and potential smokers would rely on the misinformation); Burton v. R.J. Reynolds Tobacco Co., 208 F.Supp.2d 1187, 1203 (D.Kan. 2002) (jury could infer plaintiff's reliance where evidence showed RJR and co-conspirators

"represented to the public that they would take it upon themselves to investigate and determine whether there were health consequences of smoking," but despite evidence of cigarettes' harmful effects RJR "engaged in a publicity campaign telling the public that whether there were negative health consequences from smoking remains an 'open question.'").

C. Punitive Damages

Finally, RJR challenges the $25 million punitive damage award arguing it is improperly based on the Engle findings and excessive in light of the $3.3 million in compensatory damages awarded Mrs. Martin. Section 768.72(2), Florida Statutes, requires a plaintiff seeking punitive damages to prove by clear and convincing evidence the defendant is guilty of intentional misconduct or gross negligence. See Wayne Frier Home Ctr. of Pensacola, Inc. v. Cadlerock Joint Venture, L.P., 16 So.3d 1006, 1008 (Fla. 1st DCA 2009). The evidence Mrs. Martin produced in support of her claim included, among other things, a 1972 internal RJR document stating, "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products uniquely contain and deliver nicotine, a potent drug, with a variety of physiological effects." The same document describes nicotine as a "known . . . habit forming alkaloid" and notes the "confirmed" tobacco user "primarily seek[s] physiological satisfaction derived from nicotine and perhaps other active compounds. His choice of product and pattern of usage are primarily determined by his individual nicotine dosage requirements . . . ." At the time, the

evidence showed, RJR was publicly denying nicotine is a drug, and tobacco companies including RJR were not only actively concealing their own research results revealing the harmful health effects of smoking cigarettes, but also purposefully misleading the public to believe the issue was unresolved. The evidence also showed that as early as 1935 it was technically possible to remove nicotine from Lucky Strike cigarettes but the company[3] chose not to do so because it would result in an "emasculated cigarette, shorn of those very qualities which give a cigarette character and appeal." That business decision endured, as industry documents revealed RJR in 1993 remained concerned that if it were to remove nicotine from its cigarettes people would elect not to smoke. We are satisfied Mrs. Martin produced sufficient evidence independent of the Engle findings to allow the jury to find RJR guilty of intentional misconduct or gross negligence.

Nevertheless, the $25 million award is presumed excessive under Florida law. Section 768.73, Florida Statutes (2005) provides, in pertinent part:

> (1)(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each

[3] American Tobacco Company, to which RJR is successor in interest, made and sold Lucky Strike at that time.

> person entitled thereto by the trier of fact, except as provided in paragraph (b). However this subsection does not apply to any class action.
>
> (b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

The punitive-to-compensatory ratio here is 7.58 to 1. Yet the trial court denied RJR's motion for remittitur because, "[c]onsidering the cause of action leading to the award of punitive damages, the Florida statutory cap of 3 to 1 is inapplicable." The court further concluded "[t]he award of punitive damages in this cause is not so excessive as to violate concepts of due process." We review the trial court's denial of remittitur for abuse of discretion but consider de novo whether the award is within the boundaries of due process. See Engle, 945 So.2d at 1263.

Turning first to whether remittitur was appropriately denied under section 768.73, the facts and circumstances in this case are significantly similar to those in Owens-Corning Fiberglas Corp. v. Ballard, 749 So.2d 483 (Fla.1999), in which the supreme court upheld a punitive damages award that was nearly 18 times the compensatory damages award. There the plaintiff brought a products liability action against Owens–Corning alleging he

contracted mesothelioma after 30 years of exposure to Kaylo brand asbestos-laden insulation the company manufactured and sold. The jury awarded $1.8 million in compensatory damages and $31 million in punitive damages. Id. at 484–85. The evidence in the case showed that for 30 years Owens–Corning knew about the dangers of asbestos and not only concealed the information, but also intentionally misrepresented the safety of Kaylo, advertising it as "non-toxic." Id. at 487. Further, the company refused—because it would not be profitable—to correct the defect either by removing asbestos from Kaylo or by marketing an asbestos-free substitute it had developed, and refused to warn the public of the cancer risk from exposure to asbestos. Finding the evidence sufficient to support a finding of "flagrant disregard" and "apparent indifference" to the safety of those who were exposed to Kaylo, the supreme court concluded the trial court "acted properly and responsibly under section 768.73(1) in determining that the punitive damages award . . . fell within the exception to the statutory cap." Id. at 488–89. The evidence in the instant case demonstrates with similar import RJR's disregard for the safety of Benny Martin and other smokers of its cigarette brands: decades-long purposeful concealment of the health risks from smoking cigarettes, refusal to take nicotine out of Lucky Strike because sales would decrease, and collusion with other tobacco industry entities to affirmatively mislead the public into thinking cigarettes indeed may not be harmful. We find no abuse of discretion in the trial court's approval, under section 768.73(1)(b), of the $25 million punitive damages award.

The second question to be answered is whether the award violates constitutional due process principles.

> Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors.

Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424, 433–34, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (citations omitted). The three criteria a punitive damages award must satisfy under Florida law to pass constitutional muster are: (1) "the manifest weight of the evidence does not render the amount of punitive damages assessed out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct;" (2) the award "bears some relationship to the defendant's ability to pay and does not result in economic castigation or bankruptcy to the defendant;" and (3) a reasonable relationship exists between the compensatory and punitive amounts awarded. Engle, 945 So.2d at 1263–64.

We find the $25 million award here is not out of proportion with what the jury clearly considered to be wanton conduct by RJR in marketing a product it knew to be harmful and misleading the public about

the health risks of smoking cigarettes. Neither does the award place RJR in a precarious financial position as the evidence showed that between 2005 and 2008 it had shareholder equity of approximately $8 billion and net annual earnings of $1 billion. We recognize, as RJR points out, there are thousands of Engle progeny cases pending in the trial courts and the company's potential financial exposure is significant. But our review is limited to the facts and circumstances of this case, and we decline to disturb an otherwise reasonable punitive damages award to mitigate RJR's future liability. Finally, the 7.58 to 1 ratio of punitive to compensatory damages does not, under the circumstances of this case, offend due process. Neither the United States Supreme Court nor the Florida Supreme Court has adopted a bright-line limit to which punitive damages awards must adhere. RJR asserts the Supreme Court did just that and adopted a 1 to 1 ratio in Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008). But the Court's review of the punitive damages award in Exxon Shipping did not invoke due process principles. Rather, the "enquiry differ[ed] from due process review because the case [arose] under federal maritime jurisdiction," and the Court "examin[ed] the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard." Id. at 2626. There remain "no rigid benchmarks that a punitive damages award may not surpass," but "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with" higher ratios. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408,

425, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). We find no justification in the record to undo the jury's decision to award Mrs. Martin $25 million in punitive damages.

III. CONCLUSION

In summary, the Phase I jury findings given preclusive effect in Engle established the conduct elements of Mrs. Martin's strict liability, fraudulent concealment, civil conspiracy and negligence claims against RJR. The trial court therefore correctly applied Engle. Mrs. Martin produced sufficient independent evidence to prove causation, detrimental reliance, and entitlement to punitive damages. The punitive damage award overcomes the presumption of excessiveness in section 768.73, Florida Statutes (2005), and satisfies due process in view of the evidence of decades-long wanton conduct by RJR and because the award does not financially devastate the company. Accordingly, we AFFIRM the Final Judgment in all respects.

CLARK and WETHERELL, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, ESCAMBIA COUNTY, FLORIDA

IN RE: ENGLE PROGENY CASES
TOBACCO LITIGATION

CASE NO.: 2008 CA 080000

Pertains to: All Cases

ORDER DENYING DEFENDANTS' RULE 1.200 MOTION TO DETERMINE THE PRECLUSIVE EFFECT OF THE *ENGLE* PHASE I FINDINGS

Defendants Philip Morris USA, Inc., Lorillard Tobacco Company, and R.J. Reynolds Tobacco Company filed Defendants' Rule 1.200 Motion to Determine the Preclusive Effect of the Engle Phase I Findings and Incorporated Memorandum of Law in Support Thereof on August 25, 2008. The motion was argued during a case management conference October 30, 2008. The Defendants have, apparently, filed identical motions in each of the jurisdictions where Engle Progeny cases are pending.

None of the Plaintiffs objected to the mechanism suggested to resolve the issue of the effect of Engle v. Liggett Group, Inc., 945 So.2d 1246 (Fla. 2006). Indeed, the Plaintiffs have seemingly joined in the motion to the extent they request the Court to assist in narrowing issues for future trials of Engle Progeny cases in this jurisdiction.

The parties have been diligent in providing this Court with copies of orders addressing similar motions in other jurisdictions. Those orders address in varied ways the effect of Engle as to individual

damages claims of Engle Progeny cases in those jurisdictions. While each order is thoughtfully written and is accorded some persuasive value, this court is obligated to follow controlling authority. Engle is undeniably controlling authority as it applies to a Florida Circuit Court.

The mechanism suggested in the motion is that the various provisions of Fla.R.Civ.P. 1.200 gives a trial court authority to narrow issues for trial. Certainly a trial court has that authority within the limits of the rule. In the context of the issue addressed in the motion, the mechanism suggested is a bit unorthodox. It is, therefore, understandable that some might be reluctant to rule under these circumstances.

However, all involved parties have in effect waived any objection to the motion. Thus, to the extent some other generally recognized cause of action or procedure would normally be invoked, the parties agree that the court has authority pursuant to the rule to resolve the motion. Under the unique circumstances of the narrow issue presented for resolution, providing resolution is not precluded.

To the extent a reading of the majority opinion in Engle may leave a question as to what the Florida Supreme Court meant in the conclusion of its opinion approving the Phase I findings, one need but look to the concurring, in part, and dissenting, in part, opinion of Justice Wells. In his opinion, joined by Justice Bell, in a discussion of Seventh Amendment considerations, he posited an insightful observation. He queried how can an Engle Progeny liability and damages jury compare the Engle Phase I negligence finding as to all Engle Defendants with the

anticipated defense of comparative fault of the smoker in upcoming trials? The question, itself, demonstrates that all the justices clearly understood and were directing the Engle Progeny juries must use the Phase I finding that the conduct of all of the Engle Defendants was negligent.

It is clear, then, that the members of the Florida Supreme Court understood and intended that the Phase I finding from Engle must be given effect to all Engle Progeny cases whether based up principles of res judicata, collateral estoppel, estoppel by judgment, stare decisis, or some other mechanism. The Engle Phase I findings involved the same parties which obviously includes all class members, and it would be inappropriate to require the parties to litigate anew specific findings from the class action proceeding which have successfully withstood intense appellate scrutiny. To do so would effectively void the class action litigation.

It is, therefore,

ORDER AND ADJUDGED that:

1. Defendants' Rule 1.200 Motion to Determine the Preclusive Effect of the Engle Phase I Findings is denied.

2. The Phase I findings from the Engle class action trial as specified in the conclusion to the majority opinion in Engle v. Liggett Group, Inc., 945 So.2d 1246 at 1276 and 1277 (Fla. 2006) are recognized and apply to all class members.[1]

---

[1] We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease,

3. The parties are directed to craft and submit appropriate jury instructions as to case specific issues involved in any Engle Progeny liability and damages trial which has been or shall hereafter be scheduled for trial in this jurisdiction relating to approved Phase I Engle findings.

DONE AND ORDERED this 24th day of February, 2009.

s/ Terry D. Terrell
TERRY D. TERRELL
Circuit Judge

Copies provided to:
Matthew D. Schultz, Esquire
Larry Hill, Esquire

---

esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarinoma [sic], large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), 4(a) (that the defendants 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), 5(a) (that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their additive nature with the intention that smokers and the public would rely on this information to their detriment), 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) [sic] (that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants), 8 (that all of the defendants were negligent).

APPENDIX C

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, ESCAMBIA COUNTY, FLORIDA

MATHILDE MARTIN as Personal Representative of the Estate of Benny R. Martin, as surviving spouse and on behalf of the Estate,

Plaintiff,

CASE NO.: 2007 CA 002520
DIVISION: "K"

vs.

R. J. REYNOLDS TOBACCO COMPANY,

Defendant.

ORDER DENYING DEFENDANT R. J. REYNOLDS' MOTION TO SET ASIDE THE PHASE I VERDICT, FOR JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF PLAINTIFF'S CASE IN PHASE I, FOR NEW TRIAL, AND ALTERNATIVELY FOR REMITTITUR OF THE COMPENSATORY DAMAGES AWARD

The Court received Defendant R. J. Reynolds' Motion to Set Aside the Phase I Verdict, for Judgment in Accordance with Defendant's Motion for a Directed Verdict made at the Close of Plaintiff's Case in Phase I, for New Trial, and Alternatively for Remittitur of the Compensatory Damages Award on

June 26, 2009. After considering the motion, response from Plaintiff, and argument of counsel, the Court announced on the record that the motion was denied.

It is therefore,

ORDERED AND ADJUDGED that Defendant R. J. Reynolds' Motion to Set Aside the Phase I Verdict, for Judgment in Accordance with Defendant's Motion for a Directed Verdict Made at the Close of Plaintiff's Case in Phase I, for New Trial, and Alternatively for Remititur of the Compensatory Damages Award is denied.

DONE AND ORDERED this 28th day of August, 2009.

s/ Terry D. Terrell
TERRY D. TERRELL
Circuit Judge

Copies provided to:
Matthew D. Schultz, Esquire
Larry Hill, Esquire

APPENDIX D

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850) 488-6151

February 11, 2011

CASE NO.: 1D09-4934
L.T. No. : 2007 CA 2520

R. J. Reynolds Tobacco Company	v.	Matilde C. Martin, As Personal, Etc., Et Al.
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed January 12, 2011, for certification and rehearing en banc is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Larry Hill	Gregory G. Katsas
David K. Miller	Matt Schultz
M. Stephen Turner	Charles F. Beall, Jr.
	Robert M. Loehr

jm

s/ Jon S. Wheeler [Seal]
JON S. WHEELER, CLERK

APPENDIX E

Supreme Court of Florida

TUESDAY, JULY 19, 2011

CASE NO.: SC11-483

Lower Tribunal No(s).:
1D09-4934,2007-CA-2520

R.J. REYNOLDS TOBACCO COMPANY	vs.	MATHILDE MARTIN, ETC.
Petitioner(s)		Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy

Test:

s/ Thomas D. Hall [Seal]

Thomas D. Hall
Clerk, Supreme Court

jn

Served:

HON. JON S. WHEELER,
CLERK
CARYN LYNN BELLUS
STEPHANIE ETHEL PARKER
ROBERT MICHAEL LOEHR
MARTIN STEPHEN TURNER
HON. TERRY DAVID
TERRELL, CHIEF JUDGE
HON. ERNIE LEE MAGAHA,
CLERK
TAMELA IVEY PERDUE
THOMAS LARRY HILL
CHARLES FRANKLIN
BEALL, JR.
MATTHEW D. SCHULTZ
DAVID KELLER MILLER

APPENDIX F

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT ESCAMBIA COUNTY, FLORIDA

MATHILDE C. MARTIN, as Personal Representative of the Estate of Benny R. Martin, as surviving spouse, and on behalf of the estate,

Plaintiff,

Case No.: 2007-CA-2520

v.

R. J. REYNOLDS TOBACCO COMPANY, et al.

Defendants.

FINAL JUDGMENT

Pursuant to the verdict rendered in this action,

IT IS ADJUDGED that Plaintiff Mathilde Martin, 11407 Johnston Drive, Pensacola, Florida 32534, as personal representative of the Estate of Benny Ray Martin, recover from Defendant RJR Reynolds Tobacco Company, 401 N. Main St., Winston-Salem, North Carolina 27102, the sum of ~~$5,000,00000~~ $3,300,000.00 [illegible] in compensatory damages and $25,000,000.00 in punitive damages, for a total sum of ~~$30,000,00000~~ $28,300,000.00 [illegible] which shall bear interest at the rate of 8% per annum, ~~accruing nunc pro tunc from the date of the~~

~~final verdict June 1, 2009~~ [illegible] for which let execution issue.

The Court retains jurisdiction regarding any award of costs.

DONE AND ORDERED in chambers, Pensacola, Florida, on this the 13th day of September, 2009.

s/ Terry D. Terrell
HON. TERRY D. TERRELL
Circuit Court Judge

Copies provided to:
Matthew D. Schultz, Esquire
Larry Hill, Esquire

APPENDIX G

IN THE CIRCUIT COURT AND FOR THE FIRST JUDICIAL CIRCUIT ESCAMBIA COUNTY, FLORIDA – CIVIL DIVISION

MATHILDE C. MARTIN, as representative of the Estate of Benny Ray Martin and individually as surviving spouse

Plaintiff

vs. **Case No.: 2007-CA-2520**

R. J. REYNOLDS TOBACCO CO.,

Defendant

JURY VERDICT FORM

1. Was addiction to R.J. Reynolds Tobacco Company cigarettes a legal cause of the death of Benny Martin?

YES √ VF NO ~~VF~~

(If you answered "NO" to question 1, your verdict is for the Defendant and you should proceed no further except to date and sign the verdict form and return it

to the courtroom. If you answered "YES" to question 1, please answer Questions 2 thru 5).

2. Please state the percentage of any fault that was a legal cause of Benny Martin's death that you charge to:

R.J. REYNOLDS TOBACCO COMPANY	66%	
BENNY MARTIN	34%	VF

(The total of percentage must be 100%.)

3. What is the total amount (100%) of any damages sustained by Mathilde Martin caused by the death of her husband, Benny Martin.

Total Damages $5 million dollars VF

In determining the total amount of damages, do not make any reduction because of the fault of the decedent, Benny Martin. The Court, in entering judgment, will make an appropriate reduction in the damages awarded.

4. Was R.J. Reynolds Tobacco Company's conspiracy to conceal information and actual concealment of information a legal cause of the death of Benny Martin?

YES √ VF NO ~~VF~~

5. Under the circumstances of this case, state whether punitive damages are warranted against R.J. Reynolds Tobacco Company:

YES √ VF NO ~~VF~~

(Please sign and date the verdict form.)

SO SAY WE ALL THIS 29th DAY of May, 2009.

s/ Vinita D. Ford
FOREPERSON

Vinita D. Ford
FOREPERSON'S PRINTED NAME

APPENDIX H

IN THE CIRCUIT COURT AND FOR THE FIRST JUDICIAL CIRCUIT ESCAMBIA COUNTY, FLORIDA – CIVIL DIVISION

MATHILDE C. MARTIN, as Representative of the Estate of Benny Ray Martin and individually as surviving spouse,

Plaintiff

vs. **Case No.: 2007-CA-2520**

R. J. REYNOLDS TOBACCO CO.,

Defendant

JURY VERDICT FORM – PUNITIVE DAMAGE PHASE

---

1. What is the total amount of punitive damages that you assess against R.J. Reynolds Tobacco Company?

$25 million dollars

(Please sign and date the verdict form.)

SO SAY WE ALL THIS 1st DAY of June, 2009.

/s/ Vinita D. Ford
FOREPERSON

Vinita D. Ford
FOREPERSON'S PRINTED NAME

APPENDIX I

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT ESCAMBIA COUNTY, FLORIDA

IN RE ENGLE PROGENY CASES TOBACCO LITIGATION	No. 2008-CA-80000
_____/	Pertains To: All Cases

DEFENDANTS' RULE 1.200 MOTION TO DETERMINE THE PRECLUSIVE EFFECT OF THE *ENGLE* PHASE I FINDINGS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Defendants hereby move, pursuant to Florida Rule of Civil Procedure 1.200, for an order to resolve, as soon as practicable, a critical threshold issue in these cases: the extent to which plaintiffs may rely on certain jury findings from the Engle trial to establish elements of their tort claims. In their complaints, plaintiffs assert that the preclusive effect of the Engle Phase I findings conclusively establish all of the elements of their claims except specific medical causation (whether cigarette smoking caused a plaintiff's injury) and damages. See, e.g., Complaint, Blackwell v. R.J. Reynolds Tobacco Co. ¶¶ 1, 13 28, 32, 37, 42.

United States District Judge Ursula Ungaro has already rejected this precise contention in another Engle progeny case, holding that "even affording the Phase I findings approved by the Engle court res judicata effect – as this Court must – Plaintiffs in

this action will still have to establish the specific conduct that caused their injuries and demonstrate that such conduct was wrongful in order to establish Defendants' liability as to their claims." Merlob v. Philip Morris Inc., Order on Defs.' Rule 16(c) Motion To Determine The Preclusive Effect Of The Engle Phase I Findings ("Merlob Order") at 8 (S.D. Fla. Aug. 8, 2008) (reconsideration motion pending) (emphasis added) (Ex. 1). Judge Ungaro's rejection of plaintiffs' proposed use of the findings to establish elements of their claims is correct for three reasons.

First, plaintiffs' position is flatly contrary to the Florida Supreme Court's decision in Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006), which held that plaintiffs seeking the benefit of the Phase I findings are required to prove more than mere medical causation. The Court was explicit that "issues such as legal causation" remained to be determined in these Engle progeny cases. Id. at 1268 (emphasis added). As the Court acknowledged (and established law confirms), legal causation requires a showing that the specific tortious conduct alleged by plaintiffs – and not the mere smoking of cigarettes – caused the plaintiff's injuries. Id. at 1263, 1271. Therefore, regardless of the preclusive effect given to the findings, it is clear under Engle that each progeny plaintiff must at a minimum prove a causal link between specific tortious conduct and their injuries, and not simply that smoking caused their injuries.

Second, plaintiffs' position is foreclosed by well-settled principles of preclusion law, which Engle did not purport to modify. In giving certain findings "res judicata effect," id. at 1269, the Court was referring

to the form of res judicata known as "issue preclusion" (or collateral estoppel), because it was giving preclusive effect only to issues, not any complete claims. Hochstadt v. Orange Broad, 588 So. 2d 51, 52 n.1 (Fla. 3d DCA 1991) ("courts often use the term 'res judicata' to encompass both issue preclusion and claim preclusion"). Under issue preclusion, plaintiffs bear the burden of establishing that the issue for which they seek preclusion is "identical" to the issue that was presented in the prior proceeding" and "a critical and necessary part of the prior determination." Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002). Plaintiffs cannot meet that burden here because the issues specific to individual plaintiffs cannot be matched to identical issues critically and necessarily decided in the Phase I Engle trial. As the Engle trial court acknowledged, Transcript ("T.") at 35813,[1] Phase I involved countless different allegations of tortious conduct over a five-decade period in support of each claim and, despite the Engle defendants' requests for particularized verdict findings at the end of Phase I, the generalized verdict form questions did not allow the jury to identify which of those many allegations it sustained and which it rejected. As a result, all one can determine from the findings is that defendants committed unspecified tortious acts at some unspecified time. Since there is no way to identify the conduct that the

[1] Defendants file with their memorandum a DVD-ROM containing excerpts of the Engle record (including the portions of the record cited in this memorandum) in the event the Court wishes to see for itself the great variety of allegations in Phase I.

jury found tortious, there is no way to determine whether the conduct or defect allegedly causing plaintiffs' injuries is the same conduct or defect found in Engle to be tortious.

Third, plaintiffs' proposed use of the findings would also offend due process. The U.S. Supreme Court and courts in every state in the country for well over a century have held that preclusion is unavailable "if it appear[s] that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered." Russell v. Place, 94 U.S. 606, 608 (1876); see also Fayerweather v. Ritch, 195 U.S. 276 (1904). Plaintiffs' proposed use of the generalized Engle findings to satisfy elements of their claims violates this rule because there is no way to know what specific conduct formed the basis for the Engle jury's findings. This Court should reject any interpretation of Engle that would run afoul of these constitutional principles.

For all of these reasons, this Court should reject plaintiffs' attempt to use Engle to recover damages without ever having proved critical elements of their causes of action and rule that the findings cannot satisfy plaintiffs' burden of proof on any of the elements of their claims.[2]

---

[2] As discussed below (see infra at 9), defendants do not challenge qualifying plaintiffs' use of the Engle jury's findings that "smoking cigarettes cause[s]" a variety of enumerated diseases and that "cigarettes that contain nicotine [are] addictive or dependence producing."

BACKGROUND

Engle was brought on behalf of a class of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." 945 So. 2d at 1256. Over defendants' objections, the trial court implemented a multi-phased trial plan.

Phase I. Phase I addressed supposed "common issues" relating to defendants' conduct and the general health effects of smoking. See Trial Plan. Phase I began in July 1998 and lasted over a year. The parties introduced 2,408 exhibits and presented the testimony of 79 witnesses, recorded on 37,750 transcript pages. Plaintiffs presented numerous theories regarding many different kinds of alleged misconduct by each defendant in designing, manufacturing, and marketing cigarettes at different times over the course of half a century. As the trial court observed, "'trying to figure out what it was about the conduct of [the] defendant[s] that relates to a [particular] individual" would involve consideration of "thousands" or even "hundreds of thousands" of alleged acts raised by the plaintiffs during the course of the Phase I trial. T.35813.

For example, in support of their product-based claims (encompassing negligence, strict liability, and implied warranty), plaintiffs advanced hundreds of different allegations referring to scores of different cigarette types and brands manufactured and marketed at different times over five decades. See, e.g., T.25479-519, 25537-644, 27574-764. Plaintiffs introduced evidence relating to: (1) cigarettes yielding high, medium, low, or ultra low amounts of

tar and nicotine; (2) filtered and unfiltered cigarettes; (3) cigarettes with and without ventilation holes (pores designed to dilute cigarette smoke) placed at different distances from the tip; (4) cigarettes with and without nicotine; (5) cigarettes containing different flavors, ingredients, and leaf blends; (6) cigarettes processed with ammonia compounds or containing particular tar-to-nicotine ratios; and (7) brands advertised with different slogans and images. Id.

The range of alleged defects associated with these many products was equally diverse. For example, plaintiffs alleged that: (1) certain cigarettes used genetically engineered high nicotine tobacco; (2) ammonia was used in certain cigarettes to cause nicotine to reach the brain faster; (3) certain cigarettes burned too hot; (4) ventilation holes in filtered cigarettes were placed in the wrong location; (5) unfiltered cigarettes had higher tar and nicotine yields; (6) certain cigarettes contained different harmful components, additives, and flavoring agents; (7) cigarettes containing nicotine are addictive; (8) the defendants manipulated nicotine levels in different types of cigarettes to keep smokers addicted; and (9) cigarettes had no warning labels before 1966 and inadequate warning labels between 1966 and July 1, 1969. See Engle Fla. Class Mem. of Law in Opp'n to Mot. for Directed Verdict on the Issue of Strict Liability at 3.

Plaintiffs likewise contended that a wide variety of conduct by defendants was negligent Among other things, they argued that defendants (1) failed to warn that cigarettes are addictive, (2) failed to warn that cigarettes cause disease, (3) failed to warn that

cigarette smoke contains numerous carcinogens, (4) negligently misrepresented that cigarettes are not addictive, (5) negligently misrepresented that cigarettes have not been scientifically proven to cause disease, (6) manipulated nicotine levels, (7) added substances to cigarettes to enhance the addictive impact of nicotine, (8) marketed light cigarettes that were designed to deliver equivalent or greater doses of nicotine than regular cigarettes, and (9) created the false impression that light cigarettes had less tar and nicotine than was actually the case when smoked. See Engle Fla. Class Mem. of Law in Opp'n to Motion for Directed Verdict on Conspiracy, Negligence, and Warranty at 28-30.

Similarly, in support of their fraud claims, plaintiffs introduced thousands of discrete communications in diverse media over decades — from tobacco advertisements and promotional materials to public statements by tobacco companies or industry organizations in trade journals, congressional testimony, regulatory submissions, newspapers, and magazines — that allegedly misrepresented information. See, e.g., T.11707-11, 11746-48, 11751-54, 11763-67, 11823-24, 11831-35, 19656-72, 19685-86, 19718-20, 19746-50. In addition, plaintiffs challenged a variety of different alleged marketing practices, such as "youth marketing" (targeting advertising at minors), "minority marketing" (targeting advertising at African-Americans), and "glamour marketing" (the use of attractive models, sports or movie stars, and bucolic images in cigarette advertising). See, e.g., T.11376-78, 17210, 17264-65.

Plaintiffs also alleged, among other things, that defendants failed to disclose: (1) information about whether smoking causes disease or is addictive; (2) information in the 1970s and 1980s that smokers of light cigarettes "compensated" to take in more tar and nicotine by either smoking more intensely or by smoking more cigarettes; (3) information in the 1960s and 1970s about how the nicotine levels of certain cigarettes were allegedly manipulated; and (4) information in the 1970s and 1980s about how compounds such as ammonia were allegedly added to certain cigarettes to make them more addictive. See Pls.' Consol. Resp. to Mots. for Directed Verdict on Behalf of the Council for Tobacco Research & The Tobacco Institute at 25-26. Plaintiffs further alleged that defendants cancelled research that might have produced information about the dangers of smoking and prohibited researchers working for them from publishing the results of various studies. See, e.g., T.15141, 17753-54, 17779-80, 20823-24.

The vast majority of these countless allegations, as well as the evidence presented, were not tied to any particular cause of action.[3] Indeed, plaintiffs typically asserted that their allegations cut across all claims. For example, plaintiffs argued that the youth marketing allegations were "critical on ... the issue of the intent to addict, on fraud, on conspiracy, on strict

[3] In addition, many of the conduct-based allegations related to specific diseases but not to other medical conditions caused by smoking. For example, the Engle plaintiffs' allegations about specific carcinogens in tobacco smoke, see supra at 5, would have no relevance for a progeny plaintiff who suffered heart disease because, by definition, a carcinogen is a substance that causes cancer, not coronary conditions.

liability, on tort and basically every count in our complaint," T.10478-79.

Furthermore, none of plaintiffs' Phase I evidence was linked to the alleged injuries of any identifiable class member. Plaintiffs argued that "issues as to ... individual members of the Florida class... are not relevant during this trial." T.36358-59. The trial court barred all evidence during Phase I relating to any specific class member's knowledge, conduct, medical condition, or other circumstance. T.36746; see also T.36445 (trial court's statement, following reference to the individual plaintiffs, that "we're not here to discuss specific cases"). As plaintiffs summarized Phase I, defendants "will have ample opportunity to place the class representatives and every class member under a microscope at the appropriate time in later phases.... Your Honor announced to all parties that Phase I will not be changed into a trial about smokers." T.8730-31. Because no class representative's or any other class member's claim was tried in Phase I, the trial court refused to instruct the jury on legal causation. T.36317.

Given the diverse allegations and decades of conduct presented in Phase I, defendants requested a verdict form that would specify which of plaintiffs' allegations the jury accepted. T.35915-16. Defendants argued that, because the court contemplated using the findings with future juries in relation to class members' individual claims, and because any instance of claimed tortious conduct could have affected only some but not other class members, the verdict form had to be sufficiently detailed to identify the tortious conduct supporting

the Phase I jury's findings. See Outline of Pls. Proposed Phase I Verdict Form Questions & Certain Defs.' Objections & Counterproposals Thereto; see also T.35953-54 ("If you merely ask this jury whether defendants made a material misstatement of fact, and they are not required to identify what it is, when you go into Phase II and Phase III trials of individual smokers' claims that finding will have no meaning."). The court rejected this request, electing to use a slightly modified version of the plaintiffs' generalized verdict form. T.35893-95, 35952-54; see also Certain Defs.' Objections to the Court's Final Verdict Form for Phase I.

On July 7, 1999, the jury returned its verdict, finding that each defendant:

- "place[d] cigarettes on the market that were defective and unreasonably dangerous" (Finding 3);
- "conceal[ed] or omit[ted] material information, not otherwise known or available, knowing the material was false or misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes" (Finding 4(a));
- entered "into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment" (Finding 5(a));
- sold or supplied "cigarettes that were defective in that they were not reasonably fit for the uses intended" (Finding 6);

- sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by the defendants (Finding 7); and
- "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances" (Finding 8).

Verdict Form for Phase I ("Verdict Form"). The jury further found that (1) "smoking cigarettes cause[s]" a variety of enumerated diseases, but not others (Finding 1); and (2) "cigarettes that contain nicotine [are] addictive or dependence producing (Finding 2)." Id. Defendants do not challenge qualifying plaintiffs' use of these two findings.[4]

Phase II. In Phase II-A, the same jury heard evidence relating to three representatives chosen by plaintiffs' counsel. Notwithstanding the verdicts reached in Phase I, the Phase II-A trial lasted over five months, and the parties presented the testimony of 41 witnesses, generating 11,739 transcript pages. Unlike Phase I, with respect to each of the three plaintiffs, evidence was presented about smoking and medical history, awareness of the risks of smoking, exposure to, and supposed reliance upon, statements made by the defendants, ability to quit smoking, damages, and affirmative defenses. The jury was directed to take into account its Phase I findings. See, e.g., T.50249 (instructing jury to determine whether the three plaintiffs were aware of and reasonably relied to their detriment on "any false statements of material fact which formed the basis

[4] The jury also made several findings that are irrelevant for present purposes because the Engle Court struck them. See 945 So. 2d at 1269.

for your verdict in Phase I"); T.50250 (instructing jury to determine whether any concealment or omission "as determined in Phase I was the legal cause of injury to" the three plaintiffs). The Phase II-A verdict form separately asked the jury to determine for each of the plaintiffs both specific medical causation – i.e., whether smoking cigarettes caused the plaintiff's injury (question 1) and, unlike Phase I, legal causation – i.e., whether the tortious conduct caused the plaintiff's injury (questions 2, 7-8). See Verdict Form for Phase II-A at 2, 10-11.

The jury returned verdicts in Phase II-A in favor of the plaintiffs on most issues and awarded damages for each plaintiff. See Phase II-A Jury Verdict. Subsequently, in Phase II-B, the jury assessed total punitive damages of $145 billion allocated among the defendants. See Phase II-B Jury Verdict.

The Appeal. Before Engle could proceed to Phase III (the trials of individual issues like legal causation for the remaining individual class members), the trial court entered final judgment and defendants appealed. The Third DCA reversed the judgment in its entirety and ordered the class decertified. See Liggett Group, Inc. v. Engle, 853 So. 2d 434,450 (Fla. 3d DCA 2003). The plaintiffs subsequently obtained discretionary review in the Supreme Court, which agreed that the predominance of individual issues and "problems with the three-phase trial plan negate the continued viability of this class action." 945 So. 2d at 1267-68.

At the same time, however, in light of what it characterized as a procedural posture" that was "unique and unlikely to be repeated," the Supreme Court sua sponte declared that "the pragmatic

solution" was to invoke issue certification under Florida Rule of Civil Procedure 1.220(d)(4)(A), which refers to the trial of "particular issues," and preserve certain Phase I findings. Id. at 1269 & n.12. The Court indicated that class members could initiate separate individual actions against the Engle defendants in which the eight findings listed above at pages 7-8 "will have res judicata effect." Id. at 1269.

In declaring that the findings would have "res judicata effect," the Supreme Court repeatedly emphasized that the Phase I jury "did not determine whether the defendants were liable to anyone." Id at 1263. The Court stressed that Phase I "did not consider whether any class members ... were injured by [defendants'] conduct" or address "the degree to which the defendants' conduct was the sole or contributing cause of the class members' injuries." Id. at 1263,1271 (emphases added); see also Merlob Order at 7 (describing decision).

Plaintiffs opposed defendants' motion for rehearing on the preclusive effect to be given to the findings, arguing that defendants' arguments were "premature," sought an "advisory opinion," and "address[ed] events that have not yet occurred and may never occur." Pets.' Fla. Engle Class Am. Resp. To Respondents' Mots. For Rehearing at 5. The defendants thereafter sought U.S. Supreme Court review on two issues; (1) the res judicata ruling violated due process; and (2) the Phase I verdicts were based on preempted theories of liability. Plaintiffs again argued that review was premature because "no court has yet [applied] the [Phase I] findings," and it would be improper to "prejudge whether [the findings] are to be given preclusive

effect in future actions, none of which have been tried." Resps. Brief In Opp'n at 2. The Court denied review. See R.J. Reynolds Tobacco Co. v. Engle, 128 S. Ct. 96 (2007).

ARGUMENT

Florida Rule of Civil Procedure 1.200 grants trial courts broad authority to schedule case management conferences to "coordinate the progress of the action if complex litigation factors are present" and "determine other matters that may aid in the disposition of the action." Fla. R. Civ. P. 1.200 (a)(3), (a)(10). As the commentary accompanying the rule makes clear, "Rule 1.200 is... similar to Federal Rule 16." Fla. R. Civ. P. 1.200 (Author's Comment). Federal courts have used Rule 16 motions to determine the preclusive effect of prior litigation, recognizing that such preclusion issues "control many aspects of the proceedings in substantial respects, particularly the scope of the discovery ... and the scope of the evidence [to be presented at] the trial" and therefore should be decided at the earliest possible stage of the proceedings. In re Microsoft Corp. Antitrust Litig., 21A F. Supp. 2d. 741, 742 (D. Md. 2003), review granted and decision reversed on other grounds, 355 F.3d 322 (4th Cir. 2004); see also Merlob Order (granting Rule 16 motion to determine preclusive effect of findings).

The parties here disagree as to the effect of the findings and their proper role in this case. Resolution of this key threshold issue would greatly "aid in the disposition" of this case and promote the efficient and effective resolution of this lawsuit As was the case in Microsoft, the Court's ruling regarding the preclusive effect of the findings here

would impact almost every aspect of the case, from the scope of discovery and fact and expert testimony to the trial plan, jury instructions, and verdict form. Deciding the issue now would save time and expense for both the parties and the Court, who could then approach the pre-trial and trial stages of the lawsuit with a clearer understanding of the role of the findings.

I. PLAINTIFFS' PROPOSED USE OF THE FINDINGS IS CONTRARY TO *ENGLE* AND WELL-ESTABLISHED FLORIDA PRECLUSION LAW

A. *Engle* Holds That Plaintiffs Must Establish Legal Causation

In Engle, the Supreme Court expressly recognized that "issues such as legal causation" were not resolved in Phase I and remain to be tried in progeny cases. 945 So. 2d at 1268 (emphasis added). "Legal causation" is another term for "proximate causation." See, e.g., State v. Hubbard, 751 So. 2d 552, 566-67 (Fla. 1999). A showing that smoking cigarettes (the mere sale of which is not a tort)[5] caused a plaintiff's injuries is not sufficient to satisfy legal causation. Instead, legal causation is "concerned with whether

---

[5] See, e.g., Houdaille Indus., Inc., v. Edwards, 374 So, 2d 490, 493 (Fla. 1979) (noting that a manufacturer is "not an insurer for all physical injuries caused by its product" and holding that "[f]or there to be a recovery in an action for implied warranty or strict liability, it still must be shown that plaintiff's injury was proximately caused by some defect in the product"); Liggett Group, Inc. v. Davis, 973 So. 2d 467, 472-73 (Fla. 4th DCA 2007) (claim that defendant should not make cigarettes because of smoking's dangers conflicts with Congressional policy against a ban on cigarettes and is preempted), review granted, 978 So. 2d 160 (Fla. 2008).

and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred." McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992) (emphasis added); see also id. at 503 (causation exists only "if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question") (emphasis added).[6]

As the Engle Court explained, Phase I did not address legal causation because it "did not consider whether any class members relied on [defendants']

---

[6] See also, e.g., Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003) ("Traditionally, a cause of action based on negligence comprises ... reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause,' and which includes the notion of cause in fact.") (emphasis added); Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774, 776 (Fla. 1st DCA 1994) ("The proximate causation element 'is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred.'") (emphasis added); Stahl v. Metro. Dade County, 438 So. 2d 14, 17 (Fla. 3d DCA 1983) ("a negligence action is no different from any other tort action as clearly there can be no liability for any tort unless it be shown that the defendant's act or omission was a cause-in-fact of the plaintiff's claimed injuries.") (emphasis added); Fellows v. Citizens Fed Savs. & Loan Ass'n of St. Lucie County, 383 So. 2d 1140, 1141 (Fla. 4th DCA 1980) ("Proximate cause means that the alleged wrong of the defendant caused the damage plaintiff claims.") (emphasis added); Fla. Standard Jury Instructions in Civil Cases, Nos. 5.1a & 5.2a (instructing jury to decide whether "it can reasonably be said that, but for the negligence [or the defect], the injury would not have occurred"). See generally 6 Fla. Prac. § 3.2 (proximate causation requires the plaintiff to show "that the wrongful conduct in fact caused his injuries") (emphasis added).

misrepresentations or were injured by [defendants'] conduct" or address "the degree to which the defendants' conduct was the sole or contributing cause of the class members' injuries." 945 So. 2d at 1263, 1271 (emphases added); see also id. at 1270 (all issues of causation" have been left for the progeny juries) (emphasis added) (quotations and citations omitted); id. at 1263 ("the Phase I jury 'did not determine whether the defendants were liable to anyone.'") (citation omitted) (emphasis in original). Indeed, the Engle Court specifically acknowledged that, notwithstanding the findings, the plaintiffs whose claims were tried in Phase II-A were required to prove legal causation and reliance:

> the Phase I verdict did not constitute a 'finding of liability' under Ault. This is evidenced by the fact that had the jury found for Tobacco on the legal cause and reliance issues during Phase II, there would have been no opportunity for the jury to award the named plaintiffs damages of any type.

Id. at 1263 (emphasis added).

The Phase I and II-A proceedings confirm Engle's recognition that legal causation was not adjudicated in Phase I for any plaintiff. Plaintiffs specifically requested a jury question on legal causation in Phase I, Proposed Verdict Form (Draft 2) Q. 3, 6, which the trial court rejected. See Phase I Verdict Form (containing no question regarding legal causation); see also Trial Plan (declaring that individual issues like reliance were to be tried in Phase II-A). And, as discussed above, the Phase II-A Verdict Form required the plaintiffs whose claims were tried in that phase to prove both specific medical causation

(question 1) and legal causation (questions 2, 7-8). See supra at 8. Indeed, class counsel themselves conceded in oral argument before the Supreme Court that there was "no question" that the remaining plaintiffs would need to prove legal causation and reliance. Transcript of Oral Argument at 5 (Ex. 2).

Thus, contrary to plaintiffs' characterization in their complaint, Engle itself establishes that progeny plaintiffs must prove for each of their claims that specific tortious conduct was the legal cause of their injuries. The trial court proceedings in Engle and class counsel's own statements confirm the correctness of that holding. Relieving plaintiffs of the burden of proving legal causation would permit them to recover under a lesser showing than the individual plaintiffs whose claims were tried in Engle, as those plaintiffs were clearly required to prove both medical and legal causation.

B. Florida Preclusion Law Also Prevents Plaintiffs From Using The Findings To Establish The Elements Of Their Claims

The Engle Court did not purport to change preclusion law in any respect or guarantee that every class member was assured a multi-million dollar verdict even if they were not injured as a proximate result of conduct found to be tortious. Instead, the Court merely stated that the findings would have undefined "res judicata effect" and, in keeping with ordinary practice,[7] left to future courts (including this

[7] See, e.g., Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F.2d 522, 525 (7th Cir. 1985) ("the first court does not decide the preclusive effect of its judgments . . . the [subsequent] court must decide for itself what matters were settled in the first case"); 18 Charles Alan Wright, Arthur R. Miller & Edward

Court) the task of determining the precise impact of the findings in their cases, 945 So. 2d at 1271. As Judge Ungaro recognized, even if given preclusive effect, the findings are insufficient to establish any element of plaintiffs' claims. Merlob Order at 8.

1. The Res Judicata Effect Of *Engle* Is Governed By Issue Preclusion

The Engle Court stated that certain findings would be given "Res judicata effect." Id. at 1269. "Res judicata" is an umbrella term that is used "to encompass both issue preclusion and claim preclusion." Hochstadt, 588 So. 2d at 53 n.1.[8]

H. Cooper, Federal Practice and Procedure § 4405 ("Ordinarily both issue preclusion and claim preclusion are enforced by awaiting a second action in which they are pleaded and proved by the party asserting them . . . [t]he first court does not get to dictate to other courts the preclusion consequences of its own judgment") (collecting cases).

[8] See also, e.g., State v. Freund, 626 So. 2d 1043, 1045 n.l (Fla. 4th DCA 1993) ("Collateral estoppel is an aspect of res judicata."); Tyson v. Viacom, Inc., 890 So. 2d 1205, 1211 (Fla. 4th DCA 2005) (same); Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648, 653 n.10 (Fla. 3d DCA 1982) (same); Taylor v. Sturgell, 128 S. Ct. 2161, 2171 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'"); Stevens v. Zant, 968 F.2d 1076, 1088-89 (11th Cir. 1992) (same); 18 Charles Alan Wright, Arthur R Miller & Edward H. Cooper, Federal Practice and Procedure § 4402 (although there has been "confus[ion]" and some courts have used "res judicata" to refer to claim preclusion, "substantial progress has been made toward a convention that the broad 'res judicata' phrase refers to the distinctive effects of a judgment separately characterized as "claim preclusion' and 'issue preclusion'"); Black's Law Dictionary (8th ed. 2004) ("res judicata" "refer[s] to all of the ways in which one judgment will have a binding effect on another").

Indeed, courts in Florida and elsewhere have specifically used the phrase "res judicata effect" or virtually identical terms to refer to issue preclusion. Dep't of Revenue v. Accredited Sur. & Cas. Co., 690 So. 2d 614, 616 (Fla. 5th DCA 1997) (equating terms "collateral estoppel or res judicata effect" in addressing issue preclusion).[9]

Claim preclusion and issue preclusion are distinct. Claim preclusion applies when a plaintiff pursues to judgment a "cause of action" or "claim," such as negligence, and sues subsequently. When that occurs, the outcome in the first case binds the parties in subsequent litigation with respect to the particular theory of liability adjudicated and other possible theories stemming from the "transaction . . . out of which the action arose." Signo v. Fla. Farm Bureau Cas. Ins. Co., 454 So. 2d 3, 5 (Fla. 4th DCA 1984). Once the judgment is entered, the plaintiff "cannot maintain an action upon any part of the original cause of action." Scott v. Rosenthal, 118 So. 2d 555, 558 (Fla. 3d DCA 1960). Claim preclusion thus prohibits plaintiffs' splitting claims across successive

---

[9] See also, e.g., Sibley v. Sibley, 885 So. 2d 980, 982 (Fla. 3d DCA 2004) (stating, in addressing whether a party could challenge an earlier decided issue, that the prior decision had "effect... as res judicata"); Utterback v. Starkey, 669 So. 2d 304, 305 (Fla. 3d DCA 1996) (same); McDougald v. Jenson, 786 F.2d 1465, 1485 (11th Cir. 1986) ("issue preclusion has long been applied to afford res judicata effect"); In re Simon II Litig., 211 F.R.D. 88, 109-10 (E.D.N.Y. 2002) (certifying, similar to the trial court in Engle, a class action for purposes of determining liability for, and the amount of, punitive damages and stating that, in follow-on trials, common findings could be given "res judicata effect" by "utilizing res judicata on issue principles") (emphases added), vacated and remanded, 407 F.3d 125 (2d Cir. 2005).

lawsuits — i.e., it "bars from subsequent litigation all claims that were raised or could have been raised" in the earlier lawsuit. Felder v. State Dep't of Mgmt. Servs., 2008 WL 351049, at *2 (Fla. 1st DCA 2008). By contrast, issue preclusion bars the "relitigation of the same issues between the same parties" in subsequent proceedings. Bettcher v. Wadsworth, 825 So. 2d 438, 440 (Fla. 2d DCA 2002) (emphasis added). The critical question is whether the issue for which preclusion is sought was actually and necessarily decided in the previous action. Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002).

It is clear from context and the language of the opinion that the Engle Court afforded preclusive effect only to certain issues litigated in Phase I, and thus was referring to issue, not claim, preclusion. Indeed, the Court explained that the findings did not resolve claims because Phase I "did not determine whether the defendants were liable to anyone." 945 So. 2d at 1271 (emphasis in original). Rather, "[i]n Phase I, the jury decided issues related to [defendants'] conduct." Id. at 1263; see also id. at 1270 (Phase I tried "issues common to all class members") (emphasis added). As noted above, see supra at 7, the Engle trial court even went so far as to prohibit consideration of individual claims in Phase I. The only claims resolved to final judgment in Engle were the individual claims of the three representatives -- and their claims were not resolved until the facts specific to their individual cases were tried in Phase II-A. Id. at 1274-76.

Moreover, the Engle Court justified giving the findings preclusive effect by invoking issue

certification principles under Rule 1.120(d)(4)(A). 945 So. 2d at 1268. That rule refers to the class-wide trial of "particular issues" not claims. Fla. R. Civ. P. 1.120(d)(4)(A) (emphasis added). And courts have repeatedly recognized that, under issue certification, the issues tried class-wide are given issue preclusive effect in the subsequent actions brought by individual class members. See, e.g., Waters v. Int'l Precious Metals Corp., 172 F.R.D. 479, 501 (S.D. Fla. 1996) (contemplating that, following decertification, individual class members would pursue claims individually "with the benefit of collateral estoppel as to the issues that were decided class wide") (emphasis added).

Indeed, if the Engle Court were referring to "claim preclusion," that would mean that there had been a final judgment on plaintiffs' and all class members' claims and, as a result, these plaintiffs (and others) would be barred from asserting any subsequent causes of action -- including their lawsuits here -- based on the same underlying facts that gave rise to Engle. See Felder, 2008 WL 351049, at *2 (claim preclusion bars "claims that were raised or could have been raised" in the first lawsuit); Gillespie v. Crawford, 858 F.2d 1101, 1102-03 (5th Cir. 1988) ("individual class member should be barred from pursuing individual lawsuit" because it involved a claim "within the subject matter of the class action" that had reached final judgment).

2. Issue Preclusion Applies Only To Identical Issues That Were Necessarily Decided In The Prior Proceeding

The party seeking to claim the benefit of issue preclusion (here, plaintiffs) bears the burden of proof.

See, e.g., Campbell v. State, 906 So. 2d 293, 295 (Fla. 2d DCA 2004); Excel Ins. Co. v. Brown, 406 So. 2d 534, 536 (Fla. 5th DCA 1981). This means that plaintiffs must prove, among other things, (1) that "an identical issue" was "presented in the prior proceeding" and (2) that the issue was "a critical and necessary part of the prior determination," Goodman, 804 So. 2d at 546-47; see also , e.g., Cook v. State, 921 So. 2d 631, 634 (Fla. 2d DCA 2005); State v. Strong, 593 So. 2d 1065, 1067 (Fla. 4th DCA 1992). These dual requirements are grounded in the well-established principle that the application of issue preclusion is improper where it is impossible to ascertain what issues were actually decided in a prior proceeding. See, e.g., Acadia Partners, L.P. v. Tompkins, 673 So. 2d 487, 489 (Fla. 5th DCA 1996) (preclusion was improper because "it is impossible to determine which finding the jury made from the face of the verdict alone"); Sun State Roofing Co., Inc. v. Cotton States Mut. Ins. Co., 400 So. 2d 842, 844 (Fla. 2d DCA 1981); Seaboard Coast Line R.R. Co. v. Indust. Contracting Co., 260 So. 2d 860, 865 (Fla. 4th DCA 1972); Stone v. Stone, 111 So. 2d 486, 489 (Fla. 3d DCA 1959).[10]

---

[10] See also, e.g., S.E.L Maduro (Fla.), Inc. v. M/V Antonio de Gastaneta f/k/a M/V Maria Antonia, 833 F.2d 1477, 1483 (11th Cir. 1987) ("If the jury could have premised its verdict on one or more of several issues, then collateral estoppel does not act as a bar to future litigation of the issues."); Dodge v. Cotter Corp., 203 F.3d 1190, 1198 (10th Cir. 2000); Mitchell v. Humana Hosp.-Shoals, 942 F.2d 1581, 1582-84 (11th Cir. 1991); Lory v. Ansari, 817 F.2d 1521, 1524-25 (11th Cir. 1987); SEC v. Monarch Funding Corp., 192 F.3d 295, 309 (2d Cir. 1999). See generally 18 James W. Moore, Moore's Federal Practice § 132.03[2][g] (3d ed. 1998) (collecting cases and noting that "[w]hen a court cannot ascertain what was litigated and

The Tenth Circuit's decision in Dodge provides a particularly relevant illustration of this principle. In Dodge, community residents initially sued mining operators, claiming exposure to hazardous substances. 203 F.3d at 1194, Plaintiffs alleged eleven negligent acts taking place over 40 years. Id. at 1193, 1196. Eight "bellwether" plaintiffs were selected to have their claims tried. Id. at 1196. The jury was asked "Was defendant Cotter negligent?" and answered "Yes" — without identifying the particular alleged act(s) found to be negligent. Id. at 1195 & n.4.

A second group of plaintiffs subsequently filed a virtually identical complaint asserting the same negligent acts and claiming that they were entitled to preclusion because the "pure issue of negligence" had already been decided. Id. at 1195-97 & n.7. Rejecting this argument, the Tenth Circuit concluded that the plaintiffs had not satisfied the identicality requirement. Given that "[t]he jury was not instructed on the specific duty allegedly breached ... [and that] the verdict form [did not] specify what negligent act formed the basis of the general finding of negligence," it was "not possible to know the compass of the [first] jury's finding of negligence." Id. at 1197-98. As the court summarized, "our concern is

---

decided, issue preclusion cannot operate"); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4420 ("if there is no showing as to the issues that were actually decided, there is no issue preclusion"); 21A Federal Procedure, L. Ed. § 51.263 (2006) ("if a decision could have been rationally grounded upon an issue other than that which [a party] seeks to foreclose from consideration, relitigation of the issue is not precluded under the doctrine of issue preclusion").

not that the jury did not find negligence on one or more specific allegations, but that the general finding under the negligence instruction fails to identify what the jury found to be sustained by the evidence." Id. at 1198.

Similarly, in Seaboard, the Fourth DCA considered whether a jury finding "in favor of the defendant" in a prior negligence claim could be given preclusive effect. 260 So. 2d at 864-65. Noting that "[s]uch a finding could have been premised upon the jury believing that [the defendant] was not negligent or that [the defendant] was negligent but that [the plaintiff] was guilty of contributory negligence," the court concluded that there could be no preclusion because "[a]bsent a special verdict on the issue of negligence or contributory negligence it is impossible to ascertain with any reasonable degree of certainty as to what issue was adjudicated in the former suit except to say that the jury found in favor of [the defendant]." Id. at 865. Thus, these and countless other decisions and authorities cited supra at 18 & n.10 establish that a precondition for use of a verdict for offensive preclusion purposes is the ability to identify the tortious conduct that was actually decided.

3. **Even If Given Preclusive Effect, The Findings Are Insufficient To Satisfy Elements Of Plaintiffs' Claims**

The principles applied in cases like Dodge and Seaboard apply here to prevent plaintiffs from using the findings to establish that defendants committed a specific tortious act and that this act was the legal cause of plaintiffs' injuries. The central flaw in plaintiffs' position is that – as in Dodge and Seaboard

– the findings do not specify which of the many disparate and diverse acts of conduct at issue during the year-long trial the jury found to be tortious. Accordingly, the findings establish no more than a few general propositions – specifically, that defendants sold a defective product, acted negligently, breached a warranty, concealed some fact, and engaged in a conspiracy at some point during a 50-year period.

Consider, for example, plaintiffs' design defect claims, which rely on the finding that "[o]ne or more of the Defendant Tobacco Companies placed cigarettes on the market that were defective and unreasonably dangerous." Verdict Form, Question No. 3. As phrased, that question did not require the jury to find that every cigarette on the market was defective. Rather, the jury could return a plaintiffs' verdict so long as it determined that the defendant had placed on the market at some point in time a single brand that had some defect in its design or warning.

There is no way even to "guess" the basis of the Engle jury's defect finding. As discussed supra at 4-7, the Engle plaintiffs advanced hundreds of different factual allegations referring to scores of different cigarette types and brands manufactured and marketed at different times over the course of five decades. Given the variety of different theories that the jury could have relied on – for example, theories related to cigarettes with and without filters, nicotine, and ammonia – there is no way to identify the specific defect that formed the basis of the finding or to link the finding to the defect that may have caused any individual plaintiffs injuries. As a result,

even if given preclusive effect, the finding is incapable of satisfying plaintiffs' burden of establishing that they smoked cigarettes that were defective and that this defect was the legal cause of his injuries. The same principles apply to each of plaintiffs' other claims.

Indeed, the Engle trial court itself recognized the need for the jury adjudicating a specific plaintiff's claims to know precisely what conduct was tortious in order determine whether defendants committed tortious acts that legally caused that plaintiff's injuries. In Phase II-A, the same jury that tried Phase I was instructed to determine, for example, whether any concealment or omission "as determined in Phase I was the legal cause of injury to" the three named plaintiffs. T.50250 (emphasis added); see also Verdict Form For Phase II, Question 4 (referring to verdict in Phase I). Because the same jury heard both phases, it knew what conduct it had found tortious in Phase I. No similar instruction can be given here, because it is impossible for these juries to know which specific conduct the Phase I jury found tortious.

Finally, these problems with the use of the Phase I findings to establish elements of plaintiffs' claims are compounded by many plaintiffs' intentions to seek punitive damages. See, e.g., First Amended Complaint, Gray v. R.J. Reynolds Tobacco Co., ¶¶ 65, 66. The findings are insufficient for punitive damages because they were made under the "greater weight of the evidence" standard, T.37578-79, and not the required "clear and convincing evidence" standard. Fla. Stat § 768.725. Moreover, the law is clear that any punitive damages award must be

based solely on unlawful conduct found to have harmed plaintiffs and their decedents. Due process "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007); see also State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 420 (2003). Because, as discussed above, the findings provide no basis for determining the specific conduct that was tortious and allegedly caused harm to plaintiffs, those findings cannot constitutionally support a punitive damages award.[11] Instead, to resolve plaintiffs' claims for punitive damages consistent with due process, the jury here must determine the specific conduct, if any, that was unlawful and harmed plaintiffs and their decedents. Thus, even if plaintiffs were correct that the findings could establish elements of compensatory liability, to the extent plaintiffs are permitted to seek punitive

---

[11] Plaintiffs' proposed use of the findings would also create significant problems in addressing the issue of comparative fault, which plaintiffs themselves assert See, e.g., Complaint, Blackwell v. R.J. Reynolds Tobacco Co., ¶ 25. To determine comparative fault the jury must compare the fault of the plaintiff with the fault of the defendants, and "this cannot be done without complete information as to the quantity, quality, nature and degree of the defendant's conduct so that the jury knows just what to 'compare' with its assessment of the plaintiff's." Metro. Dade County v. Cox, 453 So. 2d 1171, 1173 (Fla. 3d DCA 1984). Here, the findings do not allow a jury to compare the parties' fault because the findings do not inform the jury what specific conduct was found wrongful. Although the Engle Court held that trying comparative fault in subsequent trials in front of new juries would not violate article I, section 22 of the Florida Constitution, 945 So. 2d at 1270, that holding does not address what evidence will have to be admitted in an individual trial in order to adjudicate comparative fault.

damages,[12] "little court time would be saved, because… the same facts, or most of them, that would have been relevant on the issue of liability would still have to come in and be considered by the court or the jury on the issue of exemplary damages." Setter v. A.H. Robins Co., 748 F.2d 1328, 1331 (8th Cir. 1984).[13]

To be sure, contrary to Judge Ungaro's ruling, one trial court has concluded that the findings relieve other progeny plaintiffs of their burden of establishing for any of their claims the specific tortious conduct that caused their injuries. See Order Regarding the Effect Of The Engle Phase I Findings On Pending Cases (Ex, 3). This order is based on at least two fundamental legal errors. First, that court concluded that the Engle court was

---

[12] Defendants reserve the right to argue that, if plaintiffs are allowed to use the findings to establish elements of their claims, their claims for punitive damages are foreclosed because, among other reasons, there is no way to ensure that the basis of such an award would be limited to conduct that harmed the plaintiffs.

[13] Although the findings cannot establish elements of plaintiffs' claims, they may still have some effect. For example, as discussed above, the findings could establish that smoking causes 20 separate diseases and is addictive. In addition, to the extent that the remaining findings can be preserved consistent with defendants' constitutional rights, see infra at 23-26, the findings could establish that some undefined tortious acts occurred and thus foreclose arguments that defendants never did anything wrong" or "never manufactured a defective product." Of course, a determination that some tortious acts occurred falls short of plaintiffs' extreme proposal for use of the findings, but that is all that the findings establish, and it would be unfair, unlawful, and unconstitutional to rewrite the findings and impose liability on grounds that the Engle jury did not actually find wrongful.

applying claim preclusion, not issue preclusion. Id. at ¶ 1 & n.1. This is wrong for the reasons discussed above at Part I.B.1. Second, the court acknowledged that plaintiffs must still prove legal causation, but concluded summarily that "medical causation and legal causation are one [and] the same." Id. at ¶ 5. This is directly contrary to Engle and established authority, which both make clear that legal causation refers to the link between the conduct found to be tortious and the plaintiffs claimed injury -- not simply to a physical link between cigarettes smoking and a plaintiff's injury. See supra at I.A.[14]

II. APPLYING THE FINDINGS TO ESTABLISH ELEMENTS OF PLAINTIFFS' CLAIMS WOULD VIOLATE DEFENDANTS' FEDERAL AND STATE CONSTITUTIONAL RIGHTS

The U.S. Supreme Court has held that the "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption" of a due process violation. Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994). The Oberg Court struck on due process grounds an Oregon procedure that, in most circumstances, prohibited judicial review of the amount of punitive damages awarded. Explaining that "traditional practice provides a touchstone for constitutional analysis," the Court made clear that it would not "hesitate[]" to find "proceedings violative of due process" in which "a party has been deprived of

[14] The order also did not address the constitutional issues before this Court, discussed infra at 23-26, or the impact of plaintiffs' concealment allegations, the assertion of comparative fault, or plaintiffs' claims for punitive damages on the use of the Phase I findings.

liberty of property without the safeguards of common-law procedure." Id. at 430 (citation omitted).

Consistent with the principles articulated in Oberg, the U.S. Supreme Court has repeatedly employed due process principles to prevent state courts from casting aside long-established limitations on the use of res judicata. See, e.g., Richards v. Jefferson County, 517 U.S. 793, 797 (1996) ("extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character'") (citation omitted); Hansberry v. Lee, 311 U.S. 32, 40 (1940) (due process was violated when a state court failed to heed the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party").

In particular, the U.S. Supreme Court has held that a determination in an earlier judicial proceeding cannot be given preclusive effect in a later case unless "it is certain that the precise fact was determined by the former judgment" De Sollar v. Hanscome, 158 U.S. 216, 221 (1895). The Court has thus refused to give preclusive effect to a judgment where the generality of the verdict rendered the underlying findings uncertain. See, e.g., Russell v. Place, 94 U.S. 606, 608 (1876) (preclusion is unavailable "if it appear[s] that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered"). This rule is founded on due process principles. In Fayerweather v. Ritch, 195 U.S. 276 (1904), the

Court held, in the context of a due process challenge to the res judicata application of a state court judgment, that "where . . . testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment,. . . the prior decision is not an adjudication upon any particular issue or issues, and the plea of res judicata must fail." Id at 307. And this long-standing rule is also the established modern rule that is universally accepted in federal and state courts and in leading treatises. See supra at 18 & n.10 (collecting authority).

In light of this case law, application of the findings as contemplated by plaintiff would violate due process. As discussed above, see supra at 4-8, 20-23, each finding could be based on any single allegation or group of allegations out of hundreds or thousands asserted during Phase I. There is simply no way to know what specific conduct formed the basis of the findings.

Accordingly, as the Fayerweather Court held, "the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues; and the plea of res judicata must fail." 195 U.S. at 307. Giving preclusive effect to a finding that could have been based on any one of many different allegations — none of which can be connected to the plaintiff here — would be to abrogate "well-established common-law protection against arbitrary deprivation of property," in violation of due process. Oberg, 512 U.S. at 430. The Engle decision should be interpreted in a manner to avoid such constitutional problems. Cf. State v. Giorgetti, 868 So. 2d 512, 518

(Fla. 2004) (statutes should be read "to avoid any potential constitutional quandaries").

Any suggestion that the Court should presume that the jury found in favor of the Engle plaintiffs with respect to all allegations of misconduct would be wholly arbitrary, allow defendants to be held liable for conduct directed at third parties, and thus also violate due process. Such a presumption would ignore the questions actually posed in Engle – none of which required the jury to find that all of the allegations were tortious before answering "yes." See supra at 7-8. And it would violate Florida and federal constitutional protections against arbitrary irrebuttable presumptions. See, e.g., Agency for Health Care Admin v. Associated Indus, of Fla., Inc., 678 So. 2d 1239, 1254 (Fla. 1996) (striking state statute, on due process grounds, which effectively imposed an irrebuttable presumption against defendants that all individual Medicaid payments at issue were proper); Pub. Health Trust of Dade County v. Valcin, 507 So, 2d 596, 599 (Fla. 1987) (striking a "conclusive presumption"). Because it is impossible to know the basis for the Phase I findings, it would be impossible for defendants to rebut a presumption, that the Engle jury found in plaintiffs' favor on all allegations.[15]

---

[15] Defendants submit that applying preclusion here would be unconstitutional for two additional reasons. Defendants recognize that this Court may believe that it lacks authority to rule in favor of defendants on these issues in light of Engle, but raise them in an abundance of caution to allow the Court to consider them and to ensure that they are preserved should an appeal be necessary. First, the findings cannot be accorded preclusive effect because they are the product of trial and appellate proceedings that did not give defendants a "full and

In sum, the Engle Court never authorized (and could not have authorized) courts to provide any greater preclusive effect than due process would permit, and due process forbids plaintiffs from using the findings conclusively to establish the elements of their claims.

CONCLUSION

Based on the foregoing arguments and authorities, defendants respectfully request that the Court enter an order specifying that the Engle Phase I findings cannot be used to establish any element of plaintiffs' claims in this case.

Respectfully submitted,

---

fair opportunity to litigate." Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982) ("[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation"). Defendants did not have a full and fair opportunity to litigate because of numerous trial court errors that denied defendants due process and because the appellate courts failed to address many of those errors even though defendants raised them. Second, treating the findings as determining elements of plaintiffs' claims would violate due process and article I, section 22 of the Florida Constitution by allowing two separate juries to examine factually interwoven issues of liability, comparative fault, and punitive damages in a manner likely to produce uncertainty and confusion. See, e.g., Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931). These arguments are set forth in detail in briefs provided on the DVD-ROM accompanying this memorandum and are incorporated by reference herein. See Combined Initial Brief Of All Appellants Other Than Liggett and Brooke (in the Court of Appeals) at 34-168; Brief On The Merits Of All Respondents Other Than Liggett And Brooke (in the Florida Supreme Court) at 49-50; Respondents' Motion For Rehearing (in the Florida Supreme Court).

s/ [illegible]
P. MICHAEL PATTERSON, ESQ. (FBN: 175308)
E-mail: pmp@esclaw.com
JOSEPH A. PASSERETTI, ESQ. (FBN: 860751)
E-mail: jap@esclaw.com
EMMANUEL SHEPPARD CONDON
30 South Spring Street
Pensacola, Florida 32502
Telephone: (850) 433-6581
Facsimile: (850) 434-5856
Counsel for Philip Morris USA Inc.

RAFAEL CRUZ-ALVAREZ (FBN: 989861)
E-mail: ralvarez@shb.com
SHOOK, HARDY & BACON L.L.P.
201 South Biscayne Blvd., Suite 2400
Miami, FL 33131
Telephone: (305) 358-5171
Facsimile: (305) 358-7470
Counsel for Philip Morris USA Inc. and Lorillard Tobacco Company

Stephanie E. Parker, Esq.
John F. Yarber, Esq.
John M. Walker, Esq.
JONES DAY
120 Peachtree Street, NE

Suite 800
Atlanta, GA 30309-3053
Telephone: 404-521-3939
Facsimile: 404-581-8330
Counsel for R.J. Reynolds Tobacco Company

APPENDIX J

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, ESCAMBIA COUNTY, FLORIDA
CIVIL DIVISION

MATHILDE C. MARTIN, as personal representative of the Estate of BENNY RAY MARTIN, and individually as surviving spouse, Plaintiff v. R.J. REYNOLDS TOBACCO COMPANY, Defendant.	CASE NO. 2007-CA-2520-A

DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S MOTION TO SET ASIDE THE PHASE I VERDICT, FOR JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF PLAINTIFF'S CASE IN PHASE I, FOR NEW TRIAL, AND ALTERNATIVELY FOR REMITTITUR OF THE COMPENSATORY DAMAGES AWARD

* * *

III. PLAINTIFF'S MISUSE OF THE *ENGLE* FINDINGS ENTITLES REYNOLDS TO A NEW TRIAL

Essential elements of Plaintiff's claims were never submitted for decision by the jury in this case because she was permitted to rely instead on findings preserved by the Florida Supreme Court in Engle v.

Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006). The Engle findings, however, cannot establish any element of Plaintiff's claims. The Florida Supreme Court itself pointed out that the Engle findings do not even address—much less resolve in favor of any individual plaintiff—the essential elements of legal causation and reliance. See id. at 1263. Moreover, the Engle findings are too generalized and overbroad to prove any particular fact pertaining to Plaintiff's claims. According the generic Engle findings preclusive effect with respect to the individualized elements of Plaintiff's claims (as the Court did here) violates the Engle decision itself, bedrock principles of Florida preclusion law, and Reynolds' due process rights.

Because the Engle findings do not establish the essential individualized elements of Plaintiff's claims that were never submitted to the jury for decision, the verdict in her favor is contrary to the manifest weight of the evidence, and Reynolds is entitled to a new trial on all claims.

A. The *Engle* Findings Do Not Establish Fraudulent Concealment

Fraudulent concealment requires proof of (1) a duty on the part of Reynolds to make material disclosures to Mr. Martin; (2) a knowing suppression or omission of material information from a statement by Reynolds; (3) intent on the part of Reynolds to induce Mr. Martin to act based on the suppression or omission; and (4) a resulting injury to Mr. Martin caused by actions he took in justifiable reliance on the suppression or omission. See Wieczoreck v. H&H Builders, Inc., 475 So. 2d 227, 228 (Fla. 1985); Fla. Standard Jury Instructions in Civil Cases, MI 8.1(a).

Because the fraud claim also serves as the underlying tort for Plaintiff's conspiracy claim, she was required to establish these elements as to one or more of the parties listed under the conspiracy finding on the Engle Phase I verdict form.

Here, however, the first three elements were never submitted to the jury for decision.[9] Instead, the Court instructed the jury over Reynolds' objection that Reynolds "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." Final Instruction No. 6. This finding cannot, however, satisfy the missing essential elements for fraudulent concealment.

First, the Engle fraudulent concealment finding is fatally flawed on its face. The finding states that Reynolds "conceal[ed] or omit[ted] material information, not otherwise known or available, knowing the material was false and misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes." Engle Verdict Form for Phase I, Question 4a (emphasis added) [Exhibit D]. It violates Florida law and common sense to brand as fraudulent the concealment of "false and misleading" information. Even the Engle trial court recognized

---

[9] The fourth element was submitted to the jury in an erroneous instruction that intermingled the reliance requirements for concealment and conspiracy. See Final Instruction No.16. As a result, it is impossible to tell from the verdict form whether the jury found that Mr. Martin detrimentally relied on any alleged concealment or omission by Reynolds.

that the question was problematic: "It's curious wording that counsel points out. When you look at it, you say: How can you be accused of concealing information that you knew was false?" Engle Trial tr. at 48294 [Exhibit E]. The Engle jury's answer to this nonsensical question can have no role in this proceeding, but the jury was instructed that, upon a finding that Mr. Martin was a class member, the finding "may not be denied or questioned and . . . must carry the same weight [it] would have if [the Martin jury] had determined [the finding itself]." Final Instruction No. 6.

Second, the Engle finding on fraudulent concealment establishes only that Reynolds concealed, omitted, or failed to disclose some information at some unspecified point in time over a 50-year period, Engle Verdict Form for Phase I, Question 4a [Exhibit D]. As the Florida Supreme Court clarified, this finding does not address whether any particular plaintiff, such as Mr. Martin, relied to his detriment on a concealment by any of the Engle defendants. See Engle, 945 So. 2d at 1263. The finding also does not address, much less establish, whether Mr. Martin even read or heard any alleged misleading statement from any of the Engle defendants; whether any of the Engle defendants acted with fraudulent intent at the time of the alleged concealment against Mr. Martin; or whether any of the Engle defendants ever omitted information from statements that reached Mr. Martin. Therefore, the finding cannot establish any of the fraud elements that the Court failed to submit to the jury. Nor can the finding supply the underlying tort required for Plaintiff's conspiracy claim. See generally Loeb v. Geronemus, 66 So. 2d 241, 243 (Fla.

1953) (conspiracy requires proof of a completed underlying tort by one of the conspirators); Blatt v. Green, Rose, Kahn & Piotrkowski, 456 So. 2d 949, 951 (Fla. 3d DCA 1984) (same); Raimi, 702 So. 2d at 1284 (same).

B. The Engle Findings Do Not Establish Conspiracy

To prevail on her claim for conspiracy to fraudulently conceal, Plaintiff had to prove (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy. See Raimi v. Furlong, 702 So. 2d 1273, 1284 (Fla. 3d DCA 1997). Here, the first three of these elements were never submitted to the jury for decision.[10]

The Engle finding invoked by Plaintiff in support of the conspiracy claim states that Reynolds "enter[ed] into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public [would] rely to their detriment." Engle Verdict Form for Phase I, Question 5a [Exhibit D].

But the Engle finding establishes only that Reynolds entered into some ill-defined conspiracy at some unspecified time over a 50-year period. It does

---

[10] The fourth element was submitted to the jury in an erroneous instruction that intermingled the reliance requirements for concealment and conspiracy. See Final Instruction No.16. As a result, it is impossible to tell from the verdict form whether the jury found that Mr. Martin detrimentally relied on any act or omission of any of Reynolds' putative co-conspirators.

not establish any particular act in pursuance of that conspiracy, let alone an act on which Mr. Martin might have relied to his detriment. Because Plaintiff depended on the generalized conspiracy finding in support of essential elements not submitted to the jury, the jury's conspiracy finding is against the manifest weight of the evidence and cannot stand.

C. The *Engle* Findings Do Not Establish Negligence Or Strict Liability

To prevail on her negligence and strict liability claims, Plaintiff needed to prove, among other things, that a negligent act or omission by Reynolds or a defect in a Reynolds product Mr. Martin smoked proximately caused Mr. Martin's death. See Cintron v. Osmose Wood Preserving, 681 So. 2d 859, 861 (Fla. 5th DCA 1996) (requiring showing that the injury was caused by breach of duty owed to prevail on a negligence claim); West v. Caterpillar Tractor Co., 336 So. 2d 80, 87 (Fla. 1976) (requiring the existence of a defect and a proximate causal connection between the defect and the damages incurred to prevail on a claim for strict liability). Here, these essential elements were never submitted to the jury for decision, because Plaintiff relied exclusively on the Engle findings to supply these elements. The Engle findings, however, do not and cannot establish Plaintiff's negligence and strict liability claims.

As an example, Plaintiff's strict liability claim relied on the Engle finding that each cigarette manufacturer defendant "placed cigarettes on the market that were defective and unreasonably dangerous." Engle Verdict Form for Phase I, Question No. 3 [Exhibit D]. As phrased, that question permitted the Engle jury to return a

plaintiffs' verdict so long as it determined that each defendant had placed on the market at some point in time a single brand of cigarette that had a defect in its design or warning. At trial, the Engle plaintiffs advanced hundreds of different factual allegations referring to many different cigarette types and brands manufactured and marketed at different times over the course of five decades. Given the variety of different theories that the jury might have relied on, there is no way to identify the specific defect that formed the basis of the finding or to link the finding to the design characteristic that may have caused any individual plaintiff's injuries. As a result, the finding is incapable of satisfying Plaintiff's burden of establishing that Mr. Martin smoked cigarettes that were defective and that this defect was the legal cause of his death. The same principles apply to Mr. Martin's negligence (and other) claims. The jury's verdict based on these findings, like the others, therefore is against the manifest weight of the evidence and cannot stand.

D. Bedrock Florida Preclusion Law Demonstrates That Plaintiff's Use Of The Findings Is Improper

1. Issue Preclusion Is The Doctrine That Governs The Engle Phase I Findings

Plaintiff's use of the findings at trial depended on their receiving claim-preclusive effect. But Engle demonstrates that the findings derive their "res judicata effect" from issue, rather than claim, preclusion. The term "res judicata" can connote either claim or issue preclusion under Florida law. See, e.g., Hochstadt v. Orange Broad., 588 So. 2d 51, 52 n.l (Fla. 3d DCA 1991) ("[C]ourts often use the term 'res judicata' to encompass both issue preclusion

and claim preclusion."), abrogated on other grounds by E.C. v. Katz, 731 So. 2d 1268, 1269-70 (Fla. 1999); Hopper v. Mitsukoshi USA, Inc., No.6:05-CV-1176-ORL-22DAB, 2006 WL 1308230, at *3 (M.D. Fla. 2006) (noting that "in a broad, general sense the term 'res judicata' encompasses the concept of collateral estoppel"); Tyson v. Viacom, Inc., 890 So. 2d 1205, 1211 (Fla. 4th DCA 2005) ("Collateral estoppel is an aspect of res judicata.").

It is clear from the language of Engle that the Florida Supreme Court was invoking the issue preclusion branch of the res judicata doctrine. First, the Court invoked certification under Rule 1.220(d)(4)(A) – which refers to the class-wide trial of "particular issues" not claims – in giving the findings "res judicata effect." Engle, 945 So. 2d at 1269; see also Waters v. Int'l Precious Metals Corp., 172 F.R.D. 479, 501 (S.D. Fla. 1996) (holding that issues are given preclusive effect where class is certified under issue certification rule).

Second, the court repeatedly referred to issues, rather than claims, that were adjudicated in Phase I. See Engle, 945 So. 2d at 1263 ("In phase I, the jury decided issues related to . . . conduct."); see also id. at 1270 (Phase I tried "issues common to all class members.").

Third, the court explained that the findings did not resolve claims because Phase I "did not determine whether the defendants were liable to anyone." Id. at 1263 (emphasis in original). Indeed, the Engle trial court prohibited the consideration of individual claims in Phase I, and the only claims ever resolved to final judgment in Engle — the individual claims of

the three representatives — were not resolved until the Phase II-A trial. Id. at 1274-76.

Finally, if the Engle Court had been referring to "claim preclusion," as Plaintiff argues, then the Engle judgment would be a final judgment on Plaintiff's claims. As a result, Plaintiff would be barred from asserting any subsequent causes of action, including her claims in the present suit, based on the same underlying facts that gave rise to Engle. See, e.g., Signo v. Fla. Farm Bureau Cas. Ins. Co., 454 So. 2d 3, 5 (Fla. 4th DCA 1984) (holding that, under claim preclusion, a final judgment bars relitigation of any claim related to the "transaction . . . out of which the [first] action arose"); Scott v. Rosenthal, 118 So. 2d 555, 558 (Fla. 3d DCA 1960) (holding that once a judgment is entered in the first action, the plaintiff "cannot maintain an action upon any part of the original cause of action"). Such a result is nonsensical in light of the Florida Supreme Court's directive that members of the decertified class could initiate individual progeny actions. See Engle, 945 So. 2d at 1269.

2. Florida Preclusion Law Prohibits Plaintiff's Proposed Use Of The Findings

Accordingly, the Engle findings must derive their preclusive effect, to the extent they have any preclusive effect, from issue preclusion. A party seeking to claim the benefit of issue preclusion bears the burden of establishing its availability. See, e.g., Campbell v. State, 906 So. 2d 293, 295 (Fla. 2d DCA 2004); Excel Ins. Co. v. Brown, 406 So. 2d 534, 536 (Fla. 5th DCA 1981). This means that Plaintiff had to demonstrate that (1) "an identical issue" was "presented in the prior proceeding" and (2) the issue

was "a critical and necessary part of the prior determination." Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002). It follows that "collateral estoppel does not apply if the verdict could be grounded upon an issue other than that which the [party] seeks to foreclose from consideration." State v. Strong, 593 So. 2d 1065,1067 (Fla. 4th DCA 1992). Accordingly, courts in Florida and elsewhere consistently deny preclusion where the generality of a prior verdict makes it impossible to ascertain with certainty that the particular issue as to which preclusion is sought was actually and necessarily decided in the earlier proceeding. See, e.g., Acadia Partners, L.P. v. Tompkins, 673 So. 2d 487, 489 (Fla. 5th DCA 1996); Sun State Roofing Co. v. Cotton States Mut. Ins. Co., 400 So. 2d 842, 844 (Fla. 2d DCA 1981); Seaboard Coast Line R.R. Co. v. Indus. Contracting Co., 260 So. 2d 860, 865 (Fla. 4th DCA 1972); see also Dodge v. Cotter Corp., 203 F.3d 1190 (10th Cir. 2000) (denying preclusive effect to jury verdict which answered "yes" to the question "[w]as defendant . . . negligent," because the negligence finding could have rested on any of several grounds asserted at trial).

The principles articulated in cases like the ones cited above prevent Plaintiff from using the Engle findings to establish the essential elements of Plaintiff's claims. In order for Plaintiff to use the Engle findings to establish the individualized elements of those claims, she needed to show that the specific facts underlying them were actually and necessarily decided in Engle. Plaintiff could not and did not do so. Phase I of Engle was a year-long trial in which the class asserted innumerable alleged acts and omissions relating to diverse aspects of the

marketing of various cigarette brands over a 50-year period. The Engle trial judge himself remarked on the difficulties of determining which acts or omissions, among the "hundreds," "thousands," or even "hundreds of thousands" alleged, related to particular class members' claims. Engle Trial tr. at 35813 [Exhibit E].

Plaintiff did not even attempt to demonstrate that the Engle jury necessarily considered — much less resolved in her favor — any allegations related to any particular tortious conduct that affected Mr. Martin. Because Plaintiff did not demonstrate that the facts underlying the essential elements of her claims were "presented in the prior proceeding" and were "a critical and necessary part of the prior determination," her attempt to use the Engle findings to establish those elements fails under Florida preclusion law. Goodman, 804 So. 2d at 546-47. Therefore, the verdict in Plaintiff's favor is against the manifest weight of the evidence and Reynolds is entitled to a new trial.

E. Plaintiff's Use Of The Engle Findings Constitutes An Extreme Application of Res Judicata In Violation Of Reynolds' Due Process Rights

The U.S. Supreme Court has held that a determination in an earlier judicial proceeding cannot be given preclusive effect in a later case unless "it is certain that the precise fact was determined by the former judgment." De Sollar v. Hanscome, 158 U.S. 216, 221 (1895); see also Russell v. Place, 94 U.S. 606, 608 (1876) (preclusion is unavailable "if it appear[s] that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without

indicating which of them was thus litigated, and upon which the judgment was rendered"). This is a constitutional principle, not merely a common law one. In Fayerweather v. Ritch, 195 U.S. 276, 307 (1904), the Court held, as a matter of due process, that "where . . . testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, . . . the prior decision is not an adjudication upon any particular issue or issues, and the plea of res judicata must fail."

In light of this case law, a federal court that recently addressed the question has concluded that "application of the [Engle] findings as Plaintiffs propose would contravene the dictates of due process" because "it is impossible to determine the precise issues decided by the [Engle] jury." Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328, 1345-46 (M.D. Fla. 2008). As discussed above, given the generic nature of the Engle findings and the staggering variety of legal theories and evidence presented at the Engle trial, Plaintiff did not even attempt to demonstrate that the Engle jury necessarily considered and resolved in her favor any allegations related to her claims as they affected Mr. Martin (if they affected him at all). It is not "certain that the precise fact[s]" implicated by Plaintiff's suit were decided in Engle, and to accord the generic Engle findings preclusive effect with respect to the individualized elements of Plaintiff's claims would violate Reynolds' due process rights. See, e.g., Brown, 576 F. Supp. 2d at 1345-46; see also De Sollar, 158 U.S. at 221; Fayerweather, 195 U.S. at 276.

Thus, Plaintiff's proposed use of the Engle findings calls for an extreme application of the doctrine of res judicata in violation of Reynolds' due process rights. For this reason as well, the verdict in Plaintiff's favor is against the weight of the evidence and Reynolds is entitled to a new trial.

* * *

Respectfully submitted,

/s/ [illegible]

Larry Hill, Esq.
Fla. Bar No. 173908
Moore, Hill &
Westmoreland, P.A.
220 West Garden Street
Pensacola, Florida 32502
Phone: (850) 434-3541
Fax: (850) 435-7899
lhill@mh-law.com

Mark A. Belasic
(pro hac vice)
mabelasic@jonesday.com
Amanda S. Jacobs
(pro has vice)
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Telecopier: (216) 579-0212

Attorneys for Defendant
R.J. Reynolds
Tobacco Company

APPENDIX K

Case No. 1D09-4934

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Appellant,

v.

MATHILDE MARTIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENNY RAY MARTIN,

Plaintiff/Appellee.

Appeal from a Final Judgment rendered by the Circuit Court in and for Escambia County, Florida, Case No. 2007-CA-2520-A Hon. Terry D. Terrell, Circuit Judge

AMENDED INITIAL BRIEF OF APPELLANT

* * *

ARGUMENT

I. THE TRIAL COURT VIOLATED FLORIDA LAW AND FEDERAL DUE PROCESS BY GIVING OVERLY BROAD PRECLUSIVE EFFECT TO THE *ENGLE* PHASE I FINDINGS.

The trial court held that the Engle Phase I findings made it unnecessary for the jury to find that Reynolds committed specific tortious conduct capable of being linked to Mr. Martin's death. That ruling violated fundamental principles of Florida preclusion law and federal due process. The generalized Engle Phase I findings did not establish that any particular acts amounted to tortious conduct. As a result, the trial court erred by treating the Engle findings as dispensing with the need for the jury to determine tortious conduct.[3]

A. The Trial Court Erred In Failing To Require The Jury To Determine Whether Reynolds Engaged In Specific Tortious Conduct Capable Of Being Linked To Mr. Martin's Injuries And Death

One of the most elementary prerequisites of a plaintiff s verdict in a tort case is a finding that the defendant engaged in some specific misconduct that caused the injury. For example, "'when the injury is in no way attributable to a defect, there is no basis for imposing product liability upon the

---

[3] This Court reviews de novo a trial court's decision to give preclusive effect to findings from an earlier case. See Felder v. Dep't of Mgmt. Servs. Div. of Ret., 993 So. 2d 1031,1034 (Fla. 1st DCA 2008); Campbell v. State, 906 So. 2d 293, 295 (Fla. 2d DCA 2004).

manufacturer'" because "'[i]t is not contemplated that a manufacturer should be made the insurer' for all physical injuries caused by his products." West v. Caterpillar Tractor Co., 336 So. 2d 80, 86 (Fla. 1976) (emphasis in original); see also Houdaille Indus., Inc., v. Edwards, 374 So. 2d 490, 493 (Fla. 1979) (plaintiff must prove that the "injury was proximately caused by some defect in the product"); Fla. Std. Jury Instr. (Civil Cases), Instr. PL ("The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made).").

Along the same lines, to prevail on her negligence claim, Mrs. Martin had to prove breach of a specific legal duty by Reynolds and an "injury ... legally caused by defendant's breach." Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000) (quoting Paterson v. Deeb, 472 So. 2d 1210, 1214 (Fla. 1st DCA 1985)) (emphasis added); accord Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003). To prevail on fraudulent concealment, she had to prove that Reynolds intentionally failed to disclose a particular fact or facts that it had a duty to disclose, that Mr. Martin was justifiably unaware of the undisclosed information, and that disclosure would have altered his behavior and avoided his death. See, e.g., TransPetrol, Ltd. v. Radulovic, 764 So. 2d 878, 879-80 (Fla. 4th DCA 2000) (fraudulent concealment involves "knowing concealment or non-disclosure of a material fact" (emphasis added)). And to prevail on her conspiracy claim, she had to prove

not only an act of fraudulent concealment by a conspirator (with the same specificity just described), but also that it was taken in furtherance of a conspiracy. See, e.g., Walters v. Blankenship, 931 So. 2d 137, 140 (Fla. 5th DCA 2006).

To support a verdict, a finding of tortious conduct has to be sufficiently specific for the jury to link it to the plaintiffs (or decedent's) injury. It is not enough for a jury to determine that a product was "defective" without determining what the defect was, because a typical product is capable of causing injury in any number of ways and some of those ways have nothing to do with a defect. For example, a car could be defective because it has a gas tank that explodes in rear-end collisions. But a person who drove that car and suffered injuries when the car slid out of control on ice and hit a tree would not be able to recover in strict liability on the theory that he suffered injuries in a defective car, because the particular feature that rendered the car defective—a gas tank that explodes in rear-end collisions—would not have caused the injuries he suffered.

In a marked departure from ordinary practice in tort cases, the trial court refused to require the jury to determine whether Reynolds had engaged in any specific conduct that might have caused Mr. Martin's death. Notwithstanding Reynolds's request that all elements of proof be submitted to the jury (R23, 4284-85, 4295-97), the court did not instruct the jury to determine whether any defect existed in the unfiltered Lucky Strike or Camel cigarettes that Mr. Martin smoked, to determine whether Reynolds engaged in any negligent act that might have affected Mr. Martin, to determine whether Reynolds

concealed any information of which Mr. Martin was justifiably unaware and whose disclosure would have caused him to avoid his injuries and death, or to determine whether Reynolds or any other entity listed in the Engle "conspiracy" committed an act of fraudulent concealment relevant to this case. R17, 3145-79.

Instead, the court directed the jury to enter a plaintiff's verdict on strict liability and negligence if it found that "addiction to R.J. Reynolds Tobacco Company cigarettes [was] a legal cause of the death of Benny Martin." R17, 3178. And the court directed the jury to enter a plaintiff's verdict on fraudulent concealment and conspiracy if it made the additional finding that "R.J. Reynolds Tobacco Company's conspiracy to conceal information and actual concealment of information [was] a legal cause of the death of Benny Martin." R17, 3179.

The trial court based this decision to abridge the required proof in this case on the Florida Supreme Court's statement in Engle that "[individual plaintiffs within the class will be permitted to proceed individually with the findings set forth above given res judicata effect in any subsequent trial between individual class members and the defendants." Engle, 945 So. 2d at 1277. That was error. Res judicata is not some alchemical principle that converts a generalized finding (such as that the defendant at some time manufactured some defective product) into a specific finding (such as that the failure to include a filter on certain Lucky Strike and Camel cigarettes was a defect). The Florida Supreme Court did not say or mean to suggest otherwise.

In order to be given preclusive effect under Florida law, an issue must have been actually and necessarily decided in an ascertainable way in a prior case. See Dep't of Health & Rehabilitative Servs. v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995). Indeed, on the very day that it issued its final opinion in Engle, the Florida Supreme Court held that Florida law requires a plaintiff to demonstrate that the issues on which she seeks preclusion were "'actually litigated'" in a prior proceeding, resulting in a "determination" of those specific issues. Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1235 (Fla. 2006) (quoting in part B.J.M., 656 So. 2d at 910) (emphasis in original). The party invoking preclusion bears the burden of showing "with sufficient certainty" that this requirement is met, Meyers v. Shore Indus., Inc., 597 So. 2d 345, 346 (Fla. 2d DCA 1992), and must demonstrate that "the precise facts" on which preclusion is sought "were determined by the former judgment." Bagwell v. Bagwell, 14 So. 2d 841, 843 (Fla. 1943) (emphasis added).

The Engle jury did determine a number of "precise facts" that may, under the foregoing principles, properly be given preclusive effect in subsequent suits by individual class members. For example, the Engle jury decided that cigarettes are capable of causing a variety of specific diseases (but not certain other specific diseases) and that cigarettes containing nicotine are addictive. Engle, 945 So. 2d at 1276-77. As a result of these findings, plaintiffs who can establish membership in the Engle class are not required to offer proof on any of these issues—which had been sharply contested in tobacco litigation for decades and which would generally require both plaintiffs and defendants to present costly and time-

consuming testimony from medical and scientific experts.

The Phase I findings also authoritatively established that Reynolds "place[d] cigarettes on the market that were defective"; "conceal[ed] or omit[ted] material information" concerning the "health effects of smoking"; "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances"; and agreed with other Engle defendants "to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of cigarettes." R23, 4233A (App. Tab 3). Therefore, once Mrs. Martin satisfied the jury that she had shown membership in the Engle class, Reynolds was not free to argue that it never placed a defective cigarette on the market, that it never concealed material information about the health effects of smoking, that it never acted negligently, or that it never agreed with other Engle defendants to conceal information about the health effects or addictive nature of smoking. But that is all those findings established, and that is accordingly all that defendants may lawfully be barred from relitigating in the Engle progeny cases under the res judicata principles invoked by the Florida Supreme Court. Bagwell, 14 So. 2d at 843.

Nothing in the Engle opinion suggests, however, that—in conflict with settled Florida preclusion law—the "res judicata effect" of the findings extends to factual issues that the Engle verdict form did not actually ask the jury to decide. The highly generalized language of the Phase I findings does not reveal which cigarettes were found to be defective, the nature of any defects in those cigarettes that

were found to be defective, what material facts were concealed, what negligent acts Reynolds committed, which acts (if any) the Engle defendants committed in furtherance of any conspiracy, or when any of the tortious conduct took place. See Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328,1342-43 (M.D. Fla. 2008) (appeal pending). The Engle trial record confirms that the number of possible bases for the findings is almost without limit. Phase I of Engle lasted a year and involved innumerable allegations of tortious conduct—what the Engle trial judge described as "thousands" or even "hundreds of thousands" of allegations. R23, 4233A (App. Tab 4).

For example, the plaintiffs in Engle alleged defects in numerous brands of cigarettes marketed by different manufacturers over the course of 50 years. And no particular theory of defect applied to every brand of cigarettes. Among those alleged defects were the placement of ventilation holes in the wrong place on some filters and the inclusion of glass fibers in certain filtered cigarettes. See Engle v. R.J. Reynolds Tobacco, No. 94-08273 CA-22, 2000 WL 33534572, at *2 (Fla. 1lth Cir. Ct. Nov. 6, 2000); see also R23, 4233A (App. Tab 5 at 3). It is therefore possible that the Engle jury found that the only defect was, for example, the misplacement of ventilation holes in filters—a finding that would have no conceivable application to Mr. Martin's case, since he smoked only unfiltered cigarettes.

Similarly, as to fraudulent concealment, the plaintiffs accused the defendants of misleading customers about many things—for example, whether smoking causes disease, whether smokers of "light" cigarettes may "compensate" for the lower nicotine

yields by inhaling more deeply or smoking more cigarettes, whether nicotine is addictive, and whether the defendants manipulated nicotine yields. These divergent fraudulent concealment theories were based on myriad alleged omissions occurring at different times over the course of 50 years, see Engle, 2000 WL 33534572, at *2-*3; R23, 4233A (App. Tab 6 at 3), and any one or several of these theories may be the basis for the Engle jury's finding of fraudulent concealment. No one can know whether that jury premised its fraudulent concealment finding on information of which Mr. Martin was fully aware, or regarding types of cigarettes Mr. Martin never smoked.

In similar cases in which the generality of an earlier verdict makes it "impossible to determine which theory the jury relied on," Florida courts have not hesitated to bar the use of prior findings as proof of specific issues. See, e.g., Sun State Roofing Co. v. Cotton States Mut. Ins. Co., 400 So. 2d 842, 844 (Fla. 2d DCA 1981). For example, in Seaboard Coast Line Railroad Co. v. Industrial Contracting Co., 260 So. 2d 860 (Fla. 4th DCA 1972), the Fourth District denied preclusive effect to a prior verdict where it was "impossible to ascertain with any reasonable degree of certainty as to what issue was adjudicated in the former suit." Id. at 865. The defendant in Seaboard, a contractor that had constructed a bridge for the Seaboard railroad, had previously prevailed in a personal injury suit brought by one of Seaboard's employees, who had been injured on the construction site. See id. at 862. The railroad had paid its employee $10,000 as compensation for his injuries and subsequently sued to recover the money from the contractor. The contractor defended on the ground

that it had already prevailed on the employee's negligence claim, and thus could not be liable to Seaboard based on that alleged negligence. See id.

The Court refused to grant preclusive effect to the prior verdict because it was impossible to determine whether that verdict was premised on a finding that the contractor "was not negligent or that [the contractor] was negligent but [the employee] was guilty of contributory negligence." Id. at 865. The Court explained that "[i]t is essential that the question common to both causes of action was actually adjudicated in the prior litigation" and that, "[i]f there is any uncertainty as to the matter formerly adjudicated the burden of showing it with sufficient certainty . . . is upon the party who claims the benefit of the former judgment." Id. at 864 (emphasis in original). The contractor had failed to carry that burden and therefore could not benefit from the preclusive effect of its win in the earlier case. See id. at 865.

Seaboard and the many cases like it control here. Like the nonspecific verdict in Seaboard—which left open two possible grounds for the jury's decision—the Phase I findings are simply too generalized to have justified instructing the jury to find liability without finding that Reynolds engaged in specific tortious conduct.

All of the above is fully consistent with the Engle decision. There is nothing in Engle that even remotely suggests that the court's simple reference to "res judicata effect" somehow directed courts not to apply settled res judicata law in subsequent cases. "Res judicata" itself is a venerable and broad term that refers to preclusion generally and encompasses

both claim preclusion and issue preclusion (i.e., collateral estoppel). See Hochstadt v. Orange Broad., 588 So. 2d 51, 52 n.1 (Fla. 3d DCA 1991), overruled on other grounds by Amador v. Fla. Bd. of Regents, 830 So. 2d 120,122 n.l (Fla. 3d DCA 2002). Nothing in Engle signals a departure from existing doctrine. It would be extraordinary for the Florida Supreme Court to alter long-standing law in such an elliptical fashion. Cf. Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002) (holding that the Florida Supreme Court "does not intentionally overrule itself sub silentio"). Engle merely directed the lower courts to give "res judicata effect" to the findings that were made, not to factual issues that no jury had actually and necessarily decided.[4]

The Engle court discussed "res judicata effect" in a section of the opinion addressing whether "problems with the three-phase trial plan negate the continued viability of this class action." Engle, 945 So. 2d at 1267-68. Agreeing that "continued class action treatment for Phase III of the trial plan is not feasible," the court decertified the class, but held that

---

[4] Justice Wells's dissent does not (as the trial court thought) extend or amplify the majority's holding in Engle. It is elementary that a dissent does not establish the holding of a case. See, e.g., Miller v. State, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008) ("Only the written, majority opinion of an appellate court has precedential value."). Accordingly, relying on a dissent to define the meaning of a majority opinion is not a sound practice. See United States v. Travers, 514 F.2d 1171, 1174 (2d Cir. 1974) (Friendly, J.) ("Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling."). Moreover, nothing in the dissent implies an abandonment of well-settled principles of preclusion law or that the generalized Phase I findings could substitute for proof of specific tortious conduct in subsequent cases.

it was appropriate to do so only prospectively. Id. at 1268-69. The Supreme Court thus communicated that the decertification of the class was not in itself a reason to reject the findings that had been made or deny whatever binding effect they might ordinarily have on the parties who litigated them. That is confirmed by the two cases the court cited in support of its statement about preclusion, both of which stand for the proposition that findings made in a class action before the class is decertified can, where otherwise appropriate, have preclusive effect in subsequent proceedings. See id. at 1269-70 (citing Daenzer v. Wayland Ford, Inc., 210 F.R.D. 202 (W.D. Mich. 2002), and McCormack v. Abbott Labs., 617 F. Supp. 1521 (D. Mass. 1985)). Those cases hold, in other words, that the fact of decertification alone is not an obstacle to the application of preclusion. The Supreme Court did not address what precise effect the findings would have under well-established Florida preclusion law; that is a question for the courts charged with adjudicating subsequent cases. See, e.g., 7AA Charles Alan Wright et al., Federal Practice & Procedure § 1789, at 554-55 (3d ed. 2005) ("It is well settled that the court adjudicating a dispute cannot predetermine the binding effect of its own judgment; that can be tested only in a subsequent suit."). As demonstrated above, Florida's well-established preclusion law does not permit the use of the findings that Mrs. Martin seeks.

B. The Trial Court's Use Of The Findings Violated Due Process.

When the trial court gave preclusive effect to the Engle Phase I findings on issues that Mrs. Martin failed to demonstrate the Engle jury actually decided,

it not only violated Florida law but also overstepped the bounds of federal due process.

Courts have long held that a party cannot be precluded from litigating an issue unless it is certain that "the precise question was raised and determined in the former suit." Russell v. Place, 94 U.S. 606, 608 (1876). In Russell, the U.S. Supreme Court invoked the "settled law" that collateral estoppel was improper "if it appear[s] that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered." Id.; see also Cromwell v. County of Sac, 94 U.S. 351, 353 (1876) ("[T]he inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.").

Fayerweather v. Ritch, 195 U.S. 276 (1904), confirmed that this "actually decided" requirement is mandated by due process. In Fayerweather, a federal court had dismissed a suit on the ground that a prior state-court judgment precluded the plaintiffs' claims. The plaintiffs maintained that the state-court judgment had not actually decided the relevant issues. The Supreme Court undertook to determine whether the plaintiffs had been "'deprived of life, liberty, or property, without due process of law' ... by the judgment of the [second] court, [if that judgment] gave unwarranted effect to a judgment of the state courts." Id. at 297. The Court observed that the case "present[ed] the question how far [the second court's judgment could] be sustained in the view of the

prohibitory language of the 5th Amendment." Id. at 298.

The Court explained that it would violate due process to treat a verdict as a "conclusive determination" of a certain fact, where that verdict was "made without any finding of the fundamental fact." Fayerweather, 195 U.S. at 297, 299. The Court ruled that where

> testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues; and the pleas of res judicata must fail.

Id. at 307.[5]

Thus, "Fayerweather . . . found that a court's providing 'unwarranted effect to a judgment' was a deprivation of due process." Brown, 576 F. Supp. 2d at 1345; see also Monagas v. Vidal, 170 F.2d 99, 103 (1st Cir. 1948) (describing Fayerweather as addressing a "question of due process of law such as might arise from an application of the doctrine of res judicata to prevent a party from presenting his case on the merits"). For that reason, "an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, [and] directly determined." Goodson v.

---

[5] The Court went on to find that the issue on which preclusion had been ordered had in fact been demonstrably decided in the case at hand. See 195 U.S. at 307-08.

McDonough Power Equip., Inc., 443 N.E.2d 978, 985 (Ohio 1983).[6]

This conclusion makes perfect sense. Giving preclusive effect to a prior judgment that did not actually decide a particular issue is no different from deciding the issue with no process at all. The Due Process Clause was intended to prevent just that sort of arbitrary deprivation of property. The "right to litigate the issues raised" in a judicial proceeding is "a right guaranteed . . . by the Due Process Clause," United States v. Armour & Co., 402 U.S. 673, 681-82 (1971), and a party threatened with an adverse judgment has a due process right "to present every available defense," Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

The use of the Engle findings here was unfair in exactly that way. This case epitomizes one in which "testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment." Fayerweather, 195

---

[6] Recent decisions have reaffirmed the "actually decided" requirement articulated in Fayerweather. See, e.g., Dodge v. Cotter Corp., 203 F.3d 1190, 1198 (10th Cir. 2000) (reversing a trial court's issue preclusion ruling because the "general finding under the negligence instruction fails to identify what the jury found sustained by the evidence"); Kelly v. Armstrong, 141 F.3d 799, 801-02 (8th Cir. 1998) (refusing to treat a bankruptcy court's general finding that debtors engaged in fraudulent transfers as barring subsequent litigation of fraudulent intent as to four specific transactions because the former determination was not specific as to transactions); Mitchell v. Humana Hosp.-Shoals, 942 F.2d 1581, 1584 (11th Cir. 1991) ("Because the state court did not specify the reasons for its decision,. . . [collateral estoppel does not preclude the current suit.").

U.S. at 307. The trial court instructed the jury that the Engle jury has already found that Reynolds "was negligent" and "placed cigarettes on the market that were defective and unreasonably dangerous." T. XXIV, 3361-62. But the court did not identify (because it could not) what the negligent conduct was, what the defect was, or what the concealed information was.

Based on the Engle Phase I findings, the trial court declined to ask the jury to determine whether Reynolds engaged in any specific tortious conduct capable of being linked to Mr. Martin's injuries and death. By so stacking the deck in Mrs. Martin's favor, the trial court denied Reynolds its constitutional right to have all elements of liability proven to a jury.

*****

The trial court thus erred, both as a matter of Florida law and a matter of federal constitutional law, in refusing to instruct the jury to determine whether Reynolds (or, in the case of the conspiracy claim, any other party named in the Engle conspiracy finding) engaged in specific tortious conduct capable of being linked to Mr. Martin's injuries and death. Instead, the court read the Phase I findings to the jury and instructed that they were binding. Under the instructions and verdict form provided, the jury lacked instructions on critical elements of Mrs. Martin's causes of action—indeed, was instructed that a prior jury had already determined those elements of proof—and therefore had no way of reaching a legally supportable verdict. Accordingly, Reynolds is entitled to a new trial with proper instructions. See Sheen v. Jenkins, 629 So. 2d 1033, 1035-36 (Fla. 4th DCA 1993) (ordering new trial

where appellate court could not "say for certain that the jury's verdict was not affected by the erroneous instruction").

II. THE TRIAL COURT ERRONEOUSLY RELIEVED PLAINTIFF OF HER BURDEN OF PROVING LEGAL CAUSATION ON HER NEGLIGENCE AND STRICT LIABILITY CLAIMS

As demonstrated above, "legal" causation is a necessary element of any tort claim, including Mrs. Martin's negligence and strict liability claims. That is, even assuming that negligence and a product defect have been shown, a tort plaintiff must establish a causal link between that conduct and an injury. Reynolds filed a pre-trial motion asking the trial court to require Mrs. Martin to prove such legal causation and noted that this argument stood "wholly separate and independent from [its] arguments about the 'res judicata effect' of the findings." R9, 1579. The trial court denied the motion in relevant part (R12, 2060), and held that, once the jury had determined that Mr. Martin was a class member, Mrs. Martin was not required to prove anything else—including legal causation—to establish liability on her negligence and strict liability claims. R12, 3178. The trial court regarded the finding on class membership—that "addiction to R.J. Reynolds Tobacco Company cigarettes [was] a legal cause of the death of Benny Martin"—as sufficient proof of causation and therefore declined to instruct the jury

to determine legal cause for negligence and strict liability.[7] T. XXIV, 3361-65.

As an initial matter, the trial court's decision to dispense with legal causation on Mrs. Martin's negligence and strict liability claims is at odds with the court's own recognition that she was required to prove detrimental reliance—a form of legal causation—on her fraudulent concealment and conspiracy claims. There is no reason why legal causation should remain a requirement with respect to some claims but not others.

More fundamentally, the trial court's decision not to require a showing of legal causation on the negligence and strict liability claims is flatly inconsistent with Engle. The Florida Supreme Court stated in unambiguous terms that Phase I did not resolve issues of "legal causation and reliance." Engle, 945 So. 2d at 1263. The court explained that "individualized issues such as legal causation" were excluded from Phase I of Engle (id. at 1268), and that, "although the jury decided issues common to all class members" in Phase I, "none involved whether, or the degree to which, the defendants' conduct was the sole or contributing cause of the class members' injuries." Id. at 1271.

In going beyond the Engle decision, the trial court also violated Florida and federal constitutional principles. For example, even though the Florida Supreme Court made clear that Phase I of Engle did

---

[7] The decision whether "the jury should be instructed at all on an issue . . . presents a question of law," and therefore is reviewed de novo. McConnell v Union Carbide Corp., 937 So. 2d 148, 152-53 (Fla. 4th DCA 2006); see also Gresham v. State, 908 So. 2d 1114, 1115 (Fla. 1st DCA 2005).

not decide legal causation for any class member (see 945 So. 2d at 1268), the trial court held that the bare fact that the jury found class membership was sufficient to establish legal causation on Mrs. Martin's strict liability and negligence claims. The trial court thus extended Engle's preclusive reach to an issue that indisputably was not decided by the Engle jury. Doing so eliminated Reynolds's right to litigate and defend against an essential element of every tort claim—legal causation—and violated due process. See, e.g., Williams, 549 U.S. at 353; Armour & Co., 402 U.S. at 682. Indeed, by using a procedural rule to alter Reynolds's substantive rights, the trial court also violated the Florida Constitution's separation of powers and guarantee to right to access to the courts. See, e.g., Ramos v. State, 505 So. 2d 418, 421 (Fla. 1987) ("Substantive rights conferred by law can neither be diminished nor enlarged by procedural rules adopted by this Court.").

The trial court's failure to require the jury to determine legal causation for the strict liability and negligence claims entitles Reynolds to a new trial on those claims even if the court's preclusion ruling was otherwise correct. Therefore, at the very least, Reynolds is entitled to a remittitur of the punitive damages award to $9.9 million (the $3.3 million compensatory damages award multiplied by three).

* * *

CONCLUSION

For these reasons, the judgment below should be reversed. Judgment should be entered for Reynolds on Mrs. Martin's fraudulent concealment, conspiracy, and punitive damages claims, and a new trial should be ordered on the remaining claims and on punitive

damages; if judgment is not entered for Reynolds on concealment and conspiracy, it should receive a new trial on punitive damages. In the alternative, the punitive damages judgment should be vacated and remanded for remittitur to no more than the amount of compensatory damages.

Respectfully submitted,

s/ Charles F. Beall Jr.

Mark A. Belasic, Esq.
(admitted pro hac vice)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Phone: (216) 586-3939
Fax: (216) 579-0212

Larry Hill, Esq.
Fla. Bar No. 173908
Charles F. Beall, Jr., Esq.
Fla. Bar No. 066494
MOORE, HILL &
WESTMORELAND, P.A.
P.O. Box 13290
Pensacola, Florida 32591-3290
Phone: (850) 434-3541
Fax: (850) 435-7899

Counsel for Appellants

APPENDIX L

Case No. SC11-483

IN THE SUPREME COURT STATE OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Petitioner,

v.

MATHILDE MARTIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENNY RAY MARTIN,

Plaintiff/Respondent.

ON DISCRETIONARY REVIEW FROM A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

BRIEF ON JURISDICTION OF PETITIONER R.J. REYNOLDS TOBACCO COMPANY

* * *

STATEMENT OF THE CASE

In Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006), this Court decertified a class action against cigarette manufacturers, but allowed former class members to bring suits (commonly described as "Engle progeny" cases) in which certain findings made by the Engle jury would have "res judicata effect." Id. at 1269. The Court specifically held that the Engle jury findings "did not determine whether the defendants were liable" on any individual claim, id. at 1263 (internal quotation marks omitted), and it

nowhere suggested that its intended "res judicata effect" was greater than that provided under prior Florida preclusion law. In this case, the First District misapplied Engle by interpreting its res-judicata holding in a manner that conflicts with decisions of this Court and other district courts.

Respondent Mathilde Martin sued petitioner R.J. Reynolds Tobacco Company for the death of her husband from smoking. Based on its reading of Engle, the trial court required the jury to find Reynolds liable if it concluded that Mr. Martin was an Engle class member—i.e., if it found that he had died from an addiction to cigarettes. A:7-8. It thus allowed the Engle findings to substitute for the tortious-conduct elements of all of Mrs. Martin's claims. Id. For example, one such finding states that the Engle defendants sold defective cigarettes, but does not identity either the defect or the brands that contain it. Engle, 945 So. 2d at 1257 n.4. Based on that finding, the court held that the Lucky Strike cigarettes smoked by Mr. Martin were defective. A:7-8. The court thus relieved Mrs. Martin of the traditional burden of proving that the specific Reynolds conduct that allegedly harmed Mr. Martin (selling Lucky Strike cigarettes) was tortious. Id. Mrs. Martin prevailed on her claims and obtained a judgment for $28.3 million. A:9.

The First District affirmed. A:25. First, it noted that "t[he] crux of this appeal is the extent to which an Engle class member can rely upon the [Engle] findings." A:10. It interpreted the reference to "res judicata" as establishing all issues about the Engle defendants' alleged misconduct that could have been resolved in the Engle plaintiffs' favor, whether or not

the Engle jury actually resolved those issues. A:15-16. For example, it held that the Engle defect finding—that the defendants had sold defective cigarettes—as a matter of law encompassed the Lucky Strike cigarettes that Mr. Martin smoked. A:15. Second, the court held that the Martin jury could "infer" reliance, a necessary element of Mrs. Martin's concealment and conspiracy claims, based on nothing more than the assertedly "pervasive" nature of Reynolds' advertising. A:18.

SUMMARY OF THE ARGUMENT

The First District's treatment of the Engle findings provides this Court with jurisdiction. The First District allowed Mrs. Martin to use those findings to prove the tortious nature of the conduct that allegedly harmed Mr. Martin, without requiring her to show that the Engle jury actually and necessarily found that conduct to be tortious. This ruling conflicts with a long line of decisions establishing that "res judicata" precludes litigation only of fact issues that the proponent of preclusion shows to have been actually and necessarily decided in prior litigation. The ruling also misapplied Engle, which did not imbue the Engle findings with a unique "res judicata effect" beyond that afforded by previously well-established Florida preclusion law.

The First District's holding on reliance independently establishes this Court's jurisdiction. The First District held that Mrs. Martin proved the reliance element of her concealment and conspiracy claims even though she presented no individualized evidence that Mr. Martin himself relied to his detriment on the alleged concealment. That holding misapplied this Court's ruling in Engle that reliance

is an individual issue requiring individualized proof. It also conflicts with other district-court decisions holding that reliance may not be inferred from the nature of a defendant's alleged misconduct, but must be proven with evidence specific to the particular plaintiff.

This Court should exercise its discretion to hear this case. Thousands of Engle progeny suits have been filed, and the questions presented here are central to all of them. Immediate review would ensure prompt resolution of these issues, before dozens of trials occur under unsettled and potentially erroneous interpretations of this Court's Engle decision.

ARGUMENT

I. THE FIRST DISTRICT'S RES-JUDICATA RULING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS AND MISAPPLIES *ENGLE*

In determining the "res judicata effect" of the Engle findings, the First District held that, "[n]o matter the wording of the findings," they "establish the conduct elements of the asserted claims" for all Engle progeny plaintiffs. A:11, 16. Thus, "individual Engle plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits." A:16. To reach that extraordinary result, the First District relied on the Engle trial judge's order denying the defendants' motion for a directed verdict A:15-16 (citing Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 CA-22, 2000 WL 33534572 (Fla. 11th Cir. Ct. Nov. 6, 2000)). The First District also expressly rejected the interpretation of Engle adopted in Brown v. R.J.

Reynolds Tobacco Co., 611 F.3d 1324 (11th Cir. 2010), the only other appellate decision on the topic. A:13, 16.

This Court has jurisdiction to review the First District's interpretation of Engle. See Art. V, § 3(b)(3), Fla. Const. The decision below conflicts with well-established Florida preclusion law. See Wallace v. Dean, 3 So. 3d 1035, 1039 (Fla. 2009) (jurisdiction exists where holding conflicts with holdings of other district courts). And it misapplies Engle. See 945 So. 2d at 1254 (jurisdiction exists where court "misapplies" a decision of this Court).

A. The First District's holding conflicts with well-established Florida preclusion law. This Court has long held that the branch of "res judicata" known as collateral estoppel or issue preclusion applies only to the "precise facts" that "were determined by [a] former judgment." Bagwell v. Bagwell, 14 So. 2d 841, 843 (Fla. 1943). District courts have thus held that a factual issue on which preclusion is sought must be "identical" to one "actually" decided and a "necessary part of the prior determination." Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002); see also Acadia Partners, L.P. v. Tompkins, 673 So. 2d 487, 489 (Fla. 5th DCA 1996); Allstate Ins. Co. v. A. D. H., Inc., 397 So. 2d 928, 929-31 (Fla. 3d DCA 1981). Conversely, an issue may not be precluded "if the verdict could [have been] grounded upon an issue other than that which the [party] seeks to foreclose from consideration." State v. Strong, 593 So. 2d 1065, 1067 (Fla. 4th DCA 1992); see Sun State Roofing Co. v. Cotton States Mut. Ins. Co., 400 So. 2d 842, 844 (Fla, 2d DCA 1981) (no preclusion where "it is impossible to determine which

theory the [first] jury relied on" because the prevailing party in the first case proffered alternative theories); Seaboard Coast Line R.R. Co. v. Indus. Contracting Co., 260 So. 2d 860, 865 (Fla. 4th DCA 1972) (no preclusion where "it is impossible to ascertain with any reasonable degree of certainty as to what issue was adjudicated in the former suit").

The First District adopted a different legal rule here. It did not require Mrs. Martin to establish that any conduct that injured Mr. Martin was actually and necessarily found tortuous in Engle. A:13-16. Instead, it extended preclusion beyond the factual issues actually resolved in Engle (for example, that Reynolds sold some defective cigarettes) to all factual issues that could have been resolved in Engle. Id. Indeed, the very directed-verdict order cited by the First District establishes on its face that the Engle findings reasonably could have rested on any of a wide range of alternative defect and concealment allegations, many of which do not encompass the cigarettes smoked by Mr. Martin. For example, the directed-verdict order found legally sufficient evidence to support allegations that "some cigarettes" were defective because of misplaced air holes "in the filter" or because of glass fibers in "some filters." Engle, 2000 WL 33534572, at *2. Those defect theories—which could be the sole basis for the Engle defect finding—would have no possible application to Mr. Martin's unfiltered Lucky Strike cigarettes.

This conflict is confirmed by the First District's express and repeated rejection of Brown. A:13, 16. Contrary to the First District, Brown relied on longstanding Florida preclusion law, as reflected in cases like Seaboard, to hold that the Engle findings

have preclusive effect only to the extent that plaintiffs can "show with 'a reasonable degree of certainty'" that the factual issues that they wish to treat as precluded were actually "determined in [their] favor." Brown, 611 F.3d at 1335 (citing Seaboard, 260 So. 2d at 864-65). And Brown found "nothing in the jury findings themselves" to satisfy this standard for Engle progeny litigation. Id. In rejecting Brown, the First District necessarily rejected the Seaboard line of cases that Brown had directly applied.

B. The First District also misapplied Engle. This Court stated that the Engle findings should have "res judicata effect" (945 So. 2d at 1269), a phrase that has long had a "broad meaning which covers all the various ways in which a judgment in one action will have a binding effect in another" (Wacaster v. Wacaster, 220 So. 2d 914, 915 (Fla. 4th DCA 1969)). The Court noted that the findings resolved only issues, but "did not determine whether the defendants were liable" on any claim. Engle, 945 So. 2d at 1263 (internal quotation marks omitted). And the "res judicata" effect of fact findings, as opposed to liability determinations, is obviously a matter of issue preclusion (see Bagwell, 14 So. 2d at 843; Utterback v. Starkey, 669 So. 2d 304, 305 (Fla. 3d DCA 1996))—which, as explained, applies only to facts actually and necessarily determined. Engle's reference to "res judicata" cannot fairly be interpreted as obliquely overruling decades of settled res-judicata precedent. See Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002) ("[T]his Court does not intentionally overrule itself sub silentio").

The First District disagreed based on this Court's characterization of the Engle findings as addressing "common issues" that could have been adjudicated in an issues class. A:13. But that observation hardly establishes that every theory litigated in Engle must apply to each individual class member. For instance, as noted above, one of the prominent defect theories pressed in Engle was that "some cigarettes" contained misplaced air holes or glass fibers "in the filter." Engle, 2000 WL 33534572, at *2. That theory simply cannot apply to smokers of unfiltered cigarettes, regardless of how a class was certified (or, in this case, decertified).

The First District further misapplied Engle in holding that, to establish claims for strict liability and negligence, former class members need only prove class membership—i.e., that their injuries were legally caused by an addiction to cigarettes, not by a defect or negligence. A:16-17. Nowhere did Engle endorse this substantial departure from settled causation rules, which require plaintiffs to prove that a defendant's tortious conduct caused their injuries. See West v. Caterpillar Tractor Co., 336 So. 2d 80, 87 (Fla. 1976).

II. THE FIRST DISTRICT'S RELIANCE HOLDING MISAPPLIES *ENGLE* AND CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS

The First District's holding that reliance may be "infer[red]" from evidence of "pervasive misleading advertising campaigns" (A:18) provides an independent basis for jurisdiction. That holding misapplies Engle and conflicts with decisions of other

district courts requiring plaintiffs to present individual proof of reliance.

The First District's reliance holding cannot be squared with Engle. This Court decertified the Engle class precisely because reliance is an "individual question[]" not susceptible to class-wide proof. 945 So. 2d at 1255. In contrast, the First District relying exclusively on non-Florida precedents, permitted reliance to be shown based only on the assertedly "pervasive" character of the concealment alleged here, absent any individualized proof that Mr. Martin himself relied on the concealment. A:18. Those respective holdings are irreconcilable.

The First District's ruling also conflicts with Humana, Inc. v. Castillo, 728 So. 2d 261 (Fla. 2d DCA 1999), and Palmas y Bambu, S.A. v. E.I. Dupont de Nemours & Co., 881 So. 2d 565 (Fla. 3d DCA 2004). Whereas the ruling here allowed Mrs. Martin to establish reliance with inferences, Castillo holds that reliance may not be based on "assumptions" from class-wide proof, because "[w]hat one person may rely upon . . . may not be material to another." 728 So. 2d at 264-65 (internal quotation marks omitted). Likewise, Palmas holds that "reliance cannot be presumed due to a defendant's subjection of 'the whole market' to deceptive advertising." 881 So. 2d at 573 (citation omitted).

* * * *

For several reasons, the Court should exercise its jurisdiction to hear this case. Thousands of Engle progeny cases are presently pending in state and federal courts throughout Florida. In all of these cases, courts must address the threshold questions presented here—how the Engle findings apply in an

individual suit; what a plaintiff must show to use them; and how a plaintiff may prove reliance. The importance of those issues, the volume of Engle progeny cases, and the significant judicial disagreement about the meaning of Engle all underscore the need for this Court's prompt review.

The First District's decision also raises important federal constitutional questions. Precluding litigation of an issue violates due process unless the record affirmatively demonstrates that the "question was decided" in a previous suit. Fayerweather v. Ritch, 195 U.S. 276, 299, 307 (1904). Likewise, due process limits the use of class actions to modify substantive legal rules. See Philip Morris USA Inc. v. Scott, 131 S. Ct. 14 (2010) (Scalia, J., in chambers). And the First District's upholding liability on a theory that all cigarettes are defective (A:15), or that the mere act of selling cigarettes is negligent (A:15-16), not only overreads the Engle findings, but also raises serious questions under the Supremacy Clause. As the Fourth District has held, federal law preempts state tort claims that "would necessitate all manufacturers from refraining from producing cigarettes." Liggett Grp., Inc. v. Davis, 973 So. 2d 467, 472 (Fla. 4th DCA 2007); see FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137 (2000).

CONCLUSION

Reynolds requests that the Court grant review.

Respectfully submitted.

s/ Charles F. Beall Jr.

Stephanie E. Parker, Esq.
Fla. Bar No. 0688355
JONES DAY

Larry Hill, Esq.
Fla. Bar No. 173908
Charles F. Beall, Jr., Esq.

1420 Peachtree Street, N.E.
Atlanta, Georgia 30309
Phone: (404) 521-3939
Fax: (404) 581-8330

Fla. Bar No. 066494
MOORE, HILL & WESTMORELAND, P.A.
P.O. Box 13290
Pensacola, Florida 32591-3290
Phone: (850) 434-3541
Fax: (850) 435-7899

Counsel for Petitioner

APPENDIX M

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

General Jurisdiction Division

CASE NO. 94-08273 CA -22

HOWARD A. ENGLE, MD., et. al.,
Plaintiffs,

v.

RJ REYNOLDS TOBACCO, et. al.
Defendants

----------/

AMENDED FINAL JUDGMENT AND AMENDED OMNIBUS ORDER

THIS CAUSE having come on to be heard on the Defendants' "***Motion At The Conclusion Of Phase II-B For A New Trial Or Remittitur, To Set Aside The Verdict, And For Entry Of Judgement In Accordance With Defendants' Motions For Directed Verdict, To Grant All Motions For Mistrial previously pending Or Denied, To Decertify The Class, and Alternative Motion For New Trial***", and the Court having been fully advised pursuant to over 190 pages contained in the "Motion", and in addition, having read the 78 page memo in support for a New Trial and Or Remittitur, and in addition having read over the contents of 6 rather voluminous loose leaf volumes submitted by the defense, and several other equally voluminous loose leaf volumes submitted by the plaintiffs, and having reviewed the applicable Law as

submitted by both sides, the Court feels it can rule on the issues without further argument, oral or otherwise.

THEREFORE, the Court issues the following: **Omnibus Order**:

To say the least, this has been a most unusual and precedent setting trial. It consumed over TWO YEARS of hard fought trial by batteries of lawyers, required over 150 witnesses, involved thousands of documents and exhibits, and generated over 57,000 pages of testimony. The issues were highly complex and often novel, straining the ingenuity of the attorneys and of the Court.

This Case was brought alleging eight separate counts—1-Strict Liability, 2-Fraud and Misrepresentation, 3-Conspiracy to Misrepresent and Commit fraud, 4-Breach of Implied Warranty and Merchantability and Fitness, 5-Intentional Infliction of Emotional Distress, 6-Negligence, 7-Equitable Relief, and 8-Breach of Express Warranty.

The defense filed motions for directed verdict as to each count and the Court will address each count separately. Many of defendants motions, although titled separately, make reference to the same material relating to an individual count, but combining references to separate plaintiffs. The ruling on the efficacy of each count will therefore apply to each plaintiff unless otherwise noted.

The defendants have filed 22 Motions for Directed Verdict, and more than 24 other motions dealing with the issues in this case all of which were deferred and need resolution.

First, it should be noted that the jury in both Phase I and II A found each of the defendants Guilty as to all counts with the exception of count 7 for Equitable relief which the court dismissed previously under the plaintiffs request for Medical Monitoring.

Second, because it may become important in resolving some of the motions, the following is a list of the manufacturer, and their products, each of the plaintiffs class representatives were alleged to have smoked over the years.

MARY FARNAN

1. RJ Reynolds—Camels, Salem, Winston, Winston Lights
2. Philip Morris—Marlboro,
3. Brown and Williamson—Viceroy, Raleighs, Tareyton, Carlton, Pall Mall
4. Lorillard—Kent
5. American Tobacco—Lucky Strike

FRANK AMODEO

1. RJ Reynolds—Winston, Camels,
2. Philip Morris—Marlboro, Virginia Slims
3. Brown and Williamson—Viceroy,
4. American Tobacco—Lucky Strike

ANGIE DELLA VECCHIA

1. RJ Reynolds—Winston Lights,
2. Philip Morris—Benson & Hedges, Marlboro, Cambridge Lights, Parliament
3. Brown and Williamson—Pall Mall, Tareyton,
4. Lorillard—Kent
5. American Tobacco—Lucky Strike

MOTIONS FOR DIRECTED VERDICTS

As to Count I—Strict Liability —

There was more than sufficient evidence at trial to satisfy the legal requirements of this Count and to support the jury verdict that cigarettes manufactured and placed on the market by the defendants were defective in many ways including the fact that the cigarettes contained many carcinogens, nitrosamines, and other deleterious compounds such as carbon monoxide. That levels of nicotine were manipulated, sometime by utilization of ammonia to achieve a desired "free basing effect" of pure nicotine to the brain, and sometime by using a higher nicotine content tobacco called Y-1, and by other means such as manipulation of the levels of tar and nicotine. The evidence more than sufficiently proved that nicotine is an addictive substance which when combined with other deleterious properties, made the cigarette unreasonably dangerous. The evidence also showed some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips so that they were covered by the smoker thereby increasing the amount of the deleterious effect of smoking the cigarette. There was also evidence at trial that some filters being test marketed utilize glass fibers that could produce disease and deleterious effects if inhaled by a smoker. In addition, there was adequate evidence that all three of the class members whose claims were tried in Phase II-A smoked one or more brands manufactured by one of more of the defendants.

The defendants have claimed that this count should have been dismissed as being barred by Section 402A of the restatement of Torts, comment

(i). This Court is guided by Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D Kan. 1995) quoting Rogers v. R.J. Reynolds Tobacco Co., 557 N.E. 2nd 1045 (Ind. App. 2 Dist. 1990) which said:

> "The reference in comment (i) to tobacco...does not as a matter of law remove all claims of defective tobacco products from the operation of 402A...[footnote 8]; Failing to warn the consumer of certain properties, such as nicotine addiction, in conjunction with its harmful qualities, render the product unreasonably dangerous.... Also, a design defect which renders the product more addictive than it could be or addictive when it need not be at all, may render the cigarette unreasonably dangerous in conjunction with its harmful qualities"

The Motion for Directed Verdict as to Count I—Strict Liability, is DENIED

As to Count II—Fraud and Misrepresentation—

Abundant evidence was adduced at trial to support the legal requirements of this Count and to support the jury verdict of the Count of Fraud and Misrepresentation. From the early years of advertising up until July of 1969, defendants engaged in concerted advertising campaigns extolling the virtues of smoking and making references to the lack of health risks and stressing the alleged benefits of smoking. References were made to Doctors smoking with no ill effects, to Radio and Television stars like Arthur Godfrey, and to sports figures, all of whom smoked and hawked the health benefits of tobacco or lack of health risks. All the while the defendants knew by their own research and the work of others,

that cigarettes were carcinogenic and caused cancer and other deadly diseases. Defendants reneged on their promises contained in the Frank Statement of 1954, and never revealed to the public the addictive nature of tobacco—a fact they all recognized but never admitted. Even after 1969, defendants continued campaigns of misinformation about the dangers of smoking and fostered the myth that there was a continuing controversy about causation in face of the over whelming contrary body of evidence worldwide. Not only was there misinformation supplied by defendants, there was concealment of known information which affected the health of the public at large. Despite a duty not to deceive, and a duty to disclose, the defendants failed to reveal information they knew was contrary to that which they disseminated—information that the defendants had developed through their own research. The concept of duty to disclose and duty not to deceive can be stated in no clearer terms than the words of the Court in Joiner v McCullers, 28 So 2nd 823 (Fla. 1947)

> "—the rule that fraud cannot be predicated of a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence, does not apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. The concealment becomes a fraud where it is effected by misleading and deceptive talk, acts of conduct, or is accompanied by

> misrepresentations, or where in addition to a party's silence there is any statement, or act on his part which tends affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes fraud."

These words are as good today as they were in 1947 and apply directly to the Fraud count and the Conspiracy count below. The only conclusion that can be drawn from such activity is that the defendants intended that the public rely upon that which the defendants generated over extended periods of time and which the defendants knew were false. Having been exposed over the years to countless advertising exposures, it is reasonable, and the jury so found, that the plaintiffs relied upon the representations made by the defendants.

The Motion for Directed Verdict as to Count II— Fraud and Misrepresentation is DENIED.

As to Count III— Conspiracy to Misrepresent and Commit Fraud.—

The Court finds sufficient and more than adequate evidence to satisfy the legal requirements of this Count and to support the jury verdict that the defendants acted in concert to misinform and deceive. The Council For Tobacco Research and the Tobacco Institute were creatures of a joint effort by the defendants to either hide and/or conceal scientific research, or provide disingenuous and misleading information to the public at large. Evidence was established that these entities were not only funded and supported by the defendants, but were in some

cases controlled and manipulated by them. The establishment of the "Special Products" division to allow corporate counsel to be involved and thereby invoke the protection of the "attorney-client" privilege all the while claiming these entities were independent of the defendants, is a prime example of the collusion involved. In addition thereto, representatives met from time to time at conferences and retreats to discuss and share information about the health effects and addictive nature of smoking and reached certain agreements on how to deal with the scientific community, including the Surgeon Generals, and how best to continue the perceived controversy in the public's eye.

The Motion for Directed Verdict as to Count III—Conspiracy to Misrepresent and Commit Fraud, is DENIED.

As to Count IV—Breach of Implied Warranty of Merchantability and Fitness—

The record reflects sufficient evidence to support the legal requirements of this Count and the jury verdict that each of the three class representatives whose claims went to trial, adequately met the requirement to sustain the count of Implied warranty. The testimony revealed that each smoked and were exposed to the various brands manufactured by the defendants not only by the act of purchasing the products from retailers but also through the promotional activities of the defendants. Specific reference was made in the evidence to the mail-in coupon program whereby the defendants, by direct mail, supplied the plaintiffs with the various brands which they smoked. These coupons where found in packs of cigarettes purchased by the plaintiff

and were not available without a purchase—therefore were not "free". Other promotions offered merchandise that was available for redemption with purchased cigarette coupons. Still other promotions distributed free samples without a purchase directly from the manufacturer. The defendants rely upon the holding of Kramer v. Piper Aircraft Corp., 520 So 2nd 37 (Fla. 1988) and Westinghouse Corp., V Ruiz., 537 So 2nd 596_ (Fla. 3rd DCA 1988) which stands for the proposition that a no-privity breach of implied warranty, is supplanted by the doctrine of strict liability. However, in this case the Court specifically finds that the evidence, as referred to above, clearly establishes the requirement of "privity' necessary to sustain a claim for implied warranty. See, i.e., Sheppard v Revlon, Inc., 267 So 2nd 662 (Fla. 3rd DCA 1972)

The motion for Directed Verdict as to Count IV—, Breach of Implied Warranty of Merchantability and Fitness, in so far as it is related to privity, is DENIED.

As to Count V—Intentional Infliction of Emotional Distress —,

The evidence in this case supports the legal requirements of this Count and the jury verdict that the plaintiffs not only suffered severe injuries caused by smoking cigarettes but, also suffered extreme mental anguish and disability from the emotional distress directly attributable to the physical injury. In addition thereto the plaintiffs also suffered emotional distress upon the realization of being addicted to the defendants product, a condition that doesn't necessarily manifest itself in any physical injury. Florida Courts have recognized the principle

that there can be emotional distress with or without physical injury or impact. (Metropolitan Life Ins. Co. v. McCarson 467 So nd 277 Fla. 1985) and (Eastern Airlines, Inc. v. King, 557 So 2nd 547_Fla. 1990). Survivors are also entitled to, and so the jury found, a claim for Infliction of Emotional Distress.

The Motion for Directed Verdict as to Count V— Intentional Infliction of Emotional Distress is, Denied.

As to Count 6— Negligence—

The verdict of the jury on the issue of Negligence is well supported by the evidence. The elements of negligence have certainly been sufficiently proven by the testimony in this case in that any reasonable person or entity, armed with the information the defendants had, should have done that which a reasonable person would have done under like circumstances, or should not have done what a reasonable person would not do under like circumstances. It is obvious that a reasonable person or entity would not have allowed a condition to exist that he or it knew would injure someone, without taking appropriate measures to prevent it. The defendants according to the testimony, well knew from their own research, that cigarettes were harmful to health and were carcinogenic and addictive. By allowing the sale and distribution of said product under those circumstances without taking reasonable measures to prevent injury, constitutes, in this Courts opinion, and in the opinion of the jury as it turns out, — negligence.

The Motion for Directed Verdict as to Count VI— Negligence,, is *DENIED*.

As to Count VII—Equitable Relief —

This Count has previously been dismissed by the Court under the heading of Medical Monitoring.

The Motion for Directed Verdict as to Count VII— Equitable Relief, is GRANTED

As to Count VIII— Breach of Express Warranty—

Evidence adduced at trial more than adequately supports the jury verdict and satisfied the legal requirements of express warranty in that the defendant tobacco companies for decades prior to July 1969, advertised their products as being safe, free of medical risks, etc, by using such techniques as having "doctors" promoting the products, etc. In some instances making claims that a particular brand is easier and smoother on the throat and less irritating. Subsequent to 1969, the advertising campaign shifted to claims of low tar and nicotine when in truth the defendants knew the tar and nicotine levels were either false or manipulated.

The Motion for Directed Verdict as to Count VIII— Express Warranty, is DENIED.

In addition to the above, the defendants have filed numerous other motions for Directed Verdicts, which the Court will treat below:

Statute of Repose —

This issue as it relates to the facts of the case, has been resolved up to now by the decision in Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 FLW S12 (case No. SC94544 Opinion filed January 6th, 2000). The Supreme Court reaffirmed the decision in Diamond v E.R. Squibb & Sons, Inc., 366 So 2nd 1221 (Fla. 3rd DCA 1979) and held that there is an exception to the Statute of Repose in cases of latent injury in product liability cases.

> "Therefore, we hold that in a products liability action where the now-defunct statute of repose is still applicable, the latent injury exception remains viable so that the statute of repose will not extinguish the plaintiff's cause of action if his or her injuries are latent and undiscoverable within the repose period."

This concept has been following by the 2nd District in a recent opinion, Laschke v Brown and Williamson Tobacco Corporation et. al., 2000 WL 868251 (FLA. App. 2nd Dist.) in which the Court said:

> "The conspiracy of the defendants has been ongoing since at least December of 1953 and has been continuous through the present. We conclude that, because of the dispute surrounding these allegations, the date of the last act done in furtherance of the conspiracy presents a question of fact not proper for resolution on summary judgement. Therefore, the Laschkes' claim for conspiracy to commit fraud cannot be said to be barred by the statute of repose as a matter of law on this record."

The Motion for Directed Verdict on the issue of the Statute of Repose, is DENIED.

Statute of Limitations re: Frank Amodeo

The jury in Phase 11A determined that plaintiff Frank Amodeo knew or should have known on or before May 5, 1990 (4 years prior to the filing of this case) that he was addicted to smoking, and further, that he had cancer reasonably caused by smoking. This finding acts as a bar to Frank Amodeo's claims for Strict Liability, Implied and Express Warranty, Negligence, and Emotional Distress. It does not

however bar the claims under Fraud and Conspiracy pursuant to the holding in Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 FLW S12 (case # SC 94544 January 6 2000) which recognizes an exception to the Statute Of Repose in the case of continuing fraud.

The Motion for Directed Verdict on the Statute of Limitations re: Frank Amodeo is GRANTED as to the Counts of Strict Liability, Implied Warranty, Express Warranty, Negligence, and Intentional Infliction of Emotional Distress, and DENIED as to the Counts of Fraud and Misrepresentation, and Conspiracy to Misrepresent and Commit Fraud.

Federal Preemption

The seminal case regarding Federal preemption in tobacco cases is Cipollone v. Liggett Group, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2nd 407 (1992). That case specifically exempted claims of Fraud and Conspiracy to commit Fraud and Misrepresentation from the pre-emption effect of the 1969 Act.

> "In the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from long standing rules governing fraud... Petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions are not pre-empted...such claims are...predicated on...the duty not to deceive."

The 1969 Act does not pre-empt any claim for acts committed prior to 1969 in any event, and certainly does not pre-empt any acts of fraud or conspiracy committed by the defendants subsequent to 1969. The record in this case is replete with evidence relating to the fraud and conspiracy claims which the

jury apparently considered, and believed, in finding the defendants guilty of those counts.

As to the issue of addiction, there seems to be a head on conflict between the issue of "failure to warn" after 1969, and the concept that the defendants had a "duty not to deceive". Given the merits of those claims, and the realization that the defendants had the knowledge that nicotine addicts as early as the 50's and 60's and still publically declared, well into the 80's and 90's, that nicotine is not addictive, the record of the trial reflects that the plaintiffs presentation opted for evidence of a "duty not to deceive" which goes directly to the fraud and conspiracy exception under Cipollone ,rather than the "failure to warn" preemption element. Also see Joiner v. McCullers, 28 So 2nd 823 (Fla. 1974).supra.

The motion for Directed Verdict on the grounds of Federal Preemption is DENIED.

Failure to Warn Pre-1969

For guidance the Court relies on the decision in Burton v. R.J. Reynolds Tobacco Co., 884, F. Supp. 1515 (D. Kan. 1995), which definitively rejected the defendants theory that there was no duty to warn because everybody was aware of the dangers of smoking. The defendants position is disingenuous because the defendants for decades had decried the health risks of smoking and publically stated that there was no conclusive proof cigarettes caused disease. At the same time the defendants were aware that nicotine was addictive—something the general public did NOT know. Also, the defendants were under a duty not to deceive. This concept can be stated in no clearer terms than the words of the

Court in Joiner v McCullers, 28 So 2nd 823 (Fla. 1947).supra.

The Motion for Directed Verdict for Failure to Warn is DENIED.

Motions for Directed Verdicts on behalf of Council For Tobacco Research and Tobacco Institute

Despite protests by these defendants that the plaintiffs were unable to point to any specific act of either of these defendants to establish plaintiffs claims, the jury, having found these defendants guilty on all counts for which they were charged, apparently found enough in the evidence to conclude that the thousands of pieces of information to which the plaintiffs were exposed over several decades, came from the concerted efforts of the defendants to provide such information to the public. Ironically, the defendants claim the plaintiffs could not possibly have known, and or, relied on the content of such dissemination, while at the same time arguing that the defendants cannot be held liable because over the years everybody knew of the dangers of smoking from other unnamed sources.

Since each of these defendants were acting on behalf of, or in concert with, the other defendants in the case, the jury reasonably could, and apparently did, conclude these defendants were guilty of fraudulent representation, concealment and conspiracy.

The motions for Directed Verdicts as to the Council For Tobacco Research and the Tobacco Institute are DENIED.

Application of Michigan and/or New York Law

This issue has already been decided by Judge Postman in his pre-trial order of January 6th, 1998 and is the law of the case. That order sets the principle that if a plaintiff was in the State of Florida at the time the medical condition was diagnosed and the causal relationship with smoking had manifested itself, and the plaintiff was a resident of Florida at that time, then the law of Florida would apply regardless of the fact that the plaintiff had resided in another State and smoked prior to the diagnosis.

The Motions for Directed Verdicts on the application of Michigan and/or New York law are DENIED.

Motion for Directed Verdict on the issue of Punitive damages

The jury having heard the evidence submitted during the Phase I trial, definitively determined that the conduct and the behavior of the defendants rose to a level to entitle the plaintiffs to an award of punitive damages. The Court having heard the same testimony and evidence concurs the proofs were clear and convincing.

This motion is DENIED as to ALL defendants

OTHER MOTIONS FILED ON BEHALF OF THE DEFENDANTS MOTIONS IN LIMINE

The defendants in this case have filed numerous other motions, most of which were ***MOTIONS IN LIMINE*** or which in some regard related to the presentation of evidence. Most, if not all, were resolved during the evidentiary portion of the trial as the testimony was elicited and were either denied, or sustained in whole or in part or mooted, as the record

will reflect, therefore there is no need to rule on those motions here.

MOTIONS FOR MISTRIAL

The Court has carefully considered the Motions for Mistrial in this cause and has determined that curative instructions to the jury, and/or motions to strike have been granted as requested by the movant, for most of the motions, and in any event the cumulative effect of the alleged error, was not in the opinion of the Court, sufficient to have so influenced the jury as to affect the outcome of the case considering the length of the trial, the number of witnesses presented, the quality and quantity of the testimony, the huge amount of documentary evidence, and specifically the substance of the alleged remarks. The jury in this case rendered three verdicts, each based upon a mountain of evidence over a period of two years in three separate trials. The court feels confident, that although some remarks of counsel may have been uncalled for, or subject to objection, they were not so egregious as to require a new trial. THEREFORE:

All Motions for Mistrial which have been previously deferred or not previously denied, are hereby DENIED.

It should be noted here, that at the close of the Phase II B (punitive damages) trial, the defendants filed a plethora of motions, all outlined in a 190 page motion for New trial or Remittitur, to Set Aside the Verdict and for Entry of Judgement based on previous Motions for Directed Verdicts, Mistrial, and for Decertification.

The Court has already ruled upon the Motions for Directed Verdicts and Mistrials herein, however a

review of the voluminous **Motion for New trial** reveals far too many alleged assignments of error for the Court to address on a one on one basis. In fact, the motion ostensibly reviews every objection raised during the entire two year, three phase trial and over 57 thousand pages of transcript. As to each of the objections raised during trial, the Court entered a ruling resolving the issue at the time the objections were made, and sees no reason to reverse itself at this time, nor does the Court feel that just because possibly hundreds of objections were made, that this necessarily resulted in such a cumulative error as to require a new trial. The Court has reviewed the motion and all the alleged errors cited, and has determined that on the merits of each claim, the motion is unsustainable.

Therefore: The Motion for New Trial is DENIED.

This leaves two issues to be resolved by the Court for which the Court feels a comment is appropriate: **Decertification** and **Remittitur**.

DECERTIFICATION

Although, the 3rd District Court of Appeals and the Florida Supreme Court have already addressed the issue of Certification, approving preliminarily the case to proceed as a class action case, see R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2nd 39 (Fla. 3d DCA 1996) and Review Denied, Fla. S. Ct. Docket No. 88235 10/2/96., the matter is still before the Court for a ruling on Defendants Motion to Decertify, at the close of all the evidence.

This case was divided into separate phases—the first phase was to determine the common issues of liability, causation and entitlement to punitive damages. The second phase was a trial on the claims

of three class representatives involving issues of individual compensatory damages, causation and comparative fault. The third phase involved the issue of the amount, if any, of punitive damages in the aggregate.

The jury found for the plaintiffs in all three phases generally, and assessed compensatory damages of over **12 million dollars**, and punitive damages in the neighborhood of **145 billion dollars**.

In assessing whether a case should be classified as a "class action" lawsuit, controversy has arisen in product liability cases as compared to mass tort or accident cases. In product liability cases individual issues often outnumber common issues due to the fact that no single event has brought about the injury complained of, nor is there generally any single proximate cause which applies equally to all potential class members. Moreover, affirmative defenses such as Statutes of Limitation, Statutes of Repose and concepts of reliance etc, may depend on facts peculiar to each plaintiffs case.

The Court in Amchem Products, Inc. v. Windor, 117 S. Ct. 2231, speaking about the 1996 revision of Rule 23 noted the committee opinion that mass tort cases are not ordinarily appropriate for class action, but the text of the rule does not categorically exclude mass tort cases from class certification. Since the late 1970's, courts have been certifying such cases in increasing numbers. See Resnick, From "Cases" to "Litigation", 54 Law & Contemp. Prob. 5, 17-19 (Summer 1991) (describing trend) (emphasis added).

In trying to determine whether a case should be certified as a class action, a majority of the courts

look to three criteria: 1.) tort maturity, 2) efficiency and manageability, and 3) negative value.

TORT MATURITY

Not until torts are classified as "mature" and general causation has become relatively clear, will such cases be candidates for class action treatment. "Manual for Complex Litigation (Third) S 33.26 (1997).

In Costano v. American Tobacco Co. (5th Cir. 1996) decertification was based on an "immature tort". That case intended to encompass all potential future tobacco related personal injury claims against the Tobacco Industry, whereas the instant case involves only those who have an immediate disease or condition. It should be noted that this Court has denied the plaintiff's claim for Medical Monitoring precisely to avoid the pitfall of the Castano case and Barnes v. American Tobacco Company, 161 F.3rd. 127 (3rd Cir. 1998) The Court refused to allow potential claimants who have not manifested a disease or condition to become a member of the class, therefore this is not an "immature tort" issue.

EFFICIENCY AND MANAGEABILITY

In part, this requirement is designed to evaluate whether the resolution of cases by class action is a viable and judicially economic alternative to individual suits.

The Castano decision to decertify the class action based its ruling on the fact that the lower court has not considered how each claim in the complaint varied under the law of difference states and on the fact that the lower court did not make a finding of whether litigation is manageable in light of these

differences. Id. at 739. The Castano court found that there were "extensive manageability problems" which included "difficult choice of law determinations, sub-classing of eight claims with variations in state law, notice to millions of class members, further sub-classing taking account of transient plaintiffs, and the difficult procedure for determining who is nicotine dependent." Likewise in Georgine v. Amchem, 83 F.3d 610, 632-33 (3rd Cir. 1996), as well as in Castano, a lack of judicial efficiency also derailed the proposed class.

However the instant case is unlike Georgine or Castano in that, the trial plan has effectively allowed the determination of general issues" en mass", thereby conserving the Court's resources by then only requiring Phase II trials to determine individual issues of liability and entitlement particular to each representative member of the class. In the Castano case, the court portended 1) problems involving the manageability issues regarding the notification to a class of millions; 2) sub-classing for transient residents; and 3) problems with superiority requirements due to individual reliance and immaturity of the tort. The Court believes it has successfully addressed and allayed the above concerns of the Castano court.

First, since the immediate class has a much more limited size and involves only Florida residents and Florida law, the Court has been able to effectively notify its potential members without having to concern itself with the variations of state law which were endemic in Castano.

Secondly, unlike Castano, the instant case involves a much smaller population, involving only residents

of Florida who had manifested a disease or made a causal connection thereto. Because Florida law is the only law to be applied to determine the rights and liabilities of the parties with respect to the instant action, this Court has been able to create a touchstone which will help determine the "choice of law" analysis for the Plaintiff class, thus the shortcomings of the Castano case in regard to transient residents has been successfully avoided in the instant case. See infra Engle Class Order dated January, 1998.

Thirdly, and again unlike the Castano court which based its decision to decertify on the assumption that at the time of decertification individual reliance may come to undermine the superiority requirement for maintaining a class action, the instant action has successfully avoided the problems associated with reliance in class action suits. Although Florida courts have an aversion to class action treatment for breach of contract or fraud claims, it is in limited circumstances, appropriate for class action. See Lance v. Wade, 457 So.2d 1008 (Fla. 1984); see also Broin v. Philip Morris Companies, Inc., 641 So.2d 288.

In addition, since fraud has been shown by the Plaintiffs to be a result of deception and artifice, fraud may, under Florida law, be based upon an omission or non-disclosure. See Taylor v. American Honda Motor Co., Inc., 555 F.Supp. 59 (M.D. Fla. 1983). In such instances, the courts have recognized that a fraud class action based on an omission or non-disclosure is appropriate for class actions.

As such, the issue of superiority vis a vis individual reliance is no longer dispositive, as several courts, in

similarly situated cases involving omission or non-disclosure ,have found that reliance is not an obstacle to class action. See Keyser v. Commonwealth National Financial Corp. 121 F.R.D. 642 (M.D. Pa. 1988).

At the close of Defendants' case, it has become apparent to this Court that class action treatment is superior to pursuing this matter by individual claims. If Plaintiffs were required to try their cases individually, issues such as reliance, causation, defendants knowledge, intent, or reckless disregard, and defendants' financial capacity, etc., will have to be litigated many of thousands of times. This is more than mere speculation. After having sat through the enormous complexities involved in this trial, it is self-evident that any trial would have to involve similar proceedings. And if there were to be individual trials, it is inevitable that the common issues of Defendants' conduct would become a predominant aspect of each trial, which could result in conflicting verdicts- thus proving that common issues become the most prominent aspect of this case.

The closest parallel this Court can find to the instant case is asbestos litigation, which is undoubtedly one of the most complex of all mass tort litigation. See Ahern v. Fireboard Corporation, 162 F.R.D. 505, 528 (the primary factual and legal issues such as disease causation, product, situs and defendant identification and standard of care have been identified and developed through extensive litigation; despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex.) The same can be said for tobacco litigation since it also has fully developed and resolved issues,

and is subject to extensive litigation, thereby, contributing to the delay, high transaction costs, and arbitrary results that have become such a burden to the judicial system, (and providing further argument for the need to resolve these issues through class action litigation).

The Court is also aware that there exist legitimate Seventh Amendment concerns when a multi-phase trial involves separate and distinct issues of general and specific causation. However, the trial plan clearly limited general causation issues to Phase I and there was little to no risk that such issues would be revisited in any subsequent phases. See in re: Dow Corning Corporation, 211 B.R. 545 (E.D. Mich. 1997) (In that case the trial court held in regard to separate trial for general causation, the VII Amendment would be a concern if a specific causation/damage jury revisited the issue of general causation in its deliberations. However, experienced trial judges in conjunction with parties could overcome that pitfall through careful controls over trial processes, and could minimize the danger of allowing a second jury to re-examine findings of first jury).

Likewise, in Cimino v. Raymark Industries, Inc., 151 F.3d 297 (5th Cir. 1998), the court approved a trial plan that adequately individualized and preserved the Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease. Although that court ultimately held that the use of "extrapolation plaintiffs" in that case violated the VII Amendment, the court did find that such a plan can constitutionally divide general and specific causation.

See also Jenkins v. Raymark Inds. Inc., 782 F.2d 468 (5th Cir. 1986), (justifying class trial of common issues and individual trials of individual issues of exposure—causation and damages).

Several courts involving matters other than asbestosis have also allowed the separation of general and specific causation. For example in Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1200 (6th Cir. 1988), a personal injury suit by individuals living in the neighborhood of a landfill allegedly contaminated by defendant, the Sixth Circuit noted that

> "the [trial] court, as is appropriate in this type of mass tort class action litigation, divided its causation analysis into two parts. It was first established that Velsicol was responsible for the contamination and that the particular contaminants were capable of producing injuries of the types allegedly suffered by the plaintiffs. Up to this point in the proceeding, the five representative plaintiffs were acting primarily in their representative capacity to the class as a whole. This enabled the court the determine a kind of generic causation—whether the combination of the chemical contaminants and the plaintiffs' exposure to them had the capacity to cause the harm alleged. This still left the matter of individual proximate cause to be determined. Although such generic and individual causation may appear to be inextricably intertwined, the procedural device of the class action permitted the court initially to assess the defendant's potential

> liability for its conduct without regard to the individual components of each plaintiff's injuries. However, from this point forward, it became the responsibility of each individual plaintiff to show that his or her specific injuries damages were proximately caused by ingestion or otherwise using the contaminated water".

See also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227,1229,1234 (9th Cir. 1996) (in certifying Fed R. Civ. P. 23(b)(3) as a class in prescription drug products liability suit, the district court "specifically excluded the individual issues of proximate causation, and compensatory damages";).(Class certification reversed on other grounds, but Fed R. Civ. P. 23(c)(4)(A) exclusion of individual issues, essentially approved). See also Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992) (panel affirmed trial plan for determination of liability and punitive damages to be followed by trials on individual issues).

Given the above reasoning, this Court held that in Phase I, the jury was required to determine, among other issues:, 1) whether smoking cigarettes caused the disease(s) in question, 2) resolve general issues of causation, 3) determine the extent of the defendants wrongful conduct, and 4) determine entitlement to punitive damages. The jury returned verdicts in favor of the plaintiff on all those issues. The same jury in Phase IIA was then asked to: among other issues, 1) determine individual issues of causation for the class representatives, and, 2) determine the representative class members compensatory damages. Again, the jury returned verdicts favorable to the plaintiffs. In Phase IIB, the jury was required

to determine the amount of punitive damages to be award in the aggregate against all defendants. The jury, after hearing two years of trial in three stages, returned a multi-billion dollar punitive damage award.

In Phase III, the individual claims of the class members will be tried before different judges and different juries to determine whether the injuries complained of were the result of cigarette smoking or from other causes, and what if any, damages resulted from that activity. The Juries in Phase III will not be concerned with the general causation issues of the previous trials, nor the conduct or behavior of the defendants, or punitive damages, those issues have already been resolved, and subsequent juries may be so instructed.

The Defendants would be permitted to introduce evidence limited to the specifics of the individual plaintiffs circumstances. For example, the Defendants would be permitted to show that the plaintiff has a genetic pre-disposition to the disease, that s/he smoked cigarettes for too short a period of time for symptoms to have been caused by smoking cigarettes, or that the disease was caused by some other activity etc. Future Courts and Judges can, by skillful control of their cases, eliminate the danger of allowing a second jury to re-examine the findings of common issues determined by the first jury in Phases I, IIA and IIB.

Parenthetically, the Court is also aware of the due process problems associated with findings of liability for class actions of unspecified size. The Court feels that a statistical finding of the class size preserves the Defendants' due process rights while at the same

time preserving Plaintiffs individual rights to trial. Thus any claimants' rights are preserved through this action which otherwise would have precluded tort claimants for their day in court and many claimants who would never live to see their cause litigated nor have the opportunity to receive compensation have had an opportunity for redress.

NEGATIVE VALUE

Finally, we address the issue of whether the case is a "negative value" suit. Negative value suits "permit the plaintiffs to pool claims which would be uneconomical to litigate individually." See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809. 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); see also Rhone-Poulenc, 51 F.3d 1293 (7th Cir. 1995). Thus since issue of negative value does not inure to either Defendants or Plaintiffs in the instant action, the Court will not find it to be dispositive as to the superiority question. See also Ruiz v. American Tobacco Company, 180 F.R.D. 194.

CONCLUSIONS REGARDING DECERTIFICATION

For the reasons above, the Court record establishes in a clear fashion that there has been resolution of the problems concerning immaturity of tort, efficiency and manageability, and negative value. Thus, decertification is inappropriate in the instant action. The class certification and trial plan calling for trifurcation of the issues is the preferred option in this case.

Therefore: The Motion To Decertify The Class is—DENIED

REMITTITUR

The issue of Remittitur has been reserved for last because it was last in the scheme of things during the trial.

The case as has been stated above, was tried in three stages, the last being a punitive damage phase. The jury returned a multi-**billion** dollar verdict against the defendants to wit:

Phillip Morris, Incorporate	$ 73,960,000,000
RJ Reynolds Tobacco Company	$ 36,280,000,000
Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company	$ 17,590,000,000
Lorillard Tobacco Company/Lorillard, Inc.	$ 16,250,000,000
Liggett Group Inc./Brooke Group Holding, Inc.	$ 790,000,000
Council For Tobacco Research	$ 1,105,210
Tobacco Institute	$ 278,339

The defendants have attacked the jury verdict as excessive and unreasonable and have asked for a new trial or in the alternative, a remittitur.

A remittitur is generally controlled by the principle of whether the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage, or wantonness of the tortious conduct. Arab Termite and Pest Control Of Florida, Inc., et al., v. Jenkins Fla., 409 So 2nd 1039 (S. Ct. 1982). In addition thereto, it must be determined whether the award is out of proportion to the defendants net worth or ability to pay without going into bankruptcy or going

out of business, see: Bould v Touchette, 349 So 2nd 1181, and Jones v Greely, 25 Fla. 629, 6 So 448 (1889).

The "reasonable proportion" controlling in this type of case must ,of course, be affirmatively supported by the record, or the judge must find that the jury was influenced by matters outside the record. (Arab Termite supra). Another consideration is the meaning and effect of the term "net worth" as it relates to the imposition of punitive damages. Although net worth can simply be stated as the end result of comparing assets against liabilities, it is not the end-all when determining an award of punitive damages. The jury has the right to determine, when deciding punitive damages, the 'financial resources" of a defendant see, Florida standard Jury Instructions (Civ) subparagraph (2) PD 1b (2). Therefore, "net worth' is only one factor in determining the "financial resources" of a defendant.

Before going further, the court feels it necessary dispose of the issue of "outside influence". The Court has determined that there is **no evidence** that the jury in this case was influenced by any matters outside the record. In fact the Court took special pains to instruct the jury on a daily basis about reading anything, seeing anything or listening to anything from any source whatsoever, be it radio, T.V., newspapers, magazines, the internet or conversation with others, that might have anything to do with the issues or subject matter in this case, and/or which might influence their verdict. The jury was told they must return a verdict based solely on the evidence and testimony adduced in court and on the instructions from the court and from no other

source. The jurors were interrogated each day of trial by the Court, (the parties also had equal opportunity to question the jury), as to compliance with this instruction. After carefully evaluating the jury and their responses to the Court's inquiry, the Court is well satisfied that the jury was **NOT** influenced by any matters outside the record. **Nor**, in this Courts opinion, was the jury **unduly** influenced by matters **even experienced at trial**.

This then leaves the issues of whether the punitive damage award is out of proportion to the defendants conduct, or the defendants ability to pay, or both.

CONDUCT OF THE DEFENDANTS

The first major issue to be discussed is whether the ***conduct or behavior of the defendants*** warrants the $144.08 billion dollar punitive damage award, and whether the award "shocked the conscience of the Court," and therefore, whether a remittitur should issue.!!

This Court sat through two years of trial, listened to over 150 witnesses, heard over 57 thousand pages of testimony and conducted hundreds of hearings on legal and evidentiary issues in addition to becoming familiar with the complexity of the issues from the very inception of the filing of the complaint in 1994. The Court truly believes it has more of an understanding of the case than any non-participant, and is in a better position to render such a judgement. Remember, the issues in this case go back to the 30's, 40's and 50's—seventy years or more of conduct by the defendants which led to the complaint in 1994 and which on some issues, continues to the present. That is what makes this case so unusual and unique.

At first blush, a $144 **BILLION** dollar punitive damage award seems so far outside the comprehension of any reasonably thinking person that one would immediately say it is shocking and not in keeping with rational thought. However, keep in mind the enormity of the seventy years of behavior and the almost incomprehensible damage that was done to such a huge number of people. There has been testimony in this case that 400 thousand people have died each year from the ill effects of smoking tobacco products, and hundreds of thousands of people contracted diseases and suffered, and still suffer, the horrible effects of those diseases. The enormity of the damage is mind boggling, as is the realization that the ill effects of tobacco smoking was known as far back as the turn of the century!. Health official for years struggled with the concept of causation and sought through the scientific world to bring the matter to the attention of the public. The tobacco industry fought them at every turn, decrying the concept of causation and rallying behind the defense of "free choice".

The proof of the pudding ,as it were, was in the fact that back in 1953 Dr. Wynder with his mouse painting studies, announced to the public, a link between smoking and cancer. This led to the formation of the "Tobacco Institute Research Committee (TIRC),[later known as the Council for Tobacco Research (CTR)] by the tobacco industry which then resulted in what has been known as the "Frank Statement" in 1954. This was a statement published in 400 newspapers aimed at 43 million Americans, explaining that the tobacco industry recognized the dangers involved in smoking tobacco, and pledged to conduct a concerted research effort to

develop a safer product, and to keep the public informed of its research results. The major tobacco companies of the day (the defendants in this case) all signed off on the document (with the exception of Liggett.). TIRC meanwhile, acting as a public relations arm of the tobacco industry, engaged in a concerted effort to refute any claims of health dangers as a result of smoking. A publication called "Tobacco and Health Research" was created to disseminate false and misleading information regarding the issue of causation. Although the defendant tobacco companies had promised full public disclosure of its findings and research, the defendants, via The Council For Tobacco Research, suppressed reports and attacked research. In 1954, Liggett & Meyers, as it was known then, hired Arthur Little to duplicate Dr. Wynders skin painting tests and he got the same or similar results—but those results were never made public by the defendants.

During the ensuing years, the tobacco industry and the defendants became aware that tobacco smoke contained over 4,000 compounds, and over 40 carcinogens but did not reveal that information to the general public. In fact, the defendants knew about the addictive nature of nicotine as early as the 60's, and in 1972 in a Philip Morris report at a CTR conference a statement was made.."without nicotine there would be no smoking"...and..."cigarettes are a dispenser for a dose of nicotine".

As a matter of fact, tobacco scientists learned how to manipulate the levels of nicotine in cigarettes by adding ammonia to produce a "freebasing" nicotine which speeded up and enhanced the effect of nicotine

on the brain. They also were able to develop the Y-1 strain of a high nicotine content tobacco plant grown in a foreign country In addition, company scientists were able to devise ways of manipulating tar and nicotine content in cigarettes thus lulling the public into believing there was a "safer" cigarette.

Evidence existed regarding the conspiracy and fraud activities of the companies in the form of a so called "Gentlemens Agreement" not to do independent research, with the idea of suppressing unwanted or damaging research results. Also, under some circumstances, research results were sent to company offices over-seas in order to prevent discovery.

Another problem area was the setting up of the "Special Project" unit of CTR, in which attorneys either controlled or had a say in determining which research projects would be undertaken and by whom. The way it was structured allowed the companies to claim an attorney- client privilege whenever necessary. Comment was made on this very subject by Federal Judge Sarokin in Haines v Liggett Group, Inc., 140 F.R.D. 681 D.N.J. 1992 who said defendants used the attorney-client privilege to hide documents—never intending to give full disclosure, and he called it a fraud to mislead the public. Judge Sarokin also said in that opinion "..the tobacco industry may be the king of concealment and disinformation" In conjunction with CTR, the defendants established the "Tobacco Institute" and used it as a lobbying arm with government agencies to advance certain position strategies such as the "multi-factorial hypothesis", and the "genetic" defense, to counter-act the series of Surgeon

General's Reports, and the studies of the scientific community.

The record also reflects that in 1994, the C.E.O's. of the defendant companies went before congress and swore under oath that cigarettes and/or nicotine was not addictive, even though there was evidence as far back as the 60's to the contrary. That position was also voiced by the Vice President of the Tobacco Institute Brennan Dawson in 1994 who said cigarettes are not addictive, nor has it been established scientifically that smoking cigarettes was harmful to health. Dr. Alexander Spears of Lorillard denied before congress that the defendants manipulated nicotine levels. Charles Whitley of TI echoed that denial. However, in 1981, Dr Spears in an article for the 3rd Tobacco Chemists Research Conference had discussed manipulating nicotine levels. The defendants continued to claim that there is no proof that cigarettes cause harm. This ,in face of the many Surgeon Generals reports and other scientific evidence, over several decades, that spelled out the harm caused by smoking, specifically lung cancer and a long list of other diseases. Throughout the decades since the "Frank Statement", the evidence revealed that the tobacco industry, specifically these defendants, have followed a line of telling the public that there is no scientific proof of "causation" and no verified link between smoking and disease, when their own research proved otherwise.

Evidence at trial was replete with the history of denials by the defendants about the health effects of tobacco. Trial evidence outlined the techniques of billion dollar advertising campaigns to sell their products to the public in general and youth in

particular. Many documents from the defendant's files revealed reports, conferences, discussion and memo's dealing with youth and gender marketing and strategies to deny such practices.

Over-all, the entire two year trial record was full of examples of deceit, denials contrary to research results, efforts to conceal or suppress information, collusion among defendants to insulate themselves collectively from public and the scientific and public health communities criticism of the industry, and either outright misrepresentation, or failure to acknowledge that which was proven and obvious.

As a result of years and years of such activity , the public was led astray and confused by the seeming conflict in the evidence about the harmful effect of tobacco, and kept in ignorance about the addictive nature of nicotine, and suffered untold misery and harm, including death, from the diseases, i.e.: cancer, emphysema, heart and circulatory problems, etc, all resulting from the use of the product.

If one really examined the entire record in detail of the decades of abuses committed by the defendants upon an ill informed and unsuspecting public, one could say it was that concerted behavior on the part of the Defendants, over so many years, affecting so many people, that **"shocks the conscience of the Court"**, ***not the award itself.***

In Phase I of the trial, the jury , having heard the testimony concerning the behavior and conduct of the defendants, decided that punitive damages were indeed appropriate in this case, and in Phase IIA the jury set those punitive damages as outlined herein. **Therefore**:

As to the first Issue—behavior of the defendants—, this Court has no problem accepting the rational of the jury who heard all the evidence, that the award is warranted because of the behavior of the defendants. In other words, the Conscience of the Court is ***NOT SHOCKED*** either by the fact that an award was made, nor by the amount of the award rendered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

ABILITY TO PAY

THE PLAINTIFFS POSITION

Dealing next with the issue of ***ability to pay***, the testimony on the plaintiffs side came from two experts who testified about the "financial worth" of each of the defendants, utilizing certain criteria they felt were in compliance with generally accepted standards of persons who evaluate businesses. Although there was controversy about the method used to make the calculations, Mr. Cherner testified that based on a projected figure that one percent of market share was worth $1.5 billion, then each defendants "worth" can be calculated by the percentage of market share attributable to that defendant. Those calculations resulted in the following: (estimated values).

	MARKET SHARE %	MARKET SHARE VALUE $
Phillip Morris	..... 49.3	..... 73.95B
R.J. Reynolds	..... 24.12	..... 36.18B

Brown & Williamson	……..	14.0	……...	21.B
Lorillard	……..	10.7	……...	16.05B
Liggett	……..	1.2	……...	1.8B

In addition to the above, the plaintiffs experts opined that net worth is not an accurate measure of a company's value. Net worth is reflected in a balance sheet, sometimes called book value, but the true worth of a company is based on net worth (book value/ balance sheet), plus intangibles, which in this case includes good will and trademark. In that event, the resulting values as calculated by the testimony, are fairly close to the figures above: (Philip Morris .$80B, RJR..$36B, B&W..$22B, Lorillard..$17B, and Liggett..$1.8B.).

JOSEPH CHERNER

Plaintiffs expert Mr. Cherner indicated that his calculations are based on the only available comparables in the industry—the purchase by Philip Morris of 3 Liggett brands, which he then used to extrapolate the value of the other defendant companies. He therefore opined that since this was a Philip Morris estimate of another tobacco companies brand worth, therefore it is a more accurate indication of true worth of a company.($300 M for .2% of 1% of market share, which makes each 1% of market share worth $1.5 billion) see chart above.

Mr. Cherner, in his testimony made several points. He said, for example, that RJR net worth is not the true value of the company —it is only stockholders equity, and RJR's worth is $37.5B or 5 times what RJR reports on it's 10K. He said according to the way Philip Morris determined value in the purchase

of the Liggett brands, Philip Morris brands are valued at $75 Billion , and RJR is worth $37.5 billion, and he would use the same formula to value B&W and Lorillard, because Philip Morris would be in a better position to know better than anyone in the world what cigarette brands are worth. He also said that when Philip Morris valued its own brands at $75B it is valuing its brands including the legal liability it faces from this day forward.

Mr. Cherner also said that the defendants, in order to pay the $250 billion MSA/FSA obligation, simply raised prices 4.5 cents a cigarette and generated $21 billion, and if by raising prices there was a decrease in consumption by 10%, they would still raise $19 billion per year forever.

In another opinion, Mr. Cherner testified that Lorillard's valuation of market share would most likely be identical, and if not very similar, to Philip Morris's valuation of market share to-wit,:$15-16 billion dollars, even taking into account adjustments for assets and liabilities.

He also said that although Lorillard does not have $15 B in the bank, that does not mean by any stretch of the imagination, that Lorillard cannot take place in a punitive damage award that collectively would come to $250 Or $300 billion.

As for the MSA and the FSA, Mr. Cherner agrees that the $250 billion is to be paid out over a period of years—however he also acknowledges that the defendants have been able to make payments of up to $10 billion dollars or more, adjusted for inflation, per year since the institution of the "Agreements".

When asked by the defense about how much Philip Morris can pay in punitive damages, Mr. Cherner

said since Philip Morris has 50% of the market share, it should pay 50% of the punitive damage award.

With reference to RJR, Mr. Cherner said there is a confusion about calling shareholder equity net worth. If assets were valued at market prices and the liabilities were valued at market prices, then shareholder equity may mean the same thing as net worth, however very often assets are not valued at market level-for example one may have a building valued on the books for one million dollars, that is presently worth $100 million, but still the book shows a value of only one million. So most often, assets minus liabilities does not equal stockholders equity. Mr. Cherner also said that it is misleading to the jury to say that RJR has a net worth of $7 billion dollars. It implies that is the value of the company, but it is not. It is the stockholders equity figure and is not net worth.

In regard to Liggett, under cross examination, Mr. Cherner opined that with reference to the MSA and the FSA and the ability of the defendants to raise $20 billion dollars a year in extra income by increasing prices,...", this amounts to a present value of between a $200 billion and a $400 billion dollar settlement. So if we're trying to value what $20 billion dollars a year would be worth in a punitive damage award, it would be worth a present value of an award of anywhere between $200 billion and $400 billion dollars. That's what a punitive damage would be worth under that scenario. He also said he was aware that Liggett has paid zero or a negligible amount under the MSA.

Concerning Brown and Williamson, Mr. Cherner said B&W was the only one of the defendants that

was not doing well after the MSA—losing some market share from about 14% to around 11.6% currently. B&W operating income has also declined but still shows a net income of $215 million.. He also was unaware that B&W has received a negative one billion rating from organization such as Smith Barney or Credit Suisse.

PROFESSOR GEORGE MUNDSTOCK

The other plaintiffs expert, Professor Mundstock in essence echoed Mr. Cherner's views on whether financial statements reflect true value. He said there are three types of financial statements—an asset account, a liability account and a equity account. A balance sheet is just a snapshot in time and does not represent an appraisal or evaluation. Intangibles go into determining overall value—this is called intangible value—such as trademarks. Most of the time intangibles are not listed in the books. Generally speaking book value therefore, does not necessarily reflect market value.

He also said there is such a concept as market capitalization—the value of what a company thinks its stock is worth, however, the stock market value of the company doesn't fully reflect their ability to pay.

The real value of a business to an owner, he said, is the value of the cash they can pull out of a business and still keep going, and then figure out at current interest rates, what that future cash is worth—that's called capitalized earnings approach or present value approach or discounted earning approach. Prof. Mundstock said he used this type of approach because he did not have adequate comparables to work with. According to Prof. Mundstock, because there were no comparables he could work with, he

took his best guess of what kinds of excess cash the business would throw off; figured out what someone be willing to pay for that cash today and said that must be what the business is worth. He said he made those calculations based on information provided during the trial and reviewed some tax returns.

As regards Philip Morris, Professor said the parent company Philip Morris Companies inc, has several subsidiaries, one is called Philip Morris USA, another is called Philip Morris International.. Philip Morris stock which is traded on the stock exchange is held by the parent Philip Morris Companies Inc. The problem is then, how to value Philip Morris USA? According to Prof. Mundstock, a good part of Philip Morris USA profitability is because it owns some famous trademarks such as Marlboro, and Marlboro is sold internationally, and advertising in the USA sells Marlboro Internationally, and vice-versa—a sort of synergy exists with the sister corporation Philip Morris International which affects the value of Philip Morris USA. In his mind, Prof Mundstock said, to ignore the fact that Marlboro is a multinational trademark in a related corporation is to ignore the tremendous value of Philip Morris' worldwide business and the tremendous value they have in the U.S. because Marlboro is an internationally promoted and marketed product.

Because it was almost impossible to separate out Philip Morris USA from the whole picture, Prof. Mundstock said he used the cash flow method and Philip Morris's numbers, not on the separate company, but using the numbers Philip Morris allocated to tobacco on their public statement, he

evaluated their tobacco business and came up with the figure of $118.5 billion dollars for the tobacco business of Philip Morris Companies Inc. He said he, kept in mind the ability of the parent corporation's to generate future excess cash flow, and then he figured the present value.

Referring to net sales of the defendant tobacco companies since the master settlement Agreement, Prof. Mundstock said the defendants sold between 435 billion and 475 billion cigarettes and raised the price by about 4.5 cents a cigarette. Therefore as far as net sales are concerned the figures show in 1999, Philip Morris net sales were up 28%—RJR net sales up 32.4%—B&W net sales up 19.4%—Lorillards market share increased 15%, and Liggetts operating income was up 41%. In the first part of 2000, both Philip Morris and RJR was ahead of 1999. The reason he said, is that the price went up more than consumption went down.

Professor Mundstock, then explained the meaning of "leveraged buyout" saying a company can buy out another company using money borrowed from a bank or sometimes multiple sources based on the value of the purchased company.

In addition to the above, using a standard of Philip Morris's purchase of the three Liggett brands, Professor Mundstock calculated the market share of the defendant companies and assigned a monetary value to the companies and came up with figures closely matching those found by Mr. Cherner. Again, Prof. Mundstock said in order to determine the value of a company you must add the value of the intangibles to the "book" value to get a true value.

On cross examination, Prof. Mundstock said Philip Morris USA value of $6.4 billion dollars on its financial statement is its "book net worth" or stockholders equity. He also said his evaluation of $118.4 billion dollars is for Philip Morris USA and Philip Morris International combined (the tobacco business of Philip Morris), and represents what those businesses could be sold for today.

He also admits he has never been paid to evaluate a business, other than for tax purposes. He is not a CPA, or an economist, nor does he have a MBA.

Prof. Mundstock admits the defendants don't have on hand, the amount of money he valued the companies at, but he said, they could borrow the money, probably over a 6 month period, in the capital market.

As to how he reached the figure of $118.4 billion for Philip Morris tobacco business, Prof. Mundstock said he based it on present value of future excess cash, and that is based on the condition of the company in 1999 being fairly stable for the future years. He also said the cost of future litigation would directly impact future excess cash, as would sales and regulations. In making his calculations he did not take into consideration the size of the Engle class, nor the projected size of any compensatory award.

Philip Morris's income statement shows for the year ending 1999, the net earnings, or profit reported was $2.99 billion dollars—40 times less than the $118.4 billion dollars figure used earlier, but that $118.4 billion is spread over 25 years, according to Prof. Mundstock.

Professor Mundstock when questioned about the two methods of evaluating business said he preferred

the valuing of trademarks plus book value over valuing by trademark value alone (the Philip Morris-Liggett deal)—but he did both just as a check.

As to Brown and Williamson, he does not agree with B&W figures showing that B&W is in poor financial condition-income was up 20% in 1999 from 1998 because they raised prices to meet the MSA obligation. He did admit that B&W market share was down by one or two percentage points,- but also said there has not been any negative analysts reports since the FSA for B&W. In fact the analysts reports since the FSA have predicted a 2 or 3% growth in the industry adjusted for inflation—this would offset any loss of 2-3 percentage points in the last year. Decreasing profits would portend trouble unless you are measuring profits using financial accounting numbers.. Professor Mundstock said he realizes that dealing with competition in either premium brands or generic could affect the ability to raise prices and therefore market share would suffer—but he also said he would rather have 1% of a very profitable market, than 100% of market share for a product that doesn't sell. He also said his previous calculation of B&W's worth at $9.9 billion dollars was wrong and it is actually $22 billion.

Considering Lorillard, Prof. Mundstock points out that Lorillard on their financial statements shows the obligations to the MSA as they are due, which is proper—but they also show the companies other obligations, even though they are not due.

It is important to note here that when questioned on cross examination, Professor Mundstock said using the method he feels more comfortable with, book value plus intangibles, the value of Lorillard

would be about $12.5 billion rather than the 16 billion using the market share method of Mr. Cherner. He also agreed that according to Lorillards figures their shareholder equity is around $921 million. In order to raise $12.5 they would have to sell off an interest in the equity of the assets since they don't own any stocks. His best guestimate is Lorillard could raise $10 Billion (adjusting the $12.5 Billion equity for commission and expenses) by borrowing against, or selling the equity interest. Professor Mundstock also said that if it was structured as a sale, then Lorillard would be out of business.

Regarding RJR on cross examination, Professor Mundstock said, he previously testified that using the market share method, he would value RJR at $36 billion dollars, but by using the method he prefers, the value would be $19.6 Billion. The assets verses liability snapshot on the financial statement is not truly reflective of the company's financial picture. RJR sold off Japan tobacco and paid off billions in debt, but also bought back billions of their own stock without having to pay dividends. Currently, Prof. Mundstock agreed that after paying out all that money RJR no longer had a cushion and this was reflected in a current ratio of less than 1 which is a low ratio and means the company is not very liquid in the short term.

Professor Mundstock did say when questioned, that if RJR would be required to pay $36 billion today, it would be out of business., or for that matter $19.6 Billion.

Regarding Liggett, Prof. Mundstock valued Liggett at $1.8 billion but said under the more preferred

method the value would be $.9 billion He also said that because Liggett has changed so much after the sale of three of its brands to Phillip Morris, it was hard to figure what the future for Liggett will be. Although Liggetts books show cash or cash equivalent on hand to be less than $3 million, and current assets to be about $81 million, Prof. Mundstock opined that in an industry that generates the kind of cash flow that the tobacco industry can generate, low numbers of cash on hand are less telling indicators of a company liquidity. He also said that even if a parent company of Liggett has outstanding some senior priority notes, those notes don't pledge Liggetts assets, only the parents stock, which doesn't affects Liggetts ability to go to the financial market for a loan. He also notes that even if Liggetts market share is down from 2.5% in 1995 to 1.2% in 1999, and unit volume has decreased by 50% from 1995 to 1999 to 5.2 billion cigarettes sold, Liggetts operating income is up 40%

On Re-direct examination Professor Mundstock said that a company like Philip Morris which claims to have a net worth of $6.4 billion, but can pay $368 Billion in a proposed settlement agreement, can do so is for two reasons: one—the $6.4 billion is not their true value, and two—because the payment are over time. These companies are cash cows, he said, and can throw off considerable cash flow over a period of time. They pride themselves on their cash flow and ability to generate cash.

Plaintiff experts also offered an opinion regarding ability to pay, saying that if the tobacco companies originally offered the U.S. Government 367 Billion dollars in a settlement in 1997,(which was rejected),

and then, in 1998 agreed to pay the Master Settlement Agreement 250 Billion, even if over a period of years, this is an indicator of, at the very least, a present ability to pay a considerable amount against a punitive damage award. It was noted that the defendant tobacco companies, under the MSA agreed to pay approximately 20 Billion dollars a year over the next 25 years or so, and in order to make those payments, the companies raised the price of cigarettes approximately $1 a pack. Considering the defendants sell about 20 billion packs a year, this can amount to about 20 Billion dollars each year!!...most of the money, according to the testimony, therefore has come from the pocket of the consumer, and not from the pocket of the defendants.

THE DEFENDANTS POSITION

On the defense side of the case it is interesting to note that none of the defendants produce an "expert" witness. The Court would have welcomed and indeed, would have valued the opinions of a defendants financial expert, and/or corporate financial officer. This would have been a great help in resolving, not only for the Court, but also the Jury, the financial condition of the various defendants companies. However, the defendants relied instead, upon the testimony of the company C.E.O. to discuss the company's financial position.

The following is a summary of that testimony.

MICHAEL SZYMANCZYK (Philip Morris)

Michael Szymanczyk, C.E.O. of Philip Morris basically testified that Philip Morris could not pay $127 Billion to the State on a settlement date in a single payment—that's why they had to raise prices to make the long term payment. He claims that

Philip Morris made $41 billion in the last 25 years, but will have to pay the settlement $93 billion in the next 25 years. According to him Philip Morris's net worth is $6.4 billion and if they had to pay that amount in punitive damages, the company would be out of business. Mr. Szymanczyk said valuing Philip Morris at $75 billion is wrong—it is more like $3.75 Billion. If someone offered $75 billion to buy Philip Morris, he would recommend the board of directors to accept the deal. He also said that to properly value a company one has to consider potential litigation liabilities which in the case of Philip Morris is quite substantial, and that would offset potential earnings. Philip Morris, he said, tried but could not borrow any significant amount of money. He did admit the future outlook is good for the company. He further said currant net worth of the company reflects the value of the Marlboro trademark because it reflects earning that come from that trademark.

NICK BROOKS (B&W)

Mr. Nick Brooks, C.E.O. of Brown and Williamson Tobacco Co, testified about B&W's financial condition and said the company's net worth was $642 million, and has a market share of slightly under 12%. Lorillard has about 10%, RJR about 22 or 23%, and Philip Morris about 50 or 52% of market share. He also said that while B&W had a 12% market share, it only has 6% of the industry profit. Mr. Brooks said that B&W has been hurt more by the MSA and FSA than the other manufacturers. So far B&W has, according to Mr. Brooks, paid out $2.1 Billion in payments under the settlements. In discussing B&W's financial condition since 1996, Mr. Brooks said they made a profit of $295 million in 1996, $10

million in 1997, registered a loss of $482 million in 1998, and in 1999 realized a profit of $216 million. In the last 4 years Mr. Brooks said the company made only 1 cent per pack sold. Under the FSA, B&W lost 17 cents a pack because of the way Florida calculates their rate of payment. Currently, according to Mr. Brooks, the economic picture shows a gradual decline for B&W in market share. As to industry profits, Mr. Brooks testified that B&W has 6%, Lorillard 14%, RJR 17% and Philip Morris 63%.

When asked by defense counsel whether B&W could continue to raise prices to pay for significant punitive damages, Mr. Brooks replied "clearly not"-. that would accelerate the businesses decline. In fact he said the company had to lower prices to be competitive. On the issue of company valuation, Mr. Brooks said two entities, Morgan Stanley Dean Witter and Credit Suisse attempted to value the company and Morgan Stanley found a negative value of one billion dollars, and Credit Suisse found and even higher negative value. There also was a negative report from a Dutch firm ABN-Amro, which said B&W was declining because of competition and could face bankruptcy by the year 2012. On cross examination Mr. Brooks said the company is faced with "hundreds or thousands" of lawsuits but to date has not paid a dime to a single plaintiff.

Mr. Brooks says the value of B&W today reflected on its net worth statement is $894 million. He does say that there are other ways of determining the value of a company other than assets minus liabilities—for example a future cash flow method. According to Mr. Brooks, if B&W loses 1.5 to 2 points

additional share points the company would go "under water."

Mr. Brooks also said that B&W has $2.4 billion due from affiliates with current liabilities of $1.9 billion. B&W also has a credit-borrowing arrangement with BATUS Holding company which owes B&W $1.2 Billion coupled with $678 Million owed to B&W from foreign affiliates.

B.A.T. (British American Tobacco Co.), according to Mr. Brooks made two capital contributions to B&W—one in 1994 to support the purchase by B&W of American Tobacco CO, (about $1 billion) and another to allow B&W to enter the MSA (about $459 million). That capital investment is not like a loan and doesn't have to be paid back, Brooks said, but B&W has to pay dividends on the funds. Mr. Brooks also said it was unlikely that B.A.T. would help finance a punitive damage claim—and said B&W has only $25 million in cash.

ANDREW SCHINDLER (RJR)

Mr. Schindler testified that over the last 16 years RJR has raised prices $2.50-$2.75 per thousand, but in 1998 the price increase was $21 per thousand. He said RJR has shown a decline of 36% in volume from 1990 to 1999. For example he said the decline in volume from 1996 to 1999 was from 119 billion cigarettes to 96 billion. He expects a further decline in 2000 of between 2% and 4%. As to market share, RJR had 26.9% in 1996—and so far in 2000, 23.5%. A share point represents about 4 billion cigarettes. Mr. Shindler said that there are no funds available to pay for the MSA or FSA obligations therefore RJR had to raise prices.

He said with reference to the balance sheet, RJR showed current assets at the end of last year or $2,468 billion, and liabilities of $3,068 billion, and cash on hand of $600 million. RJR, also lists good will at $7.563 billion but claims they cannot sell off good will as a separate asset. Continuing to testify, Mr. Shindler said income from continuing operations last year totaled $195 million—while net income showed $2.3 billion reflecting a sale of the international operation. He went on to say that RJR has made cash payments to the MSA and FSA of $768 million in 1998, $1.6 billion in 1999, and estimates that for year 2000 the payment will be $1.2 billion. RJR also faces a substantial number of lawsuit with a potential large financial risk factor.

Concerning RJR stock, Mr. Shindler said the company bought back 6,370,656 shares of stock at a cost of 125 million when the stock was at $15-$16 a share. The stock was priced at about $31 a share the previous June. Since RJR didn't have to pay the $3.10 dividend they were able to save that cost and the stock to them was then worth $15-$16 a share.

Regarding the MSA and other settlements, Mr. Shindler said RJR is obligated to pay for the first 25 years, about $63.5B depending upon the number of cigarettes they sell and the size of the industry. Under the FSA, the company is obligated to pay $ 4.2B. Under cross examination by the plaintiff, Mr. Shindler admitted writing a letter to stockholders in which he painted a rosy picture of the company's future. In the letter he discussed how in 1999 RJR sold the international business for $8 billion and substantially reduced the company debt to about $2 billion, so that at the end of 1999, RJR had a debt of

$2 billion with cash and equity of $1.2 billion and $7.1 billion respectively. The letter also said the leverage ratio is low and the cash flow was strong, and the strong balance sheet and cash flow allowed RJR to pay out nearly half of cash net income as dividends and simultaneously allowed RJR to repurchase stock shares.

BENNET LEBOW (Liggett)

Mr. Lebow testified that he sold three brands to Philip Morris because he had to or go out of business. The $300 million he received was used to pay off debts. According to Mr. Lebow, Liggett would not have paid $300 million for the brands but Philip Morris would because they owned the international brands and had the structure to exploit the brands. He said it was not appropriate to value Liggett based on the Philip Morris sale because Liggett deals mostly in discount brands not premium. Right now Liggett does not have a willing buyer because of the potential of all the litigation it faces.

Regarding the MSA, Mr. Lebow said Liggett is not paying because they don't have enough volume—however by that time Liggett had already agreed with 41 other states to pay 30% of its earnings. He said since Liggett sells discount brands it does not compete with the major premium brands. Liggett is in competition with 20 other discount brands who are not part of the settlements and do not have to pay such an obligation. Liggett has no obligation to the MSA unless its market share exceeds a base share of 125% of its 1997 market share or approximately 1.65% of the total cigarettes sold in the U.S.

Liggett is building a new plant which will produce 5.5 billion cigarettes a year which is financed by currant sales.

With reference to financial worth, Mr. Lebow said GAAP accounting and fair market value will give you higher or lower numbers—a company can have a net capital deficiency of $488 million, but be valued at $100 million.

On cross examination by one other defendant, Mr. Lebow testified that at the time of the MSA Liggett raise prices part way even though they were not obligated to do so under the MSA criteria, and consequently Liggett made money unless its market share goes up above 1.67M. Mr. Lebow said Liggett is now doing well because of the fact that he could raise prices to go along with the other defendants and doesn't have to make MSA payment at Liggetts current level Liggetts stock today sells at $17, up from $5 in 1996. Liggett has 20 Million shares of stock. Mr. Lebow testified that when valuing a company, look at the multiple of earnings and cash flow, a reasonable multiple of earnings for a profitable company without significant liabilities is 5 to 5.5. earnings. A large foreseeable debt and a declining market can affect multiple earnings. Mr. Lebow conceded that Philip Morris has multiple earnings of less than zero according to the stock market-but he also said that he didn't think the MSA obligation for Philip Morris had any significance to the stock market. Mr. Lebow said that Philip Morris raised prices, and the money to pay the MSA is coming from the smokers and not out to Philip Morris's pocket. He also said that because of addiction, there not much of a limit on raising

prices—maybe as much as $4 to $5. According to Mr. Lebow, Philip Morris can easily raise prices to pay a punitive damage award—Liggett cannot.

MARTIN ORLOWSKY (Lorillard)

According to Mr. Orlowsky Lorillard has 10% of the market, down .75% from the previous year. In fact in the last 15 yrs Lorillard's market share was between 7 and 10%, however sales are decreasing and Lorillard sales are down 6% from 1999. One reason is that competition is selling cheaper and Lorillard cannot lower prices because of the MSA obligation. In overall ranking with the other defendants. Mr. Orlowsky says Lorillard is #4 out of 5 with 9 to 10% of the Florida market and Florida is 5% of Lorillards sales. Mr. Orlowsky says financial reports are important because it tells the financial position of the company at a given point in time. It reflects assets minus liabilities to determine net worth. For the year 1999, Lorillards balance sheet showed assets at $2.208.7 billion and liabilities of $1.287.5 billion, resulting in a net worth of $921,205 million.

Mr. Orlowsky further said that the company does not have the net worth money to pay out a debt, and to pay out the entire net worth, Lorillard would have to sell off all assets, pay all debts, and in essence, sell the business. Lorillard cannot borrow additional money—Mr. Orlowsky said he contacted a bank for a loan but was rejected. If any new obligations were imposed on the company, such as a large punitive damage award, Mr. Orlowsky said Lorillard would go out of business. He also said that the most accurate way to determine what a company can pay today is its net worth—not based on future income.

Mr. Orlowsky opined that what Philip Morris paid for three Liggett brands has nothing to do with the value of Lorillard and should not be used in valuing Lorillard. He said that in 1995 Lorillard offered Brown and Williamson $35.9 million for a little over 1% of the market share for 3 or 4 B&W brands, and based on about $36 million for 1% market share Lorillard would be worth $360 million using Mr. Cherner's method. However that is only 1/3 of the net worth reflected on Lorillard"s currant balance sheet.

With reference to the MSA, Mr. Orlowsky said Lorillards obligation for the first 25 years is $25- $30 billion. Annual payments are between $1.3 and $1.5 billion, and Lorillard has paid $1.7 billion to date.

On another note, Mr. Orlowsky said Lorillard's total advertising budget in 1998 was $43 million, but in 1999 it dropped to $18 due to the MSA. This however resulted in a savings of $25 million because of the billboard restrictions of the agreement and that money is now being used for magazine advertising. He also said that in 1999 Lorillard spent $7.7 million to advertise cigarettes and $8.4 million for youth prevention. He did say in a deposition however, that the company spent $12 Million for youth prevention and $250 million for advertising and promotion in 1999. Lumping advertising and promotion reveals that youth prevention is only 5%-6% of Lorillard's budget. According to Mr. Orlowsky, at the time of the settlements, if business stayed constant, Lorillard could afford the payments without going out of business. Lorillard knew they would have to raise prices to make the payments—in effect they mortgaged the business. The difference between

the Government proposed settlement and the MSA was that under the Government proposal, punitive damages would be capped which would have allowed the companies to stay in business with some degree of stability because it eliminated lawsuit liability even if it cost $100 billion dollars more than the MSA.

Mr. Orlowsky said that in 1999 Lorillard took in less than $4 Billion in sales revenue which included $600 million in Federal excise taxes—therefore revenue was not all profit. However if punitive damages exceed net worth, Lorillard will go out of business.

On examination, Mr. Orlowsky admitted that Lorillard has not yet had to pay any judgement in a lawsuit involving smoking and health. He also admitted that net income rose about 85% from 1998 to 1999 ($352 million to $652 Million) and revenue increased 41%.

In 1997 Lorillard paid dividends to Lowes (parent), of $100 million, in 1998 $450 million and in 1999 $300 million. In 1999 Lorillard retained what was left in 1999 after paying Lowes $300 as part of assets and used the money to buy $759 million of marketable securities.

According to Mr. Orlowsky, Lorillards net worth is $921 million.

SUMMARY

This then was a summary of the financial testimony of the C.E.O.'s of the various defendants. They also spent hours, and in some cases days, discussing how their individual company has changed attitudes and procedure and how each

company has implemented anti-youth smoking programs costing millions of dollars. It should be noted, if not stated already, that despite the huge obligations the individual defendants have under the MSA and the FSA, those payments, amounting to 22 billion dollars or more, have been made by the defendants after raising the price of cigarettes sufficiently to generate such sums, and without having to make any outlay of monies from their own pockets. The consumer or smoking public has so far, because of the price increase, been the source of funds for those huge payments.

That means that despite the shift in market share or profit margins as a result of the price increase, the tobacco companies were in no worse financial shape than they were before the MSA or FSA for all intent and purposes.

One thing the C.E.O's. did say was that they no longer challenge the Surgeon General's, Public Health or Scientific Communities position on generic causation and the ill effects of tobacco, and have now embarked, via the Internet, on a concentrated effort to educate the public about the good qualities of the industry and their individual company, and the dangers of youth smoking.

ISSUES

The question to be answered therefor, is whether the amount of the punitive damage award, considered in the light of the evidence of (1) the behavior of the defendants, and (2) the ability of the defendants to pay, is unreasonable.

As to the first issue—behavior of the defendants—, this Court has no problem accepting the rational of the jury who heard all the evidence, that the award is

warranted because of the behavior of the defendants. In other words, the Conscience of the Court is ***NOT SHOCKED*** either by the fact that an award was made, nor by the amount of the award rendered by the jury considering the scope of the behavior of the defendants, and the number of people affected thereby.

The second issue—ability to pay—, gives the Court far more difficulty in making a determination.

The testimony at trial on this issue ranged from the low end, the suggested punitive damage award figures by the various defendants, to the high end, the estimated total worth of the defendant companies which at least one plaintiffs expert said, could exceed 200 Billion dollars. Although the individual C.E.O's. testified that if an award, in the amount of, or exceeding the defendants estimated individual "net worth," was rendered by the jury, it would put them out of business, these comments were mere "naked statements" without any proof or evidence submitted that such a condition would result. It seems to this Court that not only does the defendant have the burden of proving its net worth, it also has the burden to show, with proof, that it will go out of business if a punitive damage award reaches a certain level. It is not the burden of the plaintiffs to establish that the defendants have the financial ability to pay a specific punitive damage award. Denis Rety v. Arthur Green and Southern Commodity Corp., 546 So. 2nd 410 (Fla. 3rd DCA 1989). A mere statement to the effect that in a C.E.O.'s opinion, a company will go out of business or be bankrupt, is not sufficient without more. Remember, the defendants, although they had listed

several financial expert witnesses in their pre-trial documents, declined to call any of them, nor did they see fit to call any company financial officer or consultant. This record, therefore, is devoid of such proof. Conversely, the Plaintiffs experts did not present any proof that if a punitive damage award was the same or close to the experts estimated total worth figures, the Defendants would not got out of business. However, as explained in the "Rety" case, this is not the Plaintiffs burden.

The Court is then left with a seemingly impossible task, trying to determine at what level a punitive damage award will put any of the defendants out of business. There are no figures which have been submitted as proof, that will aid the Court—only conjecture and supposition. It is easy for a C.E.O. to say that a company will go out of business if it has to pay a certain amount of money—but will it **really** go out of business? Some of the testimony in this case was to the effect that in the world of high finance, there are many ways to leverage large loans or financial support to bail out a company in trouble and keep that company from going under. Plaintiffs experts explored that avenue, and even though some of the defendant C.E.O.'s testified that they tried to obtain loans from one or more banks or financial institutions and were unsuccessful, there was no **proof** of that submitted. The language of Inter Union of Operating Engineers v. Lassiter, 295 So. 2nd 634 (Fla. 4th DCA 1974) rev'd on Other grounds 314 So 2nd 761 (Fla. 1975) is somewhat helpful in this regard.

> "....the term (financial resources) gives the trial judge a more liberal standard to

> determine whether a given proffer of evidence is relevant and material. For instance, there could well be, and properly so, proof as to income, cash flow, expenses, anticipated income, anticipated diminution of income, anticipated casualties...these items, among others of like moment, would be receivable in **addition** to net worth figures under the scope of financial resources. All of this material, including the reflection of net worth, goes to make up a defendants financial resources which the jury is entitled to consider in assessing punitive damages as commanded in Florida Standard Jury Instruction 6.12" " (emphasis added.)

What really needs to be determined then is what is the meaning of "net worth". Most commonly "net worth" is referred to as the difference between assets and liabilities, however this can be misleading because, as the evidence in this trial pointed out, a "net worth" statement or report is only a snapshot of a moment in time and not an indicator of true worth or value. If what the courts are really interested in is whether a particular defendant has the capability of paying a large punitive damage award, then it is more than reasonable to look to that defendants **actual** worth or value, and not a "snapshot in time". The financial experts in this case testified that in valuing a company one must take into consideration many things other than "net worth". The financial resources of a company then is the best indicator of the condition of a company in determining its true value or worth. There was ample testimony in this case of the "financial resources" available to these companies to enable the experts to reach opinions as

to each defendants actual worth,: ergo; a defendants ability to pay beyond a bare recitation of currant net worth!.

The experts testified, for example, that although Philip Morris declared a net worth of only $6.4 Billion dollars, the companies true value or worth was in the neighborhood of $75 Billion dollars when the company's "financial resources" were taken into consideration. There is obviously a huge gap between the two figures which then confuses the issue of when a company such as Philip Morris will have to go into bankruptcy in order to pay a punitive damage award.

It should be noted here that this Court is mindful of the line of cases that involve the issue of whether punitive damages that will result in bankruptcy or putting a defendant out of business, should be allowed, Arab Termite $ Pest Control v. Jenkins, 409 So. 2nd 1039 (Fla. 1982), Brooks v. Rios, 707 So. 2nd 374 (Fla. 3rd DCA 1998) and Hockensmith v. Waxler, 524_So 2nd 714 (Fla. 2nd DCA 1988), to name a few, However, none of these cases involve the kind of situation we find ourselves facing in this class action lawsuit. In those cases there was either unrebutted evidence of net worth, or the lack of evidence of net worth. What we have in the instant case, is a conflict in the evidence of net worth and actual worth. That is to say, a conflict in what a company claims its net worth is, and what an opposing expert says the company's net worth **really** is. Without a clear delineation or resolution of that conflict, it is hardly possible to determine the fine line of bankruptcy or "going out of business" without indulging in the purest of speculation.

The jury heard all of this evidence—they were exposed to the same testimonial conflicts about whether a company will go "bankrupt" or "go out of business" as the Court heard. In fact the jury was informed of their duty, in deciding this case, that they must award an amount of money without financially destroying or bankrupting the defendant, (see Jury Instructions Phase IIB page 10.). Was the jury in any less or better a position to make that determination than the Court, given the testimony and evidence presented? The law, as we know, dictates that the Court shall not allow a verdict that will financially destroy or bankrupt a defendant. In this case who is to say what will or will not bankrupt a defendant or put them out of business? —the evidence certainly is not dispositive of that issue—therefore that decision will have to be made on speculation and conjecture in this particular case since there is no definable threshold available.

If one takes the defendants position that the threshold on this issue is the "currant net worth", then by implication, the Court must reject the testimony of the experts, accept at face value the position of the defendants, and disregard all testimony to the contrary. If that be the case, then there was no need for the Plaintiffs expert witnesses to testify that they disagree with the defendants figures. Under that scenario, the Court would disregard the Plaintiffs experts testimony that the true "currant net worth" must include financial resources, and accept the defendants position at face value. This would be not only unfair, but also erroneous. This is one step this Court declines to take. There was, in this Court's opinion, insufficient evidence presented at trial, to determine that one or

more of the defendants will go out of business or into bankruptcy just because they **say** they will. That's almost akin to asking a defendant who has just been convicted of a crime, how much of a sentence he feels he would like to serve without it having an adverse effect on him.

The Jury heard all of the testimony and saw all the evidence from both sides, and more important, the Jury heard the arguments of council at the close of the case before they rendered their verdict. If the jury heard what the Court heard, and there is insufficient evidence to establish that one or more defendant will go out of business or go into bankruptcy, and if the Jury would have to speculate on that threshold issue, just as the Court would have to speculate, then in the absence of sufficient proof, how can, or even why should the Court overrule the Jury verdict and grant a remittitur?

There is also the issue of what punitive damages is all about. Succinctly, punitive damages should punish a defendant and act as a deterrent to future behavior. Punishment in this context means to cause some "hurt" to the defendant (in this case monetary hurt), that will send him or it a message. If a monetary sanction was imposed that caused no "hurt" then the purpose of the punitive award is negated. Continuing with this thought, and harking back to what has been said about the way the defendants have financed their obligations under the MSA and the FSA, if a punitive damage award was imposed upon the defendants that they could satisfy by simply raising the price of their products, then what has been accomplished in this case

This Court is not of the opinion that just because we are talking about vast sums of money, that there automatically has to be a remittitur. This Court after very careful consideration, in good conscience really could not set a figure, or a level, at which a remittitur could be set without indulging in the sheerest of speculation. To do so would be nothing more than engaging in an arbitrary exercise, given the state of the evidence or lack thereof. To remit to the level that the defendants have espoused (their net worth statement) would be wrong as explained above. The Court feels it best to consider the level found by the jury who, as the court has said many times herein, heard the same testimony and evidence as the Court.

It should be noted here that this Court has carefully considered the criteria dictated in F.S.A. Sec 768.74(5) and has determined that:

1. This jury after sitting for two solid years in trial, did not evince any prejudice, passion or corruption in rendering its verdict. The jury had to render three separate verdicts in this cause—each one was derived after an enormous amount of evidence was presented, and in this Court's opinion, each verdict comported with the evidence adduced at trial.

2. Again, after sitting for two solid years in trial, it is inconceivable that this jury ignored or misconceived the evidence or the merits of the case. The Court observed the jury taking careful notes during the trial—in fact filling several notepads in most cases, and being attentive throughout.

3. In reaching its verdict in this case, the jury was exposed to a great deal of testimony regarding

the activities, and the financial condition of the various defendants. The evidence of financial condition was discussed by two Plaintiffs experts, and at least five C.E.O.'s of the defendant companies. It was highly complex, but did cover a range of amounts and economic theories from which the jury could make a decision.

4. This was a class action case, in which the issue of punitive damages was determined in the aggregate for the entire class which, the evidence indicated, could be as high as several hundred thousand people. Although the compensatory damage claim was tried for only three class representatives, the awards amounted to approximately 12.7 million dollars. Extrapolating that figure to the overall size of the class results in an extraordinarily high figure, therefore, one can say there is a reasonable relationship to damages proved and the injuries suffered, but more important, the award is in keeping with the degree of the wrongful conduct without sending the defendant into bankruptcy.

5. In the Courts opinion, the amount of the jury verdict is within the parameters of the evidence at trial—within the limits of the highs and the lows, albeit on the high side, but when the enormity of the facts and issues of this case are considered, the award cannot be said to be unreasonable.

Therefore; Defendant's Motion for Remittitur or New Trial, is *DENIED*.

WHEREFORE, IT IS ORDERED AND ADJUDGED as follows.

1. Class Representative Mary Farnan shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown &

Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $2,850,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

2. Class Representative Frank Amodeo shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $5,831,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

3. Class Representative Ralph Della Vecchia, as surviving spouse of Angie Della Vecchia, deceased, shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $1,500,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

4. James Della Vecchia, as surviving minor son of Angie Della Vecchia, deceased, shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco

Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $2,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

5. The Estate of Angie Della Vecchia shall recover from Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, Lorillard Tobacco Company/Lorillard, Inc., Liggett Group, Inc. and Brooke Group Holding, Inc., jointly and severally, the sum of $523,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

6. The Florida Class shall recover from Defendant Philip Morris, Incorporated the sum of $73,960,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

7. The Florida Class shall recover from Defendant R.J. Reynolds Tobacco Company the sum of $36,280,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

8. The Florida Class shall recover from Defendant Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company, the sum of $17,590,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

9. The Florida Class shall recover from Defendant Lorillard Tobacco Company/Lorillard, Inc., the sum of $16,250,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

10. The Florida Class shall recover from Defendant Liggett Group, Inc./Brooke Group Holding, Inc., the sum of $790,000,000 that shall bear interest at the rate of 10% a year, for which let execution issue.

11. The Florida Class shall recover from Defendant Council for Tobacco Research, the sum of $1,195,210 that shall bear interest at the rate of 10% a year, for which let execution issue.

12. The Florida Class shall recover from Defendant Tobacco Institute, the sum of $278,339 that shall bear interest at the rate of 10% a year, for which let execution issue.

True copies of the written Verdicts in Phases I, II and II-B are attached hereto.

All sums payable to the Florida Class shall be paid to the Registry of the Dade County Circuit Court and will be maintained for the benefit of the Florida Class.

This Court reserves jurisdiction to award attorneys fees to Class Counsel, Stanley and Susan Rosenblatt and to award costs.

This Court further reserves jurisdiction to enforce the terms of this Final Judgment Nunc Pro Tunc, to supervise the maintenance and disposition of the punitive damage fund to class members and to enter any further Orders and conduct further proceedings pursuant to the Mandate of the Third District Court of Appeal of Florida.

DONE AND ORDERED at Miami, Dade County Florida this 7 day of NOVEMBER in the year **2000**.

Original signed by:

ROBERT P. KAYE
Circuit Court Judge
JUDGE ROBERT P. KAYE
CIRCUIT JUDGE

cc: All Counsel of Record

APPENDIX N

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO 94-08273 CA-22

HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY, et al.,

Defendants /

VERDICT FORM FOR PHASE I

We, the Jury, return the following Verdict:

Question No 1

[Generic Causation]

Does smoking cigarettes cause one or more of the following diseases or medical conditions?

Aortic Aneurysm	Yes	√	No	
Asthmatic Bronchitis, as related to COPD	Yes		No	√
Bladder Cancer	Yes	√	No	
Cerebrovascular Disease (including Stroke)	Yes	√	No	
Cervical Cancer	Yes	√	No	

Chronic Obstructive Pulmonary Disease-COPD (including Emphysema)	Yes	√	No	
Coronary Heart Disease (including cardiovascular disease, hardening of the arteries, atherosclerosis, coronary artery disease and arteriosclerosis, angina, abnormal blood clotting, blood vessel damage, myocardial infarction (heart attack))	Yes	√	No	
Esophageal (Throat) Cancer	Yes	√	No	
Infertility	Yes		No	√
Kidney Cancer	Yes	√	No	
Laryngeal (Throat or Voice Box) Cancer	Yes	√	No	
Lung Cancer	Yes	√	No	
Adenocarcinoma	Yes	√	No	
Bronchioloalveolar carcinoma	Yes		No	√
Large cell carcinoma	Yes	√	No	
Small cell carcinoma	Yes	√	No	
Squamous cell carcinoma	Yes	√	No	
Complications of Pregnancy (miscarriage)	Yes	√	No	
Oral Cavity/Tongue Cancer	Yes	√	No	
Pancreatic Cancer	Yes	√	No	
Peripheral Vascular Disease (including Buerger's Disease)	Yes	√	No	
Pharyngeal Cancer	Yes	√	No	
Stomach Cancer	Yes	√	No	

If your answer to all of the diseases, above, is "no", your verdict is for the Defendants, and you should not proceed further except to date and sign this verdict form. If you answered "yes" to **any** of the above questions, please answer the following questions

Question No 2

[Addiction/Dependence]

Are cigarettes that contain nicotine addictive or dependence producing?

Yes √ No ___

Question No 3.

[Strict Liability]

Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes	√	No	___
Before July 1, 1974	Yes	___	No	___
After July 1, 1974	Yes	___	No	___
Both before and after July 1, 1974	Yes	√	No	___
RJ Reynolds Tobacco Company	Yes	√	No	___
Before July 1, 1974	Yes	___	No	___
After July 1, 1974	Yes	___	No	___
Both before and after July 1, 1974	Yes	√	No	___

Brown & Williamson Tobacco Corporation	Yes	√	No	
Before July 1, 1974	Yes		No	
After July 1, 1974	Yes		No	
Both before and after July 1, 1974	Yes	√	No	
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes	√	No	
Before July 1, 1974	Yes		No	
After July 1, 1974	Yes		No	
Both before and after July 1, 1974	Yes	√	No	
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	
Before July 1, 1974	Yes		No	
After July 1, 1974	Yes		No	
Both before and after July 1, 1974	Yes	√	No	
Liggett Group, Inc.	Yes	√	No	
Before July 1, 1974	Yes		No	
After July 1, 1974	Yes		No	
Both before and after July 1, 1974	Yes	√	No	
Brooke Group, Ltd., Inc.	Yes	√	No	
Before July 1, 1974	Yes		No	
After July 1, 1974	Yes	√	No	
Both before and after July 1, 1974	Yes		No	

Question No 4

[Fraud and Misrepresentation]

Did one or more of the Defendants make a false statement of a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers ?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods

Philip Morris, Incorporated	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	
RJ Reynolds Tobacco Company	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	
Brown & Williamson Tobacco Corporation	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	

Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	
Liggett Group, Inc.	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	
Brooke Group, Ltd., Inc.	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes	√	No	
Both before and after May 5, 1982	Yes		No	
Council for Tobacco Research-U.S.A.	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	

Tobacco Institute	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	

Question No 4a

[Fraud by Concealment]

Did one or more of the Defendants conceal or omit material information, not otherwise known or available, knowing the material was false and misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	
RJ Reynolds Tobacco Company	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	
Both before and after May 5, 1982	Yes	√	No	
Brown & Williamson Tobacco Corporation	Yes	√	No	
Before May 5, 1982	Yes		No	
After May 5, 1982	Yes		No	

		___		___
Both before and after May 5, 1982	Yes	√	No	___
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes	√	No	___
Before May 5, 1982	Yes	___	No	___
After May 5, 1982	Yes	___	No	___
Both before and after May 5, 1982	Yes	√	No	___
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	___
Before May 5, 1982	Yes	___	No	___
After May 5, 1982	Yes	___	No	___
Both before and after May 5, 1982	Yes	√	No	___
Liggett Group, Inc.	Yes	√	No	___
Before May 5, 1982	Yes	___	No	___
After May 5, 1982	Yes	___	No	___
Both before and after May 5, 1982	Yes	√	No	___
Brooke Group, Ltd., Inc.	Yes	√	No	___
Before May 5, 1982	Yes	___	No	√
After May 5, 1982	Yes	√	No	___
Both before and after May 5, 1982	Yes	___	No	___
Council for Tobacco Research-U.S.A.	Yes	√	No	___
Before May 5, 1982	Yes	___	No	___
After May 5, 1982	Yes	___	No	___

		___		___
Both before and after May 5, 1982	Yes	√	No	___
Tobacco Institute	Yes	√	No	___
Before May 5, 1982	Yes	___	No	___
After May 5, 1982	Yes	___	No	___
Both before and after May 5, 1982	Yes	√	No	___

Question No 5

[Civil Conspiracy-Misrepresentation]

Did two or more of the Defendants enter into an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes	√	No	___
RJ Reynolds Tobacco Company	Yes	√	No	___
Brown & Williamson Tobacco Corporation	Yes	√	No	___
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes	√	No	___
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	___
Liggett Group, Inc.	Yes	√	No	___
Brooke Group, Ltd., Inc.	Yes	√	No	___
Council for Tobacco Research-U.S.A.	Yes	√	No	___
Tobacco Institute	Yes	√	No	___

Question No 5a

[Civil Conspiracy-Concealment]

Did two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes	√	No	___
RJ Reynolds Tobacco Company	Yes	√	No	___
Brown & Williamson Tobacco Corporation	Yes	√	No	___
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes	√	No	___
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	___
Liggett Group, Inc.	Yes	√	No	___
Brooke Group, Ltd., Inc.	Yes	√	No	___
Council for Tobacco Research-U.S.A.	Yes	√	No	___
Tobacco Institute	Yes	√	No	___

Question No 6.

[Breach of Implied Warranty]

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please

answer whether the conduct occurred during any of the following time periods

Philip Morris, Incorporated	Yes	√	No	
Before July 1, 1969	Yes	√	No	
July 1, 1969 thru July 1, 1974	Yes	√	No	
After July 1, 1974	Yes	√	No	
RJ Reynolds Tobacco Company	Yes	√	No	
Before July 1, 1969	Yes	√	No	
July 1, 1969 thru July 1, 1974	Yes	√	No	
After July 1, 1974	Yes	√	No	
Brown & Williamson Tobacco Corporation	Yes	√	No	
Before July 1, 1969	Yes	√	No	
July 1, 1969 thru July 1, 1974	Yes	√	No	
After July 1, 1974	Yes	√	No	
Brown & Williamson Tobacco Corporation as successor to American Tobacco Company	Yes	√	No	
Before July 1, 1969	Yes	√	No	
July 1, 1969 thru July 1, 1974	Yes	√	No	
After July 1, 1974	Yes	√	No	
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	
Before July 1, 1969	Yes	√	No	
July 1, 1969 thru July 1, 1974	Yes	√	No	

After July 1, 1974	Yes	√	No	

Liggett Group, Inc.	Yes	√	No	
Before July 1, 1969	Yes	√	No	
July 1, 1969 thru July 1, 1974	Yes	√	No	
After July 1, 1974	Yes	√	No	

Brooke Group, Ltd., Inc.	Yes	√	No	
Before July 1, 1969	Yes		No	√
July 1, 1969 thru July 1, 1974	Yes		No	√
After July 1, 1974	Yes	√	No	

Question No 7.

[Breach of Express Warranty]

Did one or more of the Defendant Tobacco Companies sell or supply cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendant(s), either orally or in writing?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods

Philip Morris, Incorporated	Yes	√	No	
Before July 1, 1974	Yes		No	
After July 1, 1974	Yes		No	
Both before and after July 1, 1974	Yes	√	No	

RJ Reynolds Tobacco Company	Yes	√	No	
Before July 1, 1974	Yes		No	
After July 1, 1974	Yes		No	

		___		___
Both before and after July 1, 1974	Yes	√	No	___
Brown & Williamson Tobacco Corporation	Yes	√	No	___
Before July 1, 1974	Yes	___	No	___
After July 1, 1974	Yes	___	No	___
Both before and after July 1, 1974	Yes	√	No	___
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes	√	No	___
Before July 1, 1974	Yes	___	No	___
After July 1, 1974	Yes	___	No	___
Both before and after July 1, 1974	Yes	√	No	___
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	___
Before July 1, 1974	Yes	___	No	___
After July 1, 1974	Yes	___	No	___
Both before and after July 1, 1974	Yes	√	No	___
Liggett Group, Inc.	Yes	√	No	___
Before July 1, 1974	Yes	___	No	___
After July 1, 1974	Yes	___	No	___
Both before and after July 1, 1974	Yes	√	No	___
Brooke Group, Ltd., Inc.	Yes	√	No	___
Before July 1, 1974	Yes	___	No	√
After July 1, 1974	Yes	√	No	___

		____		___
Both before and after July 1, 1974	Yes	____	No	___

Question No 8.

[Negligence]

Have Plaintiffs proven that one or more of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Please answer "Yes" or "No" as to each Defendant, below. If you answer "yes" to any Defendants, please answer whether the conduct occurred during one of the following time periods:

Philip Morris, Incorporated	Yes	√	No	___
Before July 1, 1969	Yes	____	No	___
After July 1, 1969	Yes	____	No	___
Both before and after July 1, 1969	Yes	√	No	___
RJ Reynolds Tobacco Company	Yes	√	No	___
Before July 1, 1969	Yes	____	No	___
After July 1, 1969	Yes	____	No	___
Both before and after July 1, 1969	Yes	√	No	___
Brown & Williamson Tobacco Corporation	Yes	√	No	___
Before July 1, 1969	Yes	____	No	___
After July 1, 1969	Yes	____	No	___
Both before and after July 1, 1969	Yes	√	No	___
Brown & Williamson Tobacco	Yes	√	No	___

Corporation, as successor to American Tobacco Company		___		___
Before July 1, 1969	Yes	___	No	___
After July 1, 1969	Yes	___	No	___
Both before and after July 1, 1969	Yes	√	No	___
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	___
Before July 1, 1969	Yes	___	No	___
After July 1, 1969	Yes	___	No	___
Both before and after July 1, 1969	Yes	√	No	___
Liggett Group, Inc.	Yes	√	No	___
Before July 1, 1969	Yes	___	No	___
After July 1, 1969	Yes	___	No	___
Both before and after July 1, 1969	Yes	√	No	___
Brooke Group, Ltd., Inc.	Yes	√	No	___
Before July 1, 1969	Yes	___	No	___
After July 1, 1969	Yes	√	No	___
Both before and after July 1, 1969	Yes	___	No	___

Question No 9.

[Intentional Infliction of Emotional Distress]

Have Plaintiffs proven that one or more of the Defendant Tobacco Companies engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress?

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated	Yes	√	No	___
RJ Reynolds Tobacco Company	Yes	√	No	___
Brown & Williamson Tobacco Corporation	Yes	√	No	___
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes	√	No	___
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	___
Liggett Group, Inc.	Yes	√	No	___
Brooke Group, Ltd., Inc.	Yes	√	No	___

Question No 10.

[Entitlement to Punitive Damages]

Under the circumstances of this case, state below whether the conduct of any Defendant rose to a level that would permit a potential award or entitlement to punitive damages.

Please answer "Yes" or "No" as to each Defendant, below

Philip Morris, Incorporated	Yes	√	No	___
RJ Reynolds Tobacco Company	Yes	√	No	___
Brown & Williamson Tobacco Corporation	Yes	√	No	___
Brown & Williamson Tobacco Corporation, as successor to American Tobacco Company	Yes	√	No	___
Lorillard Tobacco Company/Lorillard, Inc.	Yes	√	No	___
Liggett Group, Inc.	Yes	√	No	___
Brooke Group, Ltd., Inc.	Yes	√	No	___
Council for Tobacco Research-	Yes	√	No	___

U.S.A.				
Tobacco Institute	Yes	√	No	

SO SAY WE ALL, this 7th day of July, 1999

s/ Leighton Anthony Finegan
FOREPERSON
LEIGHTON ANTHONY FINEGAN

APPENDIX O

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

CASE NO. 3D00-3400

CONSOLIDATED: 3D00-3206 3D00-3210
3D00-3207 3D00-3212
3D00-3208 3D00-3215

LIGGETT GROUP, INC.; BROOKE GROUP, LTD.; PHILIP MORRIS INCORPORATED; R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY, LORILLARD, INC.; BROWN & WILLIAMSON TOBACCO CORP., individually and as Successor by merger to the American Tobacco Company, COUNCIL FOR TOBACCO RESEARCH U.S.A., INC. and TOBACCO INSTITUTE, INC.,

Appellants,

v.

HOWARD A. ENGLE, M.D., et al., on behalf of themselves and all others similarly situated,

Appellees, /

CONSOLIDATED ANSWER BRIEF OF
APPELLEES. FLORIDA ENGLE CLASS

* * *

VI. THE VERDICT IS NOT BASED ON ANY CLAIM BARRED BY PREEMPTION, THE FIRST AMENDMENT OR NOERR-PENNINGTON.

Defendants have thrown together a "potpourri" of alleged errors that are predicated on erroneous facts,

addressing theories of liability that were never raised or argued by the Class.

A. The Engle Class Never Asserted Any Claims Based On Defendants' Mere Act of Selling Cigarettes.

A major fiction of Defendants' argument is that the Class predicated any claim on the Defendants' sale of cigarettes – a legal product. To the contrary, Class Counsel repeatedly advised the jury and Court that no such claim had been made (T. 37451-52; 37521-22; 56609-10). The Engle Class sought punitive damages for egregious misconduct – fifty years of lying and cheating the Engle Class – not for selling a legal product.

The industry once again returns to Class Counsel's comment about Bennett Lebow during closing argument in Phase 1 (CB 132-33) (see earlier discussion supra at p. 208-210). Defendants refer to T. 37451-2 as support for their erroneous assertion that the Class sought to hold defendants "liable and punished for continuing to sell cigarettes" (CB 132). However, Class Counsel, in the rebuttal portion of his closing argument, emphasized to the jury that Defendants had the right to sell cigarettes, "a legal product" (T. 37452); that Defendants should have been "honest with the American public" (T. 37467); and that Defendants should have been "honest" and "truthful" when communicating to the public about the product" (T. 37449).

Defendants contend that "Plaintiffs continued to make such assertions in Phase 2", referring to T. 56740-41" (CB 132-33). Said transcript cite references Class Counsel's legal argument in support of a motion in limine, requesting that the trial court

prohibit Defendants from misleading and confusing the jury by continuing to argue that the industry should be immune from a punitive damage award because cigarettes are "a legal product" (T. 56741-42). The trial court denied the motion and permitted Defendants to argue in closing statements that they are in a "legal business, selling a legal product" (T. 56741). The trial court noted that Class Counsel will respond and argue that it's the Defendants' behavior that is wrong (T. 56741).

The industry was found liable for fraud and misrepresentation – not for selling a legal product. The trial court properly exercised its discretion in denying Defendants' confusing and misleading instructions about "legal products." See Gonzalez v. Rose, 752 So.2d 39, 42 (Fla. 3d DCA 2000); CSX Transportation, Inc. v. Whittler, 584 So.2d 579, 586 (Fla. 4th DCA 1991); Heck v. State, 114 So.2d 844, 845 (Fla. 4th DCA 2000).

* * *

APPENDIX P

PLAINTIFFS PROPOSED JURY INSTRUCTION

* * *

2.4

MULTIPLE CLAIMS, NUMEROUS PARTIES, CONSOLIDATED CASES

In your deliberations, you are to consider several distinct claims. I will now discuss each of these claims.

The Florida Class members allege under their strict liability count that cigarettes designed, manufactured and marketed by the Defendant Tobacco Companies were defective and unreasonably dangerous to smokers for several alternative reasons, including the addictiveness of cigarettes, the manipulation of levels of nicotine by Defendants so as to maintain the physical and psychological dependence of cigarette smokers, the disease causing carcinogens contained in cigarettes, or the failure to produce safer cigarettes. Florida Class members also allege that cigarettes are defective for the Defendants' failure to warn of the addictiveness of cigarettes or the diseases caused from smoking cigarettes, prior to July 1, 1969.

Under Plaintiffs' claims for fraud and misrepresentation and negligent misrepresentation, the Florida Class allege that the Defendant Tobacco Companies, the Tobacco Institute and the Council for Tobacco Research made numerous fraudulent misrepresentations or fraudulently concealed material facts regarding their cigarette products and

engaged in a public relations campaign that was designed to manipulate public opinion and create a false controversy so that smokers would have doubt about the adverse health effects of smoking and would continue smoking. The Florida Class members have further alleged that the Tobacco Industry has intentionally engaged in a scheme or practice to entice and target underage smokers while steadfastly denying that practice in public statements, as part of an overall pattern or practice of Defendants' false statements and deception. The Florida Class members also allege that each of the Defendant Tobacco Companies previously concealed from the public the internal tobacco documents proving that nicotine is addictive and have kept the levels of nicotine at sufficiently elevated levels to keep smokers dependent upon cigarettes and smoking. The Florida Class members claim these misrepresentations and concealments were made by all of the Defendant Tobacco Companies, the Tobacco Industry Research Council – that later became the Council for Tobacco Research – and by the Tobacco Institute, the latter two entities acting on behalf of and at the direction of the member Defendant Tobacco Companies. Plaintiffs also claim under their negligent misrepresentation claim that the Defendants should have known the statements were false, in the exercise of reasonable care.

A third claim brought by the Florida Class members against all Defendants is civil conspiracy to commit fraud and misrepresentations. The Plaintiffs claim that the Tobacco Companies agreed together, with and through the Tobacco Institute and the Council for Tobacco Research, and its predecessor the Tobacco Institute Research Committee, to create a

false controversy regarding cigarettes and disease and to create doubt in the minds of smokers as to whether smoking is hazardous to health and whether smoking is addictive. Florida Class members further allege that there has been a conspiracy to entice new smokers, consisting of underage smokers, women and minorities to make up for the smokers who are dying or who have been able to quit.

The Florida Class alleges under the negligence count that each of the Defendant Tobacco Companies was negligent in manufacturing, designing, marketing, selling and distributing cigarettes which Defendants knew or should have known (1) contained poisonous and carcinogenic substances capable of causing serious and fatal diseases, including lung cancer; (2) contained addictive or dependence producing substances likely to produce physical and psychological dependence or addiction when used as intended; (3) in not testing tobacco and commercial cigarettes to confirm that smoking causes human disease, in an effort to claim ignorance regarding the relationship between cigarette smoking and health; (4) in controlling and manipulating the nicotine level of cigarettes so as to continue the dependence producing or addictive effects of cigarettes; (5) in failing to design and produce a reasonably safe cigarette with lower non-addicting nicotine levels; (6) in failing to design and manufacture a non-addictive cigarette; (7) in negligently measuring and understating the nicotine and tar levels in low tar cigarettes; (8) and in failing to warn smokers of the dangers of smoking and the addictiveness or dependence producing effects of cigarettes prior to July 1, 1969.

On the claim for intentional infliction of emotional distress, Florida Class members allege that one or more of the Defendants engaged in extreme and outrageous conduct with the intent to cause severe emotional distress to smokers or with reckless disregard of the high probability of causing severe emotional distress to smokers.

Plaintiffs further allege in their claims against the Defendant Tobacco Companies for negligence and breach of express and implied warranties, that each of the Tobacco Companies, with the exception of Liggett, expressly and voluntarily undertook certain responsibilities and duties pursuant to the Frank Statement to Cigarette Smokers that was published throughout the United States in 1954, including an interest in people's health as a basic responsibility paramount to every other consideration in their business; a duty to cooperate closely with the public health officials whose task it is to safeguard the public health; and the duty to pledge aid and assistance to researching all phases of tobacco use and health with the duty to provide answers to the public and their customers as to whether smoking causes lung cancer and other diseases. Plaintiffs allege that the duties undertaken have been breached by these Defendants. Florida Class members further allege that cigarettes do not conform to representations of fact made by the Defendant Tobacco Companies orally or in writing and that cigarettes are not reasonably fit for the uses intended or reasonably foreseeable by the Defendant Tobacco Companies.

Finally, the Florida Class have made a claim for punitive damages under all theories of recovery,

except breach of express and implied warranties. The Defendants deny Plaintiffs' allegations. Although the Florida Class claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately as you would had each claim been tried before you separately.

Florida Standard Jury
Instruction 2.4

Granted_____
Denied_____

APPENDIX Q

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (22)

FLA. BAR NOS: 068445
142163
998389

HOWARD A. ENGLE, MD., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, RALPH DELLA VECCHIA as Personal Representative of the Estate of ANGIE DELLA VECCHIA, deceased and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RJ REYNOLDS TOBACCO, et. al.,

Defendants.

----------/

ENGLE FLORIDA CLASS MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR DIRECTED VERDICT ON THE ISSUE OF STRICT LIABILITY

The Engle Florida Class, by and through Class Counsel, hereby file their Memorandum in opposition

to the motion for directed verdict on the issue of strict liability and state:

I. ENTRY OF A DIRECTED VERDICT ON THE ISSUE OF STRICT LIABILITY WOULD BE CLEARLY ERRONEOUS UNDER FLORIDA LAW.

Only where no evidence and no inferences from the evidence exist to support plaintiffs' theory of relief may a directed verdict be properly granted. See, e.g., Sears Roebuck & Co. v. McKenzie, 502 So. 2d 940, 941 (Fla. 3d DCA) ("A directed verdict is proper only when the record conclusively shows an absence of facts or inferences from facts to support a jury verdict, viewing the evidence in a light most favorable to the nonmoving party. . . . Thus, the trial court properly refused to enter a directed verdict since a case should never be withheld from the jury unless, as a matter of law, no proper view of the evidence could possibly sustain a verdict in favor of the nonmoving party.") (citations omitted) (emphasis added), rev. denied, 511 So. 2d 299 (Fla. 1987).

Even when the trial court may believe that plaintiff did not prove a prima facie case on a particular issue, the Court must defer or reserve ruling so as to avoid the necessity of a retrial. See, e.g., Gutierrez v. L. Plumbing, Inc., 516 So. 2d 87, 88 (Fla. 3d DCA 1987) ("We have repeatedly instructed that trial judges who are inclined to grant a directed verdict at the conclusion of the case should instead reserve ruling thereon, allow the jury to return a verdict and thereafter rule on the motion.") (emphasis added).

This Court must consider all the evidence admitted before the jury and all reasonable inferences

therefrom before ruling on defendants' motion. Singer v. Borbua, 497 So. 2d 279, 280 (Fla. 3d DCA 1986), rev. denied, 503 So. 2d 328 (Fla. 1987). Admissible evidence at trial includes "testimony, admissions and documents" and all must be considered when ruling on a motion for directed verdict. E & S Agency of Florida, Inc. v. Ratcliff Welding, Inc., 609 So. 2d 180 (Fla. 3d DCA 1992).

Defendants' burden – to prove that plaintiffs have presented no evidence and there are no inferences from the evidence to support plaintiffs' theory of relief – cannot possibly be met in this case.

II. DEFENDANTS' ASSERTION THAT THE PHASE ONE JURY VERDICT FORM IS DEFECTIVE IN THAT IT DID NOT IDENTIFY SPECIFIC DEFECTS FOUND BY THE JURY, IS FRIVOLOUS, AND DEFENDANTS' MOTION SHOULD BE DENIED.

Defendants acknowledge that there was evidence of numerous defects in cigarettes during Phase I and state at page two of their memorandum:

> 3. Plaintiffs in Phase I introduced evidence on numerous alleged defects. To name a few, that certain cigarettes use genetically engineered high nicotine tobacco; that ammonia was used in the manufacture of certain other cigarettes to create unbound nicotine that reached the brain faster; that cigarettes burned too hot; that ventilation holes in filtered cigarettes were placed in the wrong location; that unfiltered cigarettes had higher tar and nicotine yields; that cigarette smoke contains carcinogens, nitrosamines,

> carbon monoxide and other allegedly deleterious compounds; that cigarettes before July 1, 1969 did not have adequate warnings; and that certain cigarettes contained different additives and flavorance [Defendants' motion at pgs. 2-3].

In addition to the above, the Florida class also presented evidence and testimony during Phase I that cigarettes were defective in that they contained carcinogens that cause lung cancer, emphysema and other diseases and medical conditions; that cigarettes with nicotine are addictive to smokers; that the levels of nicotine have been manipulated by these Defendants to keep smokers addicted and smoking; that the design was defective in that a safer cigarette without nicotine that was not addictive could have been designed and sold; and that cigarettes did not have any warnings at all prior to 1966 and had grossly inadequate warnings between 1966 and July 1, 1969.

The jury found pursuant to the verdict form in Phase I that each of the Defendant tobacco companies placed cigarettes on the market that were defective and unreasonably dangerous both before and after July 1, 1974.

In a motion significant for its absence of any legal authority, Defendants assert that because the Phase I jury verdict form did not require that the jury specify each and every defect contained within cigarettes, these defects cannot be linked as a proximate cause of Mary Farnan's, Frank Amodeo's or Angie Della Vecchia's cancer. Defendants' assertion is frivolous.

The issue of proximate cause is a question of fact to be determined by the jury. Stanzenski v. Tennant Co., 617 So.2d 344 (Fla. 1st DCA 1993). Defendants were provided the opportunity to present evidence during Phase One that cigarettes were not defective and did not cause illnesses and death. Defendants cannot now attack the jury verdict form in Phase One and argue that some alleged defect in the Phase One verdict form entitles Defendants to a directed verdict in Phase Two. These arguments are untimely and unwarranted.

III. NO DEFENDANT IS ENTITLED TO A DIRECTED VERDICT ON STRICT LIABILITY.

Defendants claim that there is insufficient evidence to find that Plaintiff Mary Farnan smoked any cigarette manufactured by Lorillard Tobacco Company or Philip Morris, Incorporated. See Defendant's Motion, para 9. Yet, in the very next paragraphs of their motion, Defendants concede that Mary Farnan smoked cigarette brands manufactured by Lorillard and by Philip Morris. See id., para. 10 and 11.

The Defense argues that Lorillard is entitled to a directed verdict as to the claims of Mary Farnan because she was not a long term regular smoker of Kent cigarettes. However, the evidence in Phase One is that there is no safe threshold for carcinogens and smoking. Mary Farnan's exposure to Lorillard's product by smoking Kent cigarettes requires that the motion for directed verdict be denied.

The Defense distorts Mary Farnan's testimony and alleges that she was not a regular smoker of Marlboro cigarettes. Defendants ignore the trial

testimony of Mrs. Farnan who stated that she smoked Marlboro cigarettes for approximately one year (Tr. 40382, 40405); for maybe a year and three months (Tr. 40426). Neither Lorillard nor Philip Morris are entitled to a directed verdict as to the strict liability claims of Mary Farnan.

Both Mary Farnan and Frank Amodeo testified that they smoked a variety of cigarettes over the years that would include all brands. Although Frank never regularly smoked a Lorillard product, when he borrowed cigarettes he would smoke all brands, including Lorillard. Moreover, these Defendants acted in concert through the Tobacco Institute and the Council for Tobacco Research, as the jury found during Phase I.

Each of the class representatives testified that they regularly borrowed or "bummed" cigarettes from others and would smoke any and all brands. The Defendants cannot argue with any credibility that one brand causes disease while another brand does not because the Defendants to date have refused to provide anyone, including the public health officials, with a list of ingredients in each particular brand of cigarettes. The evidence is that all cigarettes, including low tar cigarettes and light cigarettes cause lung cancer, throat cancer and other diseases.

IV. CONCLUSION

For the foregoing reasons, the Engle Florida Class respectfully requests that this Court deny Defendants' motion for directed verdict on strict liability.

* * *

APPENDIX R

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (22)

FLA. BAR NOS: 068445
142163
998389

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, RALPH DELLA VECCHIA as Personal Representative of the Estate of ANGIE DELLA VECCHIA, deceased and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RJ REYNOLDS TOBACCO, et al.,

Defendants.

----------/

ENGLE FLORIDA CLASS MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR DIRECTED VERDICT ON THE ISSUE OF FRAUD

The Engle Florida Class, by and through Class Counsel, hereby file their Memorandum in opposition

to the motion for directed verdict on the issue of fraud and state:

I. ENTRY OF A DIRECTED VERDICT ON THE ISSUE OF FRAUD WOULD BE CLEARLY ERRONEOUS UNDER FLORIDA LAW

Only where no evidence and no inferences from the evidence exist to support plaintiffs' theory of relief may a directed verdict by properly granted. See, e.g., Sears Roebuck & Co. v. McKenzie, 502 So. 2d 940, 941 (Fla. 3d DCA) ("A directed verdict is proper only when the record conclusively shows an absence of facts or inferences from facts to support a jury verdict, viewing the evidence in a light most favorable to the nonmoving party . . . . Thus, the trial court properly refused to enter a directed verdict since a case should never be withheld from the jury unless, as a matter of law, no proper view of the evidence could possibly sustain a verdict in favor of the nonmoving party.") (citations omitted) (emphasis added), rev. denied, 511 So. 2d 299 (Fla. 1987).

Even when the trial court may believe that plaintiff did not prove a prima facie case on a particular issue, the Court must defer or reserve ruling so as to avoid the necessity of a retrial. See, e.g., Gutierrez v. L. Plumbing, Inc., 516 So. 2d 87, 88 (Fla. 3d DCA 1987) ("We have repeatedly instructed that trial judges who are inclined to grant a directed verdict at the conclusion of the case should instead reserve ruling thereon, allow the jury to return a verdict, and thereafter rule on the motion.") (emphasis added).

This Court must consider all the evidence admitted before the jury and all reasonable inferences therefrom before ruling on defendants' motion.

Singer v. Borbua, 497 So. 2d 279, 280 (Fla. 3d DCA 1986), rev. denied, 503 So. 2d 328 (Fla. 1987). Admissible evidence at trial includes "testimony, admissions and documents" and all must be considered when ruling on a motion for directed verdict. E & S Agency of Florida, Inc. v. Ratcliff Welding, Inc., 609 So. 2d 180 (Fla. 3d DCA 1992).

Defendants' burden – to prove that plaintiffs have presented no evidence and there are no inferences from the evidence to support plaintiffs' theory of relief – cannot possibly be met in this case.

II. THERE IS OVERWHELMING EVIDENCE IN THIS RECORD OF FRAUD THAT PRECLUDES THE ENTRY OF A DIRECTED VERDICT

Defendants are basically re-arguing motions for directed verdict that were denied at the conclusion of Plaintiffs' case in chief and denied at the conclusion of the trial of Phase I. Several examples of fraudulent activities that cause these class representatives to rely to their detriment and suffer injury and damages include the manipulation of levels of nicotine to keep the class representatives smoking and addicted; concealment of critical information in the 1950's, 1960's and thereafter as to the health consequences of smoking and the addictiveness of nicotine; many many misrepresentations and public statements in advertising commencing in the 1950's and continuing into the 1990's; misrepresentations and concealments regarding "light cigarettes" that were actually more dangerous to Mary Farnan and Angie Della Vecchia; and the fraudulent misinformation campaign to confuse smokers and the public, including these class

representatives, about the so-called continuing controversy.

As one example of the fraud and its effect on the class representatives, the testimony of Plaintiff Class Representatives Mary Farnan and Frank Amodeo, contains overwhelming evidence of their reliance on Defendants' decades-long fraudulent advertising and public misinformation campaign which enticed them to become smokers, led to their addiction to cigarette smoking, and culminated in their painful suffering from smoking-caused diseases. Defendants' audacious claim that Plaintiffs have failed to establish a prima facie case is without support under Florida law.

In Florida, once a party undertakes a duty to disclose information, that party must disclose the "whole truth." Vokes v. Arthur Murray, Inc., 212 So.2d 906 (Fla. 2d DCA 1968). Where there is a duty to reveal information, it is fraudulent not to disclose information. Franklin v. Brown, 159 So.2d 893, 898 (Fla. 1st DCA 1964). See also Besett v. Basnett, 389 So.2d 995, 998 (Fla. 1980); Johnson v. Davis, 480 So.2d 625, 628 (Fla. 1986).

In 1954, each of these Defendants in The Frank Statement to Smokers, voluntarily undertook a duty to Florida smokers to inter alia place the health of the general public paramount to every other consideration in their business and to cooperate closely with those whose task it is to safeguard the public health. In that Statement, Defendants stated: "We believe the products we make are not injurious to health . . . . This Statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about

it." The U.S. Supreme Court recognized in Cipollone v. Liggett Group, 505 U.S. 504, 112 S. Ct. 2608, 120 L.Ed.2d 407 (1992), that where a manufacturer expressly promises or voluntarily undertakes a duty, that duty is not imposed under state law and is not pre-empted.

Defendants have flagrantly violated the obligations they undertook in The Frank Statement. The Court's decision in State of Minnesota and Blue Cross/Blue Shield of Minnesota v. Philip Morris, et al., Case No.: C1-94-8565-Civil, on January 24, 1998, is equally applicable here:

> . . . Plaintiffs have represented facts which reasonably support an inference that defendants engaged in a decades-long successful campaign to hide and conceal information from their internal files regarding the misrepresentations and fraud and other wrongdoing. The disputed record reflects that Defendants' conduct includes: Hiding and misrepresenting knowledge about the actual health risks of smoking while publicly denying or diminishing those risks; hiding and misrepresenting actions suppressing independent scientific research while publicly purporting to support such research; hiding and misrepresenting efforts to manipulate the nicotine content of cigarettes while publicly denying the fact; hiding and misrepresenting knowledge of the addictiveness of nicotine while publicly denying that nicotine was addictive; hiding and misrepresenting efforts to market to children while publicly denying they

> marketed to children; and hiding and misrepresenting evidence that they were breaking their promise to place the public health as their primary concern. Plaintiffs assert that these facts demonstrate a campaign of deception that continues today. .

This Court has recognized that the impact of Defendants' decades-long advertising campaign on plaintiffs is critical:

> The Court: I think there is a distinction that can be made here. We are not talking about the specific ads; we are talking about the impact of an advertising campaign over the years and how it affects [Mr. Amodeo].

TR. 41,434. Further, in this Court, in its recent Order on Certain Defendants' Motion for a Mistrial Based on the Admission of Expert Testimony of Dr. Michael Siegel, held:

> [T]his Court has concluded that there is a reasonable nexus between the expert literature and the opinion proffered. The expert opinions and conclusions of Dr. Siegel comports with the underlying scientific and research literature which he relies upon in making his conclusions since the class representatives were exposed to the tobacco industry's marketing practice in a substantially similar manner as in the case studies and literature.

Order dated January 28, 2000, paragraph 4 (emphasis added).

The testimony of Class Representatives Mary Farnan and Frank Amodeo and of Expert Witness Dr. Michael Siegel is replete with statements indicating that the Plaintiffs relied on the fraudulent representations and affirmative misrepresentations made in the advertising and public information campaign of Defendant Tobacco Companies. The following excerpt is from the testimony of Mr. Amodeo:

Question: When you read or heard statements from the tobacco industry saying it had not been scientifically proven that cigarette smoking had caused lung cancer, did you believe that?

Answer: Yes, I did.

Question: Why?

Answer: Because I didn't believe that the government would allow cigarettes to be sold if they were unsafe.

Tr. 41, 370.

Question: When you read statements over the years or heard on radio or television from tobacco representatives that they were researching the matter and that they would tell the American people the truth, once they learned the truth, about causation and addiction, did you believe them?

Tr. 41,371.

Answer: Yes, I believed them.

Question: You relied on them?

Answer: I relied on them.

Question: And did you continue to smoke because you believed the tobacco company representatives that causation had not been scientifically proven, and when they learn the truth, they would tell you the truth?

Answer: Absolutely.

Tr. 41,375.

Question: In terms of the . . . relatively few ads that I showed you this morning in front of the jury, what influence did those ads have upon you and your smoking behavior?

Answer: It kept me smoking. When I see people like sports stars, that you showed me, smoke, it made them seem healthy. They kept me smoking. I relied on the ads that I saw and they kept me smoking

Tr. 41,430-31.

In the following excerpt, Plaintiff Class Representative Mary Farnan discusses the affirmative misstatements of the Tobacco Industry as to "low tar" and "low nicotine" cigarettes. The "low tar" "low nicotine" label is a false representation in light of the concept of compensation: that a smoker smoking cigarettes with lower nicotine and lower tar may smoke more cigarettes and inhale more deeply to compensate.

Question: Why did you believe that Winston Lights, or any light cigarette, was . . . a safer cigarette?

Answer: Because the advertisements that the tobacco companies put out said they were . . . lighter. On the front of the package, if you read the front of the package, it says right there: Low tar, low nicotine.

Question: Well, why . . . did low tar and low nicotine mean to you that it was, in fact, safer?

Answer: Because I thought that's what the disagreement was . . . whether the cigarettes had bad things for you or not.

Question: When you switched to Winston Lights, did you notice any difference in the way you actually inhaled the cigarette, when compared to the full flavor Winston that you had been smoking before?

Answer: Yes. I smoked more of them and . . . I held it in my lungs longer, before I would breathe it back out. Inhaled it more. I increased the amount of cigarettes that I smoked.

Tr. 40,248-49.

Expert witness Dr. Michael Siegel testified as to the exposure and defect of the marketing and advertising practices of the tobacco industry on class representatives Frank Amodeo, Mary Farnan and Angie Della Vecchia.

Defendants' contention that plaintiffs' fraud claim is preempted under Cipollone as a neutralization of the effect of warning labels is erroneous, as Cipollone

provides that fraud is an exception to the preemption doctrine. Much of defendants' advertising consisted of affirmative misrepresentations of the health effects of smoking, such as representations about health studies of cigarette smokers, as well as false statements of fact, such as the "low tar, low nicotine" cigarettes which is a fallacy in view of the concept of compensation. Frank Amodeo started to smoke in 1953; Mary Farnan in 1965 and Angie Della Vecchia in 1957. These class representatives were exposed to many years of cigarette advertising before the preemption date of July 1, 1969.

Defendants' further contention, that plaintiffs' fraudulent concealment claim is nothing more than a thinly veiled failure to warn claim, is equally vacuous. The Engle Class did not claim in Phase I and has not claimed in Phase II that there should have been stronger warnings on cigarette packages. None of plaintiffs' claims are predicated on a failure to warn after July 1, 1969 and thus no doctrine of preemption applies in this case.

The evidence during Phase II reveals that the class representatives were misled by the tobacco company Defendants and relied to their detriment on the so-called "continuing controversy" and the claim by the Defendants that there was no proof that smoking causes any disease, including lung cancer. Class representatives Mary Farnan and Angie Della Vecchia were misled into believing that low tar, low nicotine "light" cigarettes were safe. Both class representatives dramatically increased their cigarette consumption and relied to their detriment by smoking more and increasing their exposure to

carcinogens because of the misrepresentations of these Defendants.

The three class representatives continued to smoke because they were addicted to the nicotine in cigarettes and based on the testimony in Phase I, the levels of nicotine in cigarettes were manipulated by the tobacco companies through various mechanisms to keep smokers addicted and smoking.

Defendants again argue that this Court should apply a fraud statute of repose. As addressed in the memorandum of law on the statute of repose, the Diamond exception applies in this products liability action so that the statute of repose will not extinguish Plaintiffs' claims in this latent injury action. See Pulmosan Safety Equipment Corp. v. Earl Barnes, 25 F.L.W. S12 (Case No. SC94544 Opinion, filed January 6, 2000).

III. CONCLUSION

For the foregoing reasons, the Engle Florida Class respectfully requests this Court to deny Defendants' motion for directed verdict on plaintiffs' fraud claims.

* * *

APPENDIX S

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

General Jurisdiction Division

CASE NO. 94-08273 CA (22)

FLA. BAR NOS: 068445
142163
570095

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, RALPH DELLA VECCHIA as Personal Representative of the Estate of ANGIE DELLA VECCHIA, deceased and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY, et al.

Defendants.

----------/

ENGLE FLORIDA CLASS' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS FOR DIRECTED VERDICT ON THE ENGLE FLORIDA CLASS' CIVIL CONSPIRACY, NEGLIGENCE AND WARRANTY CLAIMS AS TO FRANK AMODEO, MARY FARNAN AND ANGIE DELLA VECCHIA

The Engle Florida Class, by and through Class Counsel, file its Consolidated response to Defendants' motions for directed verdict on the Engle Florida Class' civil conspiracy, negligence and warranty claims as to Frank Amodeo, Mary Farnan and Angie Della Vecchia and state:

The trial testimony of Frank Amodeo, Mary Farnan and Angie Della Vecchia is more than sufficient to defeat Defendants' motions for directed verdict. The Phase II trial testimony is a supplement to the nine months of trial during Phase I. During Phase II the class representatives were provided the opportunity to explain how the behavior of Defendants impacted their lives.

Defendants' respective motions for directed verdict on the counts of civil conspiracy, negligence and warranty, either ignore or give no weight to the fact that on July 7, 1999 the Engle jury unanimously found each of them liable for civil conspiracy — misrepresentation; concealment; breach of implied warranty before and after July 1, 1969 (with the exception of Brooke Group); breach of express warranty before and after July 1, 1969 (with the exception of Brooke Group); and negligence before and after July 1, 1969.

In reaching its breach of implied warranty verdict the jury determined that each of the Defendant tobacco companies, with the exception of Brooke

Group, prior to July 1, 1974, sold or supplied cigarettes that were defective in that they were not reasonably fit for the uses intended.

In reaching its breach of express warranty verdict the jury determined that each of the Defendant tobacco companies, with the exception of Brooke Group before July 1, 1974, sold or supplied cigarettes that did not conform to representations of fact made by said Defendant(s), either orally or in writing.

In reaching its negligence verdict the jury determined that each of the Defendant tobacco companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances.

In reaching its civil conspiracy verdict the jury determined that (1) each of the Defendants entered into an agreement to misrepresent information relating to the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment; and (2) each of the Defendants entered into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment.

The evidence in Phase II clearly illustrates that Frank Amodeo, Mary Farnan and Angie Della Vecchia were smokers, they were members of the public and that they were victimized by each of the Defendants. The trial testimony in Phase II of the class representatives establishes the nexus between the behavior of the Defendants and the severe injuries suffered by Plaintiffs. Expert witnesses,

including Drs. Siegel, Burns and Richmond also established the nexus between Defendants' behavior and the Plaintiffs' smoking initiation, smoking history, brand switching behavior, addiction, motivation to quit and knowledge of the relationship between smoking and health.

I. FRANK AMODEO TRIAL TESTIMONY ILLUSTRATING IMPACT OF INDUSTRY BEHAVIOR

Frank was born in 1939 and had his first cigarette at the age of 14. (Tr. 41354) By 1955 he was smoking a pack and a half a day. (Tr. 41355) Although he smoked other brands, his regular brands at that time were Lucky Strike and Camels. (Tr. 41356). In 1966, he was smoking Luckys and Camels but his wife was smoking Viceroy so he started smoking her Viceroys "and then I also went over to Marlboro." (Tr. 41358) From 1967 to 1987 his primary brand was Marlboros or Viceroys. (Tr. 41358) He would also smoke other brands in addition to Viceroys and Marlboros. (Tr. 41364) When he would try to quit, his wife would say calm down and have a cigarette. . . "I would be irritable, I would be a miserable person." (Tr. 41359) At this time he smoked a pack and a half to two packs a day and some days three packs a day but on the average a pack and half to two. (Tr. 41360).

In January of 1987 he had a sore throat "every time I tried to swallow food and I was losing weight and I had ear aches and headaches I could not tolerate." (Tr. 41334-35) He visited the doctor three times between January and June of 1987, his doctor was treating him for an upper respiratory infection, bronchitis and laryngitis. (Tr. 41335) His birthday

was June 12 and his grandson wanted him to have a piece of cake. "I was feeling lousy. . . I hemorrhaged because the blood and the cake came projecting out of my mouth across the room." (Tr. 41336) On June 14, 1987 he was told he had terminal cancer. (Tr. 41339). He survived the cancer and eventually a feeding tube was put in his stomach so he could receive nourishment. (Tr. 41343) He has not had anything to eat or drink by mouth since June 12, 1987. (Tr. 41351)

Frank testified in detail concerning the impact tobacco industry messages had on his smoking behavior. For example, he found the macho cowboy Marlboro ads to be attractive. . . "the mountains, the reflections of the trees in the lake it seemed fresh, beautiful ads which made smoking seem healthy." (Tr. 41361-62). He also explained how he received free samples of cigarettes from the tobacco companies.

"You would mail in coupons, you would get discounted coupons back or you would get a product in the mail or it would be on the carton and you would take the carton to the store and redeem it there. The person would give you a coupon and you would mail it in and the product for cigarettes came back to you. This went on for years and years." (Tr. 41354). He specifically recalled receiving free samples of Marlboro and Salem cigarettes. (Tr. 41429) He did not recall the names of all free sample brands he received but knew he received free samples from "lots of companies, lots of samples." (Tr. 41428) Frank also recalled being in many places where free cigarettes were distributed, including the Fox Theater in Detroit, Winn Dixie Markets and bars in

which he performed as a singer. (Tr. 41364-5) He said he received free samples of cigarettes at different points in time directly from the manufacturers. (Tr. 41429)

He continued to smoke from January 1967 to June 1987 but cut down and switched to Virginia Slims because he saw an ad in a magazine that said Virginia Slims were milder and thinner and "I was going to try to cut down so I used Virginia Slims." (Tr. 41362-63) He got a prescription for Nicorette Gum during 1987 but it did not help. (Tr. 41363). From the 1950s through the 1980s he never learned from any source that smoking was addictive (Tr. 41435). He never knew at any time, from the 1960's through the 1980's, that tobacco companies were adjusting levels of nicotine to keep smokers addicted and buying their products. (Tr. 41438) He was never aware from any source that ammonia and other additives were placed in cigarettes to enhance the effectiveness of the nicotine and keep smokers smoking. (Tr. 41438-39) He was not aware from any source that from the early 60s tobacco companies knew smoking was addictive and cigarettes were a nicotine delivery device. (Tr. 41440) He was not aware from any source of the concepts of compensation meaning with lower tar and lower nicotine the smoker may smoke more cigarettes and inhale more deeply. (Tr. 41440-1)

During the time he was smoking from 1954 to 1987, he never heard cigarettes contained numerous carcinogens that could be bad for you such as benzopyrene, nitrosamines and phenols. (Tr. 41366) He never learned from any source that cigarette smoked contained thousands of chemicals. (Tr.

41438-39) He never learned from any source that there were cancer causing chemicals known as carcinogens in cigarette smoke. (Tr. 41439) At no time was he aware from any source that the internal tobacco documents from the various Defendant tobacco companies revealed that smoking causes lung cancer and other diseases. (Tr. 41439) From the 1950s to the 1980s he was not aware from any source that smoking causes laryngeal or throat cancer. (Tr. 41440) From the 1950s through the 80s he was not aware from any source that while he was hearing it had not been scientifically proven that cigarette smoking causes any disease that, at the same time, the research conducted by the companies established disease causation from their products. (Tr. 41440) He was not aware from any source that research conducted overseas by various tobacco companies was not shared with public health officials including the Surgeon General of the United States. (Tr. 41442)

He recalled that spokesmen for all the tobacco companies would say, "There is no proof that smoking causes lung cancer and we are spending millions of dollars for research and if we find out there is something wrong with our product we will let everybody know." (Tr. 41367) He testified that he would see that statement in newspapers, magazines and on television. (Tr. 41367) He believed the statements from the tobacco industry that cigarette smoking had not been proven to cause lung cancer. (Tr. 41370) He believed the tobacco CEO's when they testified in Congress in 1994.

Not long after the CEO's testified, he started hearing reports from different people about how they had lied and knew the dangers of cigarettes even

before the warnings came out "and that's when I knew smoking had caused my cancer and I felt stupid. . . It had to be somewhere in 1995 or early 1996." (Tr. 41370-1).

Frank testified that he believed and relied on statements he read over the years or heard on radio or television from tobacco representatives that they were researching the matter and that they would tell the American people the truth, once they learned the truth, about causation and addiction. (Tr. 41370) He said he continued to smoke because he "absolutely" believed the tobacco company representatives when they said that causation has not been scientifically proven and that when they learned the truth they would tell him the truth. (Tr. 41375)

He testified that the cigarette advertisements he saw in the 1960s, 70s and 80s "had an impact on me that made me continue to smoke." (Tr. 41434) He said he "absolutely" relied on the ads. (Tr. 41434-5) He saw cigarette advertisement on television programs, including "Lucky Strike Hit Parade," "I love Lucy," "Jack Benny," "Ed Wynn," "Sgt. Bilko" and "The Flintstones." (Tr. 41416-7) He recalled Arthur Godfrey advertising for Chesterfield and read from one such ad that said," . . . no adverse effects to the nose, throat and sinuses from smoking Chesterfields. He said, "If Arthur Godfrey said it was true. It just made smoking safe." (Tr. 41419) He reviewed the Camel ad that said "More doctors smoke Camels than any other cigarette." He said he had seen the ad and to him it meant "that smoking is safe and I relied on that information." (Tr. 41420-21) The cigarette ads he saw that depicted famous sports figures "made me think that smoking was safe and

there could be no harm from a cigarette because these guys are athletes, above average athletes, and they smoked so how could it be bad." (Tr. 41425) He also recalled that he has seen thousands of Marlboro ads over the years. (Tr. 41428) He said cumulatively all of the ads he saw "kept me smoking. . . I relied on the ads that I saw and it kept me smoking." (Tr. 41431)

He explained that he discounted the things he was hearing in the 1960s through 1980s that cigarettes smoking is bad for you "because of the ads because of what the tobacco people were saying that there was no proof that smoking causes lung cancer. I believed that." (Tr. 41431)

II. MARY FARNAN TRIAL TESTIMONY ILLUSTRATING IMPACT OF INDUSTRY BEHAVIOR

Mary Farnan was born July 25, 1955 (Tr. 40180) and started to smoke cigarettes at the age of ten or eleven (Tr. 40221). Within a month, she was smoking at least a couple of cigarettes everyday (Tr. 40221). Mary worked as a dishwasher and a waitress as a teenager (Tr. 40186); worked as an emergency room clerk beginning in 1980 (Tr. 40186); became a Licensed Practical Nurse in 1982 and a Registered Nurse in 1986 (Tr. 40192).

An extremely painful shoulder caused her to go to the Shands Hospital Emergency Room in Gainesville December 1995 (Tr. 40203). During a follow up visit to the hospital she was told she had cancer (Tr. 40205). Even though she believed her cancer was caused by smoking cigarettes, she continued to smoke during the time she was undergoing chemotherapy and radiation therapy (Tr. 40207). She continued to

smoke because she "couldn't quit. I was addicted. I had to have them. And at that time I was so stressed out, I probably even smoked more. I just — I could not quit." (Tr. 40207) Her normal smoking pattern was to begin to smoke cigarettes each day as soon as she woke up in the morning, before she washed or face or had a cup of coffee (Tr. 40222). She would get dressed and buy cigarettes at night before she went to bed if she ran out of them at bed time. "I didn't want to wake up in the morning and not have a cigarette available." (Tr. 40223)

Prior to the time the mass in her left lung was removed in June of 1996, she had never been successful in quitting smoking because she was "absolutely addicted. I could not quit." (Tr. 40236) She sincerely tried to quit "especially in the 1980s." Once she started working in the hospital she saw the condition some of her patients were in "and I started to believe that perhaps cigarettes were bad for you, even though — even though there was absolute controversy back and forth all the time about whether cigarettes were good or whether they were bad." (Tr. 40236)

During the time she worked at the hospital, Mary tried several methods to quit smoking, including the patch, Nicorette gum and she tried hypnosis twice (Tr. 40236). Nothing worked. "I was just not able to quit." (Tr. 40236) Even though after she was diagnosed with lung cancer she was satisfied in her own mind that cigarettes caused her lung cancer, she smoked three packs per day during radiation and chemotherapy. "I had to have them. I — I would go through withdrawal symptoms. I would get sick to my stomach, and I was already having enough

trouble with the chemotherapy and the radiation. I couldn't give up my cigarettes then. There's no way. I was addicted to them. I had to have them." (Tr. 40239)

When she tried to quit cigarettes she would get "agitated and nervous. My stomach would grumble. I wouldn't be as mentally alert. I wouldn't be as mentally alert. I wouldn't be able to work as quickly. Concentration wasn't there. This would happen... and it would subside. And it would come back shortly thereafter again." (Tr. 40252) The symptoms would go away after she took a few deep drags from a cigarette. (Tr. 40253) She explained the circumstances under which she was able to quit smoking in June of 1996. She began the process by smoking half a pack of cigarettes immediately before she knew she was going to be admitted into the hospital for lung surgery the next day (Tr. 40240). She was admitted to the hospital, had the surgery and was, in her words, "out for days." "I was on morphine. I had the anesthesia. And I had problems coming off of the anesthesia. And I — they kept me totally out of it for days, and then when I came home, I was under medication. If I was awake, I was in extreme pain. Immediately they would give me something to put me back to sleep. And by the time that I was totally aware of what was going on, I wasn't thinking about cigarettes anymore." (Tr. 40239)

On June 4, 1996 a cancerous tumor was removed from her left lung (Tr. 40208). She has not had a pain free day since the initial surgery on her left lung (Tr. 40213). A cancerous mass subsequently discovered in her right lung was removed in May of

1997 (Tr. 40213). No doctor ever told her the form of cancer she had was BAC (Tr. 40214). She was told she had adenocarcinoma in one lung and squamous cell or large cell in the other lung (Tr. 40215). She was informed the cancer had spread to her brain in early 1998 (Tr. 40216). She recalled over the years smoking Viceroy, Raleighs, Camels, Marlboro, Salem, Kents, Tareytons, Carltons and Winston Lights (Tr. 40223). She started smoking Winston Lights close to the time they first came out because "I thought they would be safer." (Tr. 40224). She sometimes smoked three and one-half packs of Winston Lights per day (Tr. 40225).

On cross examination she remembered that "the advertisement is what led me to want to try Marlboros. . ." (Tr. 42261) During the time she smoked Marlboros in the 1970s, she felt the Marlboro advertisements communicated to her that smoking was safe. (Tr. 42264).

When she started to smoke as a child she had "no idea there was anything wrong with cigarettes at all." She did not see anything wrong with cigarettes at that time. "I thought it was cool. Everybody smoked... in the movies they smoked and blew cigarette rings in the sky. It was cool. . ." (Tr. 40243). She was not aware in the mid 60s when she started to smoke or at any time during her smoking history that tobacco companies could control or manipulate the level of nicotine to keep her smoking and addicted. (Tr. 40244) During the time she first started to smoke, she "had no idea there was anything bad in cigarettes. I probably didn't even think about the word 'tar' and 'nicotine' at the time when I first started smoking." (Tr. 40245) She did

not know how many carcinogens were in cigarette smoke before or after 1980 (Tr. 40247).

When she was growing up, program she watched included "Bonanza," "I Love Lucy" and "The Flintstones" and "The Beverly Hillbillies." (Tr. 40245). Prior to the time cigarette advertising was banned on television, she probably watched television every day. There were lots of tobacco commercials in those days. (Tr. 42211) She remembered Marlboro commercials "had wonderful music that they played." She does not know how many "Winston tastes good like a cigarette should" commercials she saw "but I can still go over the commercials in my head on Winstons, and the little clack thing they did." (Tr. 42211). Although she had no idea of the exact number, Mary estimated that she had seen Winston commercials thousands of times (Tr. 42212). She remembered from trial testimony that Winston was the number one brand in the country prior to Marlboro and that the former CEO of Philip Morris testified that the "Winston tastes good like a (clack, clack) cigarette should," did not translate well to print advertising. (Tr. 42212).

She also remembered seeing magazines over the years with tobacco advertising and growing up she recalled billboard advertising. She also remembered advertisement that are "not really billboards, but big standup themes of like Virginia Slims, 'You've come a long way baby.' They had those out in front of convenient stores and they had Winston ads sometimes. And sometimes Marlboro. It varied." (Tr. 42213)

She smoked Winston and Winston Lights cumulatively for 15-20 years. (Tr. 42213) She

remembered seeing a 1974 Winston ad that included the following: ". . . All Winston will ever give me is taste. A taste that's very real. If a cigarette isn't real, it isn't anything. Winston is for real." The message conveyed to her from the ad was "Winstons were real cigarette smoking; that they were just real tobacco; that there was nothing wrong; they were safe." (Tr. 42215-16)

She was asked about an ad depicting a man and a woman apparently saying, "We want low tar." The ad conveyed to her that "it was safer... much safer." (Tr. 42216) Mrs. Farnan said the word "light" meant "it was a safer cigarette because it had less impurities in it. It had less tar. . ." (Tr. 42224) She saw a lot of ads over the years emphasizing low tar and ultra low and "light." When asked what impact those ads had on her she said, "I went from Winston Regular to Winston Lights." (Tr. 42226) She was smoking two to two and a half packs a day when she smoked Winston Regulars. (Tr. 42227) Six months to a year after she switched to Winston Lights she was probably smoking "three, maybe three and a half packs. And I would smoke deeper, too. I would inhale harder." (Tr. 42228) After switching to Winston Lights she smoked more of them, held them in her lungs longer and increased the amount of cigarettes she smoked (Tr. 40249). The "light" advertisements that she saw gave her a feeling of reassurance during the time she was smoking three to three and one half packs of Winston Lights (Tr. 42233). She believed Winston Lights or any light cigarette was safer "because the advertisements that the tobacco companies put out said they were, that they were lighter. On the front of the package, if you read the front of the package, if you read the front of

the package, it says right there: Low tar, low nicotine." (Tr. 40248). "I felt I was smoking a safer cigarette. . . I'm under the impression that's why the tobacco companies came out with lights." (Tr. 42232)

She testified that she relied on the collective sampling of cigarette advertisements that she looked at during her trial testimony, as well as other ads that she saw during the 1960s, 70s and 80s, 90s (Tr. 42234). She said she believed those advertisements influenced her smoking behavior both in the sense of smoking initiation and continuing to smoke (Tr. 42234). She never smoked a generic cigarette brand (Tr. 42280). She has never seen a full page ad for a generic brand (Tr. 42281).

The cigarette advertisements she saw in the 1960s, 70s and 80s portrayed something that was essentially safe (Tr. 42239). "I didn't see anything unhealthy at all about them." (Tr. 42239) She explained during cross examination that "it's a synergistic effect of all the cigarette ads. It's just not one ad that appeals to you. . ." (Tr. 42252)

She recalled that overall most cigarette advertisements depicted a healthy young man and woman. (Tr. 42226) She never in her life saw a cigarette ad where one of the models was either elderly or infirm or disabled in any way. (Tr. 42239)

She remembered seeing coupons for free cigarettes "all over the place" and she "would get them in the mail sometimes." (Tr. 42215) She especially remembered seeing coupons for Winston ads where you could send in a coupon and either get free cigarettes or savings on cigarettes. (Tr. 42216). Mrs. Farnan has been on the mailing list for tobacco companies that sell Winstons and Raleighs. (Tr.

40251) She would occasionally use and save Raleigh coupons. (Tr. 40254) On cross examination she explained that she in fact receive cigarette packs, packages of cigarettes, free packages, directly from the manufacturers. (Tr. 42252) She was sure she was on Winston's mailing list. (Tr. 42252) She recalled receiving Winstons and Winston Lights directly from the manufacturer (Tr. 42252).

She had no information that ammonia was being used in cigarettes. (Tr. 40251) The only thing she learned about nicotine during her 30 years of smoking was what she learned in nursing school — "that nicotine gives people an emotional high." (Tr. 40251). Before she went to work at Seven Rivers Community Hospital in 1980 she did not believe that cigarettes were harmful, in the sense that they could cause cancer or any other disease (Tr. 40255). Prior to working in the hospital, she "heard good and bad things, back and forth. There was a controversy there." (Tr. 40255) She has heard on television or radio or read in newspapers and magazines that cigarettes have not been proven to be addictive and there was not enough research to show cigarettes caused lung cancer and other diseases (40439-40).

At times the controversy confused her as to who was right. "I figured cigarettes were safe. The government allowed them to be purchased and manufacturers advertised them as being safe; that there had been no evidence that there was anything wrong with cigarettes." (Tr. 40255). In response to a question during cross examination, she explained that "until I went to nursing school, I didn't even know who the Surgeon General was." (Tr. 42248) To her knowledge, in the late 1980s and early 90s it is

her recollection that the Surgeon General told smokers to quit smoking as opposed to telling them to go ahead and smoke but smoke low tar. (Tr. 42275) On re-direct she said from 1965 until 1996 she never saw a full page ad paid for by the Surgeon General of the United State, or any public health authority or any government agency, recommending to smokers to switch to a low-tar product where they can still get good taste. (Tr. 42277)

III. ANGIE DELLA VECCHIA TRIAL TESTIMONY ILLUSTRATING IMPACT OF INDUSTRY BEHAVIOR

During her November 1998 videotaped testimony that was played to the jury Feb. 2, 2000, Mrs. Della Vecchia, who was born in March 5, 1946 and died of lung cancer in 1999, explained that she started smoking at the age of 11 and was smoking about 10 cigarettes per day by the time she was 12. When she was 11, cigarette brands she smoked included Parliament, Kents and Lucky Strikes. She smoked Pall Mall unfiltered when she was 12 up until the late 1970s. She smoked a pack a day from the age of 16 until she changed brands in the late 1970s (Tr. 44203).

"When I started smoking I didn't know anything about them. I didn't know they were bad for you, that's for sure. . . I had no information about cigarettes. . . as far as health-wise, I knew nothing." (Tr. 44267)

She said tobacco companies did not tell her what was bad about cigarettes (Tr. 44243).

When she was a child she never tried any drugs like marijuana, cocaine or heroin because "I was

scared to. I knew they were not good for you. And — just wouldn't." (Tr. 44254).

She would not try anything she knew to be a drug because "I just knew that drugs were no good for you." (Tr. 44254)

She said there was never a time in her life when she considered herself to be a risk taker.

She also did not consider herself to be a strong willed, decisive or assertive person. (Tr. 44186) She does not drink alcohol (Tr. 44189).

She watched television "a lot" as a child and recalled watching programs such as "I Love Lucy" which was sponsored by Philip Morris. She recalled seeing advertisements that depicted cigarettes during the time she was a child.

"Besides TV, I would see billboards. . . and newspapers and magazines. . . mostly anywhere where there's advertising." (Tr. 44268)

When she started smoking, the advertisements conveyed to her that "it made you happy; it was sophisticated; and it tastes good." She thought smoking was "cool. . . Everyone in my family smoked. . . it looked like it was enticing." (Tr. 44172) She was not sure whether any advertisement caused her to start smoking, she said "I'm not sure, because I know there was a lot of advertisements on. And I know I really enjoyed the advertisements from the 'I Love Lucy' show. And there was dancing cigarettes, you know. And whether that caused me to smoke or want to smoke, I'm not sure." (Tr. 44241)

She testified that she did not know cigarettes caused any disease when she started smoking. She said there was no warning label on cigarettes at that

time. (Tr. 44257) She also did not know how difficult it would be to quit smoking. She said she not make a free adult choice to start smoking (Tr. 44290).

She started smoking Winston Light 100s in the late 1970s "because they said they were light. . . I thought. . . that's better than full strength of nicotine and tar and . . . they said it was lower in tar, so I thought it was better for my health. . ." (Tr. 44270)

Mrs. Della Vecchia explained that the "they" she was referring to were "the commercials for cigarettes, the advertisements in the newspaper."

She explained that after switching to Winston Lights she smoked more cigarettes. "I increased in six months to a pack and a half; then a little after that, two packs I was up to."

She was diagnosed with lung cancer Feb. 15, 1997 and shortly afterward informed by her physician that she needed to quit smoking to prepare for lung surgery. She was subsequently in the hospital for a few days for tests and at that point she started her effort to quit smoking to prepare for the operation. Although she had difficulty in quitting during that time, she was able to stop smoking prior to the operation to remove the lower of her right lung.

During the seven day she was in the hospital following the operation in March of 1997, she did not smoke any cigarettes. She started to smoke again in May of 1997. She discovered that once she had one cigarette she couldn't stop.

"I just thought, let me just try one. . . I just was drawn to it. . . And I couldn't believe it. I went right to smoking as if I had never stopped."

She again tried to quit, using the nicotine patch and the prescription drug Zyban but they did not work. She was allergic to the Zyban, ". . .my face went like (indicating) out here and big lumps and all contorted." (Tr. 44221)

She continued to smoke two packs per day until she stopped smoking after her seizure and brain metastasis from the lung cancer. Only after she had brain surgery was she able to quit smoking. (Tr. 44237) Although she wasn't smoking Angie continued to crave cigarettes each day (Tr. 44289). Her daughter Janine Goluba described how her mother would secretly search for Janine's old cigarette butts and put them in her robe pocket and smoke the butts because of her addiction.

IV. FRANK AMODEO, MARY FARNAN AND ANGIE DELLA VECCHIA CONTRACTED CANCER AS A RESULT OF THE COLLECTIVE BEHAVIOR OF ALL OF THE DEFENDANTS

The trial testimony reflects that Frank Amodeo, Mary Farnan and Angie Della Vecchia smoked cigarettes manufactured by each of these Defendants. Whenever they ran out of cigarette they would smoke any brands available to them. In terms of regularly smoked brands, Mary Farnan testified that she smoked the following:

MARY FARNAN

1. Viceroy — Brown & Williamson Tobacco
2. Raleighs — Brown & Williamson Tobacco
3. Camels — RJ Reynolds
4. Marlboro — Philip Morris

5. Salem — RJ Reynolds
6. Kent — Lorillard
7. Tareyton — Brown & Williamson Tobacco
8. Carlton — Brown & Williamson Tobacco
9. Winston — RJ Reynolds
10. Winston Lights — RJ Reynolds
11. Lucky Strikes — American Tobacco/Brown & Williamson
12. Pall Mall — Brown & Williamson Tobacco

Frank Amodeo similarly smoked all types of cigarettes and specifically mentioned the following cigarettes during his testimony:

FRANK AMODEO

1. Winston — RJ Reynolds
2. Marlboro — Philip Morris
3. Lucky Strike — American Tobacco/Brown & Williamson
4. Camels — RJ Reynolds
5. Viceroy — Brown & Williamson Tobacco
6. Virginia Slims — Philip Morris

Angie Della Vecchia also smoked many brands of cigarettes but the ones that she mentioned during her testimony or were mentioned by her daughter Janine Goluba include the following:

ANGIE DELLA VECCHIA

1. Winston Lights — RJ Reynolds
2. Pall Mall — Brown & Williamson Tobacco
3. Benson & Hedges — Philip Morris
4. Marlboro — Philip Morris

5. Doral — RJ Reynolds

6. Cambridge Lights — Philip Morris

7. Parliament — Philip Morris

8. Kent — Lorillard

9. Lucky Strikes — American Tobacco/Brown & Williamson

10. Tareyton —Brown & Williamson Tobacco

Defendants argue that if Mary, Frank or Angie did not smoke a particular brand of cigarettes manufactured by that Defendant, then that Defendant cannot be found liable. This argument ignores the fact that each of the class representatives smoked a variety of brands manufactured by all Defendants, including the brands listed above. Defendants' argument also conveniently and erroneously ignores the fact that the Phase I jury found that the Defendants' acted in concert. The Defendants conspired in convincing Frank, Mary and Angie to take the first puff of their first cigarette; the Defendants acted in concert using the same false and fraudulent language to describe their respective products and jointly concealed the truth they all knew, through the Tobacco Institute and the Council for Tobacco Research.

For example, the evidence in Phase I revealed that it is no accident that each tobacco company refers to "low tar" products as "light." Defendants use the same language because they wanted to create the uniform impression that "light cigarettes" are safer. This consistent industry imagery was used to keep people smoking and is reflected by the many exhibits admitted during Phase I. The Phase I exhibits further reflect that Defendants were highly

successful in marketing "light" cigarettes and convincing smokers such as Angie and Mary that light cigarettes were safe. It does not matter that Mary or Angie switched to a particular "light" brand. The relevant issue is that Mary and Angie relied to their detriment on the industry wide lies that were revealed in Phase I and reflected by the testimony of Mary Farnan and Angie Della Vecchia during Phase II. Mary and Angie relied on all of the advertisements for "light" cigarettes and not just those that advertised "Winston Lights." Mary testified that "it is the synergistic effect of all of the cigarette ads. It's just not one ad that appeals to you."

Dr. Michael Siegel testified during Phase II that it was his expert opinion that "cigarette advertising does affect cigarette consumption in general, not only for the brand that's being advertised. One brand can be advertising its own cigarettes, but it has an impact on other people smoking. Even if they don't end up smoking that cigarette. . ." (Tr. 42373).

He said, in his opinion, advertisements for cigarettes that she did not smoke, "did have an effect on Mrs. Farnan. . ." (Tr. 42373). "Advertising works subconsciously, so the fact that she is able to say that the advertising was what influenced her to start smoking, continue smoking, to me is a very strong finding. And I think it suggests that advertising definitely had a huge impact on her." (Tr. 42375)

Mary testified that she relied on the collective sampling of cigarette advertisements that she looked at during her trial testimony, as well as other ads she saw during the 1960s through the 1990s. (Tr. 42234) She said she believed those advertisements

influenced her smoking behavior both in the sense of smoking initiation and continuing to smoke. (Tr. 42234) When she started to smoke as a child she had "no idea there was anything wrong with cigarettes at all. Prior to working in the hospital in 19809, she "heard good things and bad things, back and forth. There was a controversy there." (Tr. 40255) She has heard on television or radio or read in newspapers and magazines that cigarettes have not been proven to be addictive and there was not enough research to show cigarettes caused lung cancer and other diseases (Tr. 40439-40).

Frank Amodeo testified he believed and relied on statements he read over the years or heard on radio or television from tobacco representatives that they were researching the matter and that they would tell the American people the truth, once they learned the truth about causation and addiction. (Tr. 41370) He said he discounted the things he was hearing in the 1960s through 1980s that cigarette smoking is bad for you because of the ads and "because of what the tobacco people were saying that there is no proof that smoking causes lung cancer. I believed that." (Tr. 41431)

Dr. Siegel testified during Phase II that in his expert opinion "the impact that cigarette advertising and marketing had on both Mr. Amodeo and Mrs. Farnan was that it kept them at the lowest level of awareness. It prevented them from actually believing that cigarette smoking was harmful. It kept them in the state of conflict and controversy." (Tr. 42399). He also testified that Mary Farnan's and Frank Amodeo's decisions to smoke and continue

smoking over decades was most likely influenced by cigarette advertising. (Tr. 42399).

Dr. Siegel also stated that, based upon reading her two depositions and reviewing her medical records, it was his opinion that cigarette smoking played a major contributing role to Mrs. Della Vecchia's starting to smoke at age 11; for her switching to a different brand of cigarettes in the 1970s, rather than quitting smoking, and in her continuing to smoke for an additional 20 years, until she finally quit at the time of her lung cancer." (Tr. 43769-70)

Dr. Siegel also expressed his expert opinion that "the advertising of the light cigarettes did convey the message to her that smoking those cigarettes would be safer. . . because she had that belief, because of the advertising, she decided that rather than quit smoking, which is what she really wanted to do in 1977, that instead, she would just fall back on this other option, of simply switching to a low tar, low nicotine cigarette." (Tr. 43769-70)

Dr. Siegel explained that the reason Angie did not know whether smoking caused her to start smoking is because "typically smokers do not know that it was the advertising that caused them to start smoking or to influence their smoking behavior. . . Advertising works subconsciously. Advertising did influence her, but she wasn't necessarily aware of it." (Tr. 43771-72).

Dr. Siegel said from the time Angie started to smoke in 1957 through the 1960s "the power and the prevalence of the cigarette advertising was so strong that it would have completely overwhelmed any possible messages that the public health community was sending. . . even with the messages that the

public health community was trying to get out, the cigarette companies, through their public relations efforts, were undermining that message by convincing the public, by trying to convince the public that cigarette smoking actually wasn't harmful." (Tr. 43764)

V. CONSPIRACY

Frank Amodeo, Mary Farnan and Angie Della Vecchia testified during Phase II that they were not aware of a litany of relevant information which Defendants' acted in concert to conceal from its customers. Defendants' clearly established in Phase I that Defendants continued to deny cigarettes were addictive decades after they knew or should have known cigarettes were addictive (1963 Exhibit by Addison Yeaman admitted in Engle Phase I). In addition, Defendants' uniformly and consistently denied cigarettes have been proven to cause any disease decades after they knew or should have known of the disastrous health consequences of smoking cigarettes (1953 Exhibit by Claude Teague admitted in Engle Phase I).

The knowledge of one manufacturer can be a proper basis for concluding that another should have warned of a specific danger, Dartez v. Fibreboard Corp, 765 F.2d 456, 461 (1985). Instead of warning of a specific danger in the 1950s and 1960s, prior to the existence of any preemption argument, Defendants' acted in concert to reassure smokers and pre-smokers that cigarettes had not been proven to cause any disease. Defendants had a duty to protect consumers long before the first Surgeon General's Report was published in 1964. Defendants knew of the dangers of cigarettes before any Florida class members

started to smoke. The 1953 document authored by Claude Teague and admitted in Phase I cites to research decades prior to 1953. The distributor of a commodity inherently burdened with potential danger has the duty to take reasonable precautions to avoid reasonably foreseeable injuries to those who might use the commodity, Advance Chemical Co. v. Harter, 478 So.2d 444, 447 (Fla. 1st DCA 1985), citing Tampa Drug Company v. Wait, 103 So.2d 603, 607 (Fla. 1958).

Defendants cannot hide behind the fact that a smoker representing the class of all Florida smokers injured by Defendants' products did not smoke a particular brand. Judge Kaye explained this during a sidebar that occurred during Frank Amodeo's trial testimony.

> "It does not make any difference whether or not they smoked the brand that an ad portrays as long as they either acted on it or were influenced by it in some manner shape or form. . . an additional aspect to be considered is whether or not they relied on it or whatever action they took or did not take during the course of smoking. Either increased their smoking or decreased it because of what they saw or heard. . ." (Tr. 41405-6)

Defendants are jointly responsible for the injuries caused by cigarettes that were inflicted on Florida smokers because they acted together and in concert to convince smokers to begin to smoke cigarettes and to continue smoking cigarettes. The Tobacco Institute and the Council for Tobacco Research cannot escape responsibility because they did not

directly sell cigarettes or because an individual may not recognize their names. These entities were the conduits utilized by the tobacco companies as part of the conspiracy that was established during Phase I.

Each act done in pursuance of a conspiracy by one of several conspirators is an act for which each is jointly and severally liable, Nicholson v. Kellin, 481 So.2d 931, 935 (Fla. 5th DCA 1985), citing 10 Fla.Jur.2d & 3, Conspiracy-Civil Aspects (1979). A conspirator need not take part in the planning, inception, or successful conclusion of a conspiracy. The conspirator need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators. Donofrio v. Matassini, 503 So.2d 1278, 1281 (Fla. 2d DCA 1987), citing Karnegis v. Oakes, 296 So.2d 657 (Fla. 3d DCA 1974), cert. denied, 307 So.2d 450 (Fla. 1975). The existence of a conspiracy and an individual's participation in it may be inferred from circumstantial evidence. Donofrio v. Matassini, 503 So.2d 1278, 1281 (Fla. 2d DCA 1987), citing Northwestern National Insurance Co. v. General Electric Credit Corp., 362 So.2d 120 (Fla. 3d DCA 1978), cert. denied, 370 So.2d 459 (Fla. 1979).

VI. NEGLIGENCE AND WARRANTY CLAIMS

The evidence presented during Phase I clearly establishes that Frank Amodeo, Mary Farnan and Angie Della Vecchia contracted cancer as a result of the negligence and breach of warranties of these Defendants. Frank, Mary and Angie were not permitted to testify as to what they would have done had they been given appropriate warnings when they began to smoke, etc. However, what Frank, Mary or Angie would have done may properly be inferred from

the trial testimony of these class representatives. This fact was acknowledged by defense counsel during trial on November 16, 1999 prior to Mary Farnan's testimony:

> Mr. Webb: ". . . she can testify to what she relied upon. But what she can't give testimony on is 'what I would have done if I had known.' That's where the line is drawn ... jurors are supposed to be given facts, and they do get a right to draw inferences . . . All we're talking about is she can't testify to it. If they want to draw inferences, they're free to do so." (Tr. 40165-66)

Prior to July 1, 1969, Defendants breached their duty to the class representatives by not warning and informing smokers that cigarettes are addictive; that cigarettes cause disease; that cigarette smoke contains numerous carcinogens. Based on the testimony of the class representatives, it is reasonable to infer that they would not have started to smoke if they had been fully informed of the health effects of smoking, including the fact that it was addictive. But for the behavior for which all of the Defendants' have been found liable by the jury in Phase I, based on the testimony of Mary Farnan and Frank Amodeo, it can be reasonably inferred that they would not have started to smoke, would not have become addicted to cigarettes and would not have contracted cancer. But for the Defendants' uniform and consistently deceptive behavior for the decades in which they smoked, based on the testimony of Mary Farnan and Frank Amodeo, it can be reasonably inferred that they would have been able to quit smoking before contracting cancer.

Defendants' compounded their breach of duty to Plaintiffs' by affirmatively lying to Plaintiffs both before and after July of 1969, claiming cigarettes were not addictive and that it had not been scientifically proven that cigarettes cause any disease. In addition, Defendants manipulated nicotine levels and added substances to cigarettes which enhanced the addictive impact of the nicotine. Defendants also marketed cigarettes as "light" in tar and nicotine while designing such cigarettes to deliver a dose of nicotine and tar equivalent and sometimes greater than the amount received from cigarettes that were not labeled as "light" or low in tar.

Defendants continuously breached the duty not to deceive by intentionally creating the false and misleading impression that cigarettes were lower in tar and nicotine than they actually were when smoked by actual smokers; and by providing reassuring messages to smokers, claiming disease causation had not been proven. The testimony of Mary Farnan, Angie Della Vecchia and Frank Amodeo summarized above reflects that the three class representatives were victimized by the behavior of Defendants. Such behavior included negligence, breach of warranty and conspiracy.

Even assuming that a party to a transaction owed no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, if he undertakes to do so he must disclose the whole truth. Nicholson v. Kellin, 481 So. 2d 931, 936 (5th DCA 1985). The Florida Supreme Court held that a recipient may rely on the truth of the representation even though its falsity could have been ascertained

had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him, Besett v. Basnett, 389 So.2d 995 (Fla. 1980).

For example, Mary Farnan testified that she switched to so called light cigarettes because she was led to believe they would be safer. She estimated that she increased her cigarette consumption by one-half to one pack per day after switching to "light" cigarettes. Dr. David Burns testified during Phase Two that in his expert opinion Mary Farnan did not reduce her intake of tar or nicotine by switching to Winston Lights. (39292)

> ". . . there is evidence that when she shifted to a product that she thought was lower in dose, she thought – she described it as being safer –that she actually maintained the same level of ingestion of the nicotine and the toxic tar that she had been getting from the higher tar and nicotine Winstons that she had been smoking earlier." (Tr. 39293)

For example, Angie Della Vecchia testified that she switched to Winston Lights in 1977 "because I thought it was better for my health." Within six months her cigarette consumption increased from 1 pack to 1 and one-half packs per day. A short time later she was up to two packs per day. She continued to smoke two packs per day for more than twenty years (Tr. 44270). She explained that she switched to a so called light cigarette because of "the commercials for cigarettes, the advertisements in the newspaper." (Tr. 44270)

Dr. Burns testified switching to a so called low tar cigarette actually increased Mrs. Della Vecchia's likelihood of contracting lung cancer.

> "If you go from smoking one pack of cigarettes per day, unfiltered Pall Malls, to smoking two packs of cigarettes per day with Winston Light, you actually dramatically increase rather than decrease your risk of lung cancer." (Tr. 42869)

For example, Frank Amodeo testified that he believed the statements from the tobacco industry that cigarette smoking had not been proven to cause lung cancer. Dr. John Holbrook, an editor of more than one dozen Surgeon General Reports testified during Phase One that industry statements denying causation had been proven "reflected the approach of a trade industry promoting a product, totally indifferent to the implications of the public of their assessment." (Tr. 23089).

Dr. Holbrook also corroborated Mr. Amodeo's recollection of the tobacco industry message he received.

> ". . . you see a pattern year after year denying that . . . The Surgeon General would say that smoking causes lung cancer, and up until a few weeks ago, The CEOs of these companies were denying it." (Tr. 23090) "... one of the strategies of this industry has been to nitpick studies to find faults, to suggest that in some way there's still a debate . . . when they knew very well that there was no debate or question." (Tr. 23092)

VII. FRANK AMODEO, MARY FARNAN AND ANGIE DELLA VECCHIA ARE IN PRIVITY WITH THE DEFENDANT TOBACCO MANUFACTURERS

This issue has been addressed in prior Engle motions, filed by Defendants, specifically motions to dismiss implied and express warranty claims filed by Defendants during Phase I.

The Tobacco companies who are Defendants in Engle enjoy a close and ongoing relationship with Florida smokers. This global statement specifically applies to Mary Farnan, Frank Amodeo and Angie Della Vecchia. During his trial testimony Mr. Amodeo stated that he received free samples of cigarettes from tobacco companies.

> "You would mail in coupons, you would get discounted coupons back or you would get a product in the mail or it would be on the carton and you would take the carton to the store and redeem it there. The person would give you a coupon and you would mail it in and the product for cigarettes came back to you. This went on for years and years." (Tr. 41354)

He specifically recalled receiving free samples of Marlboro and Salem cigarettes (Tr. 41429). He did not recall the names of all free sample brands he received but knew he received free samples from "lots of companies, lots of samples." (Tr. 41428)

Mr. Amodeo also recalled being in many places where free cigarettes were distributed, including the Fox Theater in Detroit, Winn Dixie Markets and bars in which he performed as a singer (Tr. 41364-65). He said he received free samples of cigarettes at different points in time directly from the manufacturers (Tr. 41429).

Mrs. Farnan remembered seeing coupons for free cigarettes "all over the place" and she "would get

them in the mail sometimes." (Tr. 42215) She especially remembered seeing coupons for Winston ads where you could send in a coupon and either get free cigarettes or savings on cigarettes (Tr. 42216). She has been on the mailing list for tobacco companies that sell Winston and Raleighs (Tr. 40251). She would occasionally use and save Raleigh coupons (Tr. 40254). During cross examination, Mrs. Farnan explained received cigarette packs, packages of cigarettes, free packages, directly from the manufacturers (Tr. 42252). She was sure she was on Winston's mailing list (Tr. 42252). She recalled receiving Winstons and Winston Lights directly from the manufacturer (Tr. 42252).

Angie Della Vecchia testified that she received coupons in the mail directly from cigarette manufacturers. (Tr. 44229) She recalled receiving $2 off a carton of cigarettes coupons for Winston and Winston Lights (Tr. 44229). She redeemed the Winston coupons she received (Tr. 44229). She did not recall whether she redeemed any coupons for any other brands of cigarettes (Tr. 44229).

She also recalled if you saved pieces of the pack you could get "hats an stuff like that." She also recalled the same type of offers were made by Marlboro (Tr. 44230). Janine Goluba testified that she and her mother Angie Della Vecchia together smoked and saved coupons for Benson & Hedges to receive special free gifts including beautiful flute wine glasses, a cheese cutter, and an expresso machine.

Where, as here, there has been direct contact between Plaintiffs and the manufacturers of cigarettes, privity exists in products liability actions.

See, i.e. Cedars of Lebanon Hosp. v. European X-Ray, 444 So.2d 1068, 1072 (Fla. 3d DCA 1984); Sheppard v. Revlon, Inc., 267 So.2d 662 (Fla. 3d DCA 1972). There are also public policy reasons why any privity requirement should be relaxed when dealing with a product like cigarettes that causes so much harm to so many people. See, i.e. Pate v. Threlkel, 661 So.2d 278 (Fla. 1995); Espinosa v. Sparber Shevin, 612 So.2d 1378, 1380 (Fla. 1993).

VIII. CONCLUSION

The Florida Engle Class most respectfully requests that this Court deny the Defendants' motions for directed verdict on the conspiracy, negligence and warranty claims as to Frank Amodeo, Mary Farnan and Angie Della Vecchia.

* * *

APPENDIX T

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Case No. 94-08273 CA (22)

HOWARD A. ENGLE, M.D., et al.	*
Plaintiffs,	*
	*
vs.	*
R.J. REYNOLDS TOBACCO COMPANY, et al.,	*
	*
Defendants.	*

CERTAIN DEFENDANTS'[1] OBJECTIONS TO THE COURT'S FINAL VERDICT FORM FOR PHASE I

Defendants object to the Court's final Verdict Form for Phase I, delivered to the parties on Friday, June 18, 1999, on the following grounds:

1. To the extent that the Court adopted plaintiffs' previously submitted Phase I Verdict Form Questions, defendants adopt and incorporate by reference their previous Outline of Plaintiffs' Proposed Phase I Verdict Form Questions and Certain Defendants' Objections and Counter-Proposals Thereto served June 14, 1999, copy attached at Tab A, and the oral objections made on

[1] These objections are filed on behalf of all defendants except Liggett Group, Inc., and Brooke Group Ltd., Inc.

the record by defendants on June 10, 11 and 14, 1999.

2. To the extent that the Court refused to give defendants' proposed jury verdict form questions, previously submitted, defendants object and request that the Court give those to the jury. A copy is attached as part of Tab A.

3. Defendants object to the extent that the Verdict Form for Phase I is inconsistent with the Jury Instructions for Phase I.

4. Defendants object to the use of headings on the Verdict Form for Phase I naming the causes of action in the Second Amended Complaint.

5. Defendants make the following additional objections to the final Verdict Form for Phase I:

A. Question No 1 [Generic Causation]:

   a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

   b. The non-B&W defendants submit that the question should include the phrase "in some smokers."

   c. The question is inconsistent with page 5 of the Jury Instructions for Phase I.

   d. "Asthmatic Bronchitis, as related to COPD" is not a separate disease entity.

B. Question No. 2 [Addiction/Dependence]:

   a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

b. The non-B&W defendants submit that the question should include the phrase "in some smokers."

c. The question asking whether cigarettes are "dependence producing" changes the issues tried in Phase I and violates defendants' due process rights.

d. The question is vague and ambiguous, and does not present a common question.

e. The question asks a disjunctive question of "addictive or dependence producing" which will lead to a vague and confusing verdict on the issue.

f. The question regarding "addiction or dependence producing" is inconsistent with page 5 of the Jury Instructions for Phase I.

C. Question No. 3 [Strict Liability]:

a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

b. The question requires the jury to determine whether the defendants' conduct occurred before or after July 1, 1974. However, Fla. Stat. § 95.031, the product liability statute of repose, begins to run not from the date of any conduct, but from the date of delivery of the product to the original purchaser.

c. The question relating to the dates should use the phrase "during any of the following time periods," rather than "during one of the following time periods."

d. The question does not require specificity as to the product (brand or brand style), the defect, or the time of occurrence, which renders it useless for application to individual plaintiffs in other Phases of this case.

e. B&W requests that the form on all questions be edited to refer to The American Tobacco Company as follows: "The American Tobacco Company Yes___ No___."

D. Question No. 4 [Fraud and Misrepresentation]:

a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

b. The question relating to the dates should use the phrase "during any of the following time periods," rather than "during one of the following time periods."

c. The question does not require specificity as to the false statement published in Florida, the date, and the form of publication, which renders it useless for application to individual plaintiffs in other Phases of this case.

d. If a heading is to be used, the claim should be called "Fraudulent Misrepresentation," which are the words used with the standard instructions.

E. Question No. 4a [Fraud by Concealment]:

a. This question relates to a claim for fraudulent concealment, for which there is

no cause of action under Florida law. There is no general duty to disclose under Florida law, and federal preemption bars claims relating to the disclosure of information about the health effects of smoking cigarettes after July 1, 1969.

b. The question confusingly refers to "material information," "material," or "material fact," but the Court has only charged the jury on the definition of a "material fact."

c. The reference to the "addictive nature of smoking cigarettes" is improper because it assumes a fact in dispute.

d. The reference to "proving the health effects" of smoking is improper because it assumes a fact in dispute.

e. The question relating to the dates should use the phrase "during any of the following time periods," rather than "during one of the following time periods."

f. The question does not require specificity as to the facts omitted or concealed, or the date of occurrence, which renders it useless for application to individual plaintiffs in other Phases of this case.

g. The question is unintelligible, asking apparently whether any defendants concealed information knowing the information was false. The question uses misrepresentation, rather than concealment language.

h. The question is inconsistent with page 16 of the Jury Instructions for Phase I.

F. Question No. 5 [Civil Conspiracy-Misrepresentation]:

a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

b. The question does not require specificity as to the terms of the agreement and the date of the agreement, or the alleged acts, statements or actionable conduct, which renders it useless for application to individual plaintiffs in other Phases of this case.

c. The reference to the "addictive nature of smoking cigarettes" is improper because it assumes a fact in dispute.

d. The reference to "the health effects of cigarette smoking" is improper because it assumes a fact in dispute.

e. The question has no reference to a repose period, and refers to "members of the public."

f. The question is inconsistent with page 19 of the Jury Instructions for Phase I.

G. Question No. 5a [Civil Conspiracy-Concealment]:

a. Defendants adopt and incorporate by reference their objections to Question No. 5 at Tab A in so far as they relate to issues of concealment or omission.

b. This question relates to a claim for fraudulent concealment, for which there is no cause of action under Florida law. There is no general duty to disclose under Florida law, and federal preemption bars claims relating to the disclosure of information about the health effects of smoking cigarettes after July 1, 1969.

c. The question does not require specificity as to the terms of the agreement and the date of the agreement, or the alleged acts, statements or actionable conduct, which renders it useless for application to individual plaintiffs in other Phases of this case.

d. The reference to the "addictive nature of smoking cigarettes" is improper because it assumes a fact in dispute.

e. The reference to "the health effects of cigarette smoking" is improper because it assumes a fact in dispute.

f. The question has no reference to a repose period, and refers to "members of the public."

g. The question asks whether defendants intended reliance on an omission - a non-sequitor.

h. The question is inconsistent with page 19 of the Jury Instructions for Phase I.

i. The question is inconsistent with the language of Question No. 4a.

H. Question No. 6 [Breach of Implied Warranty]:

a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

b. The question requires the jury to determine whether the defendants' conduct occurred before or after July 1, 1974. However, Fla. Stat. § 95.031, the product liability statute of repose, begins to run not from the date of any conduct, but from the date of delivery of the product to the original purchaser.

c. The question does not require specificity as to the product (brand or brand style), the defect, or the time of occurrence, which renders it useless for application to individual plaintiffs in other Phases of this case.

d. The question does not ask about privity, notice, adulteration, or variation from ordinary cigarettes.

I. Question No. 7 [Breach of Express Warranty]:

a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

b. The question requires the jury to determine whether the defendants' conduct occurred before or after July 1, 1974. However, Fla. Stat. § 95.031, the product liability statute of repose, begins to run not from the date of any conduct,

but from the date of delivery of the product to the original purchaser.

c. The question relating to the dates should use the phrase "during any of the following time periods," rather than "during one of the following time periods."

d. The question does not require specificity as to the warranty, product (brand or brand style), the defect, or the time of occurrence.

e. The question does not ask about privity or notice.

J. Question No. 8 [Negligence]:

a. The question does not require specificity as to the product (brand and brand style), the alleged negligent act, and the date of the act, which renders it useless for application to individual plaintiffs in other Phases of this case.

b. The question relating to the dates should use the phrase "during any of the following time periods," rather than "during one of the following time periods."

K. Question No. 9 [Intentional Infliction of Emotional Distress]:

a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

b. The question does not require that the conduct of the defendant(s) be directed to a specific individual, i.e. a particular Florida smoker.

c. The question does not require specificity as to the type of conduct or the period of time in which it occurred, which renders it useless for application to individual plaintiffs in other Phases of this case.

d. The "reckless disregard" phrase is erroneous and out of place. The reference to "reckless disregard" in the standard instructions refers to intent, not to the kind of conduct needed to trigger a claim. The conduct required is intentional outrageousness, not reckless disregard.

L. Question No. 10 [Entitlement to Punitive Damages]:

a. Defendants adopt and incorporate by reference their previously submitted objections and alternative question at Tab A.

b. The question is inconsistent with page 26 of the Jury Instructions for Phase I.

* * *

APPENDIX U

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT

IN AND FOR ESCAMBIA COUNTY, FLORIDA

CIVIL DIVISION

IN RE: ENGLE
PROGENY CASES
TOBACCO LITIGATION

CASE NO. 2008 CA 80000

Pertains to:
Martin, Case No.: 2007 CA 2520

VOLUME I

Proceedings held in the above-styled cause before the Honorable Terry D. Terrell, Circuit Court Judge, on the 11th day of May, 2009, commencing at 9 a.m., at the M.C. Blanchard Judicial Center, 190 Governmental Center, Pensacola, Florida, reported by Gina Hawkins, Registered Professional Reporter.

* * *

[Page 1294]

A Yeah,

Q After this you guys moved to Cheyenne; is that correct?

A Cheyenne, yeah.

Q Was Mr. Martin continuing to smoke at that time?

A Yes.

Q And just so we'll have the record straight, did he continue to smoke all the way up through a time period close to his diagnosis with lung cancer?

A Yes.

Q Did you notice, while you were in Cheyenne, did you pay more attention and notice exactly how much your husband was smoking?

A Yes. We had — he kept his cigarettes in the top drawer in a chest of drawers where we kept other things, and I looked in there, and I could tell there were two packs missing every day, you know, so I knew that's how much — that's when I really found out how much he was smoking.

Q If we go back to the time in Germany when you first met your husband, did you notice whether his fingers were stained at that time?

A Yes, they were yellow.

Q And what brand of cigarettes did your husband smoke?

A At that time he smoked Lucky Strike.

[Page 1295]

Q And did he continue, for most of his life that you knew him, smoking Lucky Strikes?

A Yeah.

Q Did you — back in the time when you were in Cheyenne, did you like his smoking?

A No, not really, you know. I didn't like his bad breath and his yellow fingers.

Q And did you mention that to your husband at times?

A Yes, I mentioned it to him.

Q And did you nag your husband about his smoking?

A Did I what?

Q Did you nag him?

A No.

Q Now, where were you stationed after Cheyenne, Wyoming?

A My husband volunteered with Korea, and I stayed with his parents for a year.

Q At that point in time, did you have an almost newborn child; is that correct?

A Yeah. The third one was pretty small then.

Q And how long were you separated from your husband at that point?

A About a year.

Q And if we could look at photograph 2528.0027.

* * *

[Page 1323]

Q So you don't know the brands of cigarettes that he might have smoked before you met in 1948?

A No, I don't.

Q And is it true that you don't ever remember your husband buying Camel cigarettes?

A There are very vague memories where he was bumming cigarettes, is what they call it, from buddies in the military.

Q When he'd be out of his Lucky Strike brand?

A Yes.

Q And was it always unfiltered Lucky Strikes that he smoked?

A Yes.

Q Did you ever tell him to switch to filters?

A No, I didn't. I didn't have — didn't know much about cigarettes then.

Q At any time — I understand that Mr. Martin smoked unfiltered cigarettes all the way until 1994; is that right?

A That's right.

Q Did you ever tell him in the '60s or the '70s or later to switch to a filtered?

A No, I never told him that.

Q Now, Mr. Loehr asked you some questions about the times when Mr. Martin stopped smoking before he finally

* * *

[Page 1981]

very much a part of our family.

Q And I know they traveled as a family, Benny Ray and Hilde Martin and their children when he was still in service, and there came a time when they all came back and settled back home in the Pensacola area?

A Correct.

Q About roughly when would that have been?

A Oh, I'm not sure.

Q Sixties maybe?

A Probably late '60s, maybe.

Q Did you — did you then start spending more time with Benny Ray than you had when he was in

service and traveling around the world? Did you see more of them?

A Yes, because we always had family outings, you know, family reunions, Christmas, holidays.

Q Was he — was he still smoking?

A Yes.

Q Had he always smoked — let me ask you this, because I don't think I asked you. When is the first time you remember Benny Ray smoking cigarettes?

A The first time I remember is when he came back from Germany, and I was in the living room at 111 A Street, I believe. And he had high regard, high respect for my mother's teaching as far as smoking was concerned, and he requested her permission to smoke — well, not her

[Page 1982]

permission to smoke, but he just let her know, "Mom, I'm smoking now. Mother, I'm smoking now."

And she just indicated, you know, she understood. And if I'm not mistaken, he went outside to smoke.

Q She didn't say anything, like, "Benny Ray, you know smoking is bad for your health" or anything like that?

A No. She accepted him as he was, you know.

Q And were you surprised to see him smoking?

A No, because I think probably most of the GIs — that was right after World War II, and it was glamourized on the movies.

If you watch Turner Classic Movies now, you'll know that. And in the Post and the Life magazine, it was glamourized, you know.

Q So lots of people smoking back then?

A A lot of people were smoking.

Q Young men like Benny Ray?

A Very common.

Q Very common. And do you remember from that point what brand of cigarettes he smoked, or do you know one way or the other?

A I always remember it was Lucky Strike nonfiltered.

Q And was that true all of his life?

A As far as I know.

* * *

[Page 2017]

A Yes.

Q Are all of your brothers and sisters generally in fairly good health?

A Yes. Yes.

Q Now, you mentioned that you're still in good health. What do you do to stay active?

A Well, until the wind started blowing so hard in the past couple of weeks, I played golf five days a week. We have a regular group. We tee off at seven o'clock, and we play 18 holes, and we walk. Our group walks, and that keeps me in pretty good shape.

Q You play 18 holes of golf five days a week?

A Yes, when the weather allows.

Q And you had mentioned — well, let me ask you this first. When did you first learn that Benny Ray was smoking?

A Excuse me. You bring back some memories. He had just finished basic training, and he was home on leave, and he and an older cousin and I, we drove to Andalusia, which we had an aunt there — very favorite aunt. We went there for a visit on a Sunday, and on the visit he pulled out a cigarette.

That was the first time I had seen him smoke. I had to just really fight myself. I wanted to just take it and smash it. I didn't, out of respect to him. He was

* * *

[Page 2066]

and started having families of your own?

A Not as close as — as we were then, but we remained fairly close.

Q- Did y'all still have family reunions and family gatherings on occasion?

A Yes.

Q- We've heard that Benny Ray golfed some. Did you ever golf with him?

A I did.

Q- And when you golfed with him, did y'all walk or did you ride?

A Almost always walked.

Q- All 18 holes?

A Yes.

Q And how often would you and Benny Ray golf together?

A For a two- or three-year period we played probably every two months.

Q- Would Benny Ray smoke while he was golfing?

A Yes.

Q- Mr. Martin, you mentioned earlier that the first time you saw Benny Ray smoke was when he came home from basic training from the Air Force. And I believe you told us what year that was.

[Page 2067]

A 1946. But it wasn't basic training. He came home from Scott Field.

Q Oh, I apologize.

A It was technical training.

Q From technical training.

A Yeah.

Q Do you know how old Benny Ray was at that time?

A Seventeen.

Q Seventeen.

Did he, as far as you know, continue to smoke: from that point on, until around his diagnosis with cancer?

A Yes.

Q Did you ever know him to try to quit smoking?

A No.

Q Did you ever hear —

A. Let me rephrase that.

Q Okay.

A He never personally told me that he had tried to quit, but I did hear him remark to my Aunt Pauline that he tried to quit and — and had not been able to.

Q Tell us a little bit about that.

* * *

[Page 2131]

A Has — No.

Q Has she ever?

A Not to my knowledge.

Q Do you recall seeing your father smoke cigarettes?

A Yes.

Q Do you know when your father began smoking?

A I do not.

Q Did you ever discuss with your father how he began smoking?

A No, ma'am.

Q Do you recall what brands of cigarettes your father smoked?

A The only one that I'm aware of is Lucky Strike.

Q So you never recall your father smoking anything other than Lucky Strike?

A No, ma'am.

Q Did you ever have any discussion with your father about the brand of cigarettes that he smoked?

A No, ma'am.

Q So you don't know why he chose Lucky Strike?

* * *

[Page 3358]

Members of the Jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your

verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence and all facts that may be admitted or agreed to by the parties.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case, but you should not speculate on any matters outside the evidence.

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness;

[Page 3359]

the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

Some of the testimony before you was in the form of opinions about certain technical subjects. You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the

knowledge, skill, experience, training or education of the witness; the reasons given by the witness for the opinion expressed; and all the other evidence in the case.

The fact that R.J. Reynolds Tobacco Company is a corporation must not prejudice you in any of your deliberations or in your verdict. You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and

[Page 3360]

impartial consideration by the same legal standard.

During this trial the sworn testimony of certain witnesses given before trial has been presented to you. You are to consider and weigh this testimony as you would any other evidence in the case.

Answers to interrogatories were also read to you. Interrogatories are written questions that have been presented before trial by one party or another. They are answered under oath. You are to consider and weigh these questions and answers as you would any other evidence in the case.

This action has been brought as a part of a case known as the Engle class action. The first issue for your determination, which I will instruct you on in a moment, is whether Benny Martin was a member of the Engle class. Certain findings from that action are binding upon you, the Court and the parties. The findings may not be denied or questioned, and they must carry the same weight they would have if you had determined them yourselves. The established findings are:

Finding one, is that cigarettes are

[Page 3361]

addictive. Finding two, is that cigarettes cause lung cancer.

If you find that Benny Martin is a member of the Engle class, certain other findings are binding upon you, the Court and the parties. The findings may not be denied or questioned, and they must carry the same weight they would have if you had determined them yourselves. Those established findings are:

Finding three, is that R.J. Reynolds Tobacco Company was negligent. Finding four, is that R.J. Reynolds Tobacco Company placed cigarettes on the market that were defective and unreasonably dangerous. Finding five, is that R.J. Reynolds Tobacco Company conspired with other companies to conceal or omit information regarding the health effect of cigarettes or their addictive nature or both. Those companies include Philip Morris, Liggett, Lorillard, Brown & Williamson Tobacco Corporation, individually, and as successors to the American Tobacco Company, the Council for Tobacco Research, USA, Inc., and the Tobacco Institute.

Finding six, is that R.J. Reynolds Tobacco Company, in furtherance of that conspiracy,

[Page 3362]

concealed or omitted material information, not otherwise known or available, knowing that material was false or misleading, or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both.

Findings three through six are only binding upon you, and only relevant to the case, if you find that Benny Martin was a member of the Engle class.

R.J. Reynolds Tobacco Company is legally responsible for the acts of each of the coconspirators named above as long as those acts were in furtherance of the conspiracy to conceal or omit material information regarding the health effects or addictive nature of smoking cigarettes or both.

Additionally, R.J. Reynolds Tobacco Company is the successor corporation to the American Tobacco Company and Brown & Williamson Tobacco Corporation. Accordingly, R.J. Reynolds Tobacco Company is legally responsible for the conduct of both the American Tobacco Company and Brown & Williamson Tobacco Corporation and for any harm caused by cigarettes manufactured by

[Page 3363]

American Tobacco Company and Brown & Williamson Tobacco Corporation.

The findings that I have described to you do not establish that R.J. Reynolds Tobacco Company is liable to Mrs. Martin, nor do they establish whether Benny Martin was injured by R.J. Reynolds Tobacco Company's conduct or the degree, if any, to which R.J. Reynolds Tobacco Company's conduct was the sole or contributing cause of Benny Martin's death. The findings establish only what they expressly state, and you must not speculate or guess as to the basis for the findings.

The first issue for your determination on the claim of Mathilde Martin as the personal representative of the Estate of Benny Martin is whether Benny Martin was a member of the Engle class. In order to be a member of the Engle class, the plaintiff must prove that Benny Martin was addicted to R.J. Reynolds

cigarettes containing nicotine and, if so, that his addiction was the legal cause of his death.

If the greater weight of the evidence does not support the claim of the Estate of Benny Martin, then your verdict should be for R.J.

[Page 3364]

Reynolds Tobacco Company.

If, however, the greater weight of the evidence does support the claim of the Estate of Benny Martin, then you shall determine and write on the verdict form what percentage of the total fault of both parties is chargeable to each.

Plaintiff has admitted that Benny Martin's acts relating to the duration and frequency of his efforts to stop smoking with a partial cause of his death, in combination with the acts and omissions of R.J. Reynolds Tobacco Company.

R.J. Reynolds Tobacco Company denies that its acts or omissions contributed to causing Benny Ray Martin's death.

Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case.

Addiction is a legal cause of death if it directly and in a natural and continuous sequence produces or contributes substantially to producing such death, so that it can be reasonably — excuse me — so that it can reasonably be said that, but for the addiction to cigarettes containing nicotine, the death would not have occurred.

[Page 3365]

In order to be regarded as a legal cause of death, addiction need not be the only cause. Addiction may be a legal cause of death, even though it operates in combination with the act of another, or some other cause, if such other cause occurs at the same time as the addiction and the addiction contributes substantially to producing such death.

If you find Benny Martin was not a member of the Engle class, you will not consider the matter of damages. If your verdict is for Mathilde Martin, as personal representative of the Estate of Benny Martin, you should determine and write on the verdict form, in dollars, the total amount of loss, injury or damage which the greater weight of the evidence shows Mathilde Martin sustained as a result of Benny Martin's death, including such damages she is reasonably certain to experience in the future.

In determining the total amount of any damages sustained by Mathilde Martin, you should consider certain elements of damage for which there is no exact standard of measurement. Concerning the following elements, your determination should be fair and just in the

[Page 3366]

light of the evidence:

Mathilde Martin's loss of Benny Martin's companionship and protection, and her mental pain and suffering as a result of Benny Martin's death.

In determining the duration of any future loss sustained by Mathilde Martin by reason of the death of Benny Martin, you may consider the life

expectancy of each. The mortality tables you received in evidence may be considered, together with other evidence in the case bearing on the health, age and physical condition of each, in determining how long each may be or may have been expected to live.

In determining the total amount of any damages sustained as a result of his death, you should not make any reduction because of the fault of Benny Martin. The Court will enter a judgment based on your verdict and the Court, in entering judgment, will reduce the total amount of damages by the percentage of fault which you find is chargeable to Benny Martin.

During the trial you've heard references to defendant's appearances before Congress and various regulatory agencies. Under the law the

[Page 3367]

defendant has the right to petition, provide information, and express its views to its government on the issues of policy and legislation concerning smoking and health. These, and similar communications with the government, advocacy efforts, and government submissions, are protected under the First Amendment to the Constitution of the United States, as well as Florida law.

However, false, misleading or deceitful statements and representations are not protected under the First Amendment.

The next issue for your determination is whether the conspiracy to withhold health information or information regarding addiction and the acts proven in furtherance of that conspiracy were a legal cause of the death of Benny Martin. In order to be a legal

cause of death, plaintiff must show that Benny Martin relied on statements by either R.J. Reynolds Tobacco Company or any of the other companies involved in the conspiracy that omitted material information concerning the health effect of cigarettes or their addictive nature or both made at any time during or after December 1953.

[Page 3368]

I hereby instruct you that plaintiff has made no claim for conspiracy to conceal information regarding smoking and health or addiction before December 1953.

If the greater weight of the evidence does not support the plaintiff's claim on this issue, then your verdict should be for the defendant on this claim.

Benny Martin's reliance on such statements to his detriment is a legal cause of loss if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, so that it can reasonably be said that, but for Benny Martin's reliance, the loss would not have occurred.

In order to be regarded as a legal cause of loss, Benny Martin's reliance on such statements need not be the only cause. Benny Martin's reliance on such statements may be a legal cause of loss even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as Benny Martin's reliance and if the reliance contributes substantially to producing such loss.

* * *

APPENDIX V

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D., ROBERT W. ANGELL, RAYMOND LACEY, FROSENE D. STEEVENS, FRANK AMODEO, MARY FARNAN, LOREN E. LOWERY, ANGIE DELLA VECCHIA and MICHAEL MATYI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and TOBACCO INSTITUTE, INC.

Defendants.

Miami-Dade County Courthouse
Miami, Florida
Monday, 9:50 a.m.
July 6, 1998

TRIAL – VOLUME 1

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

* * *

[Page 10477]

that when and if it comes up in the context of a specific witness or document.

MS. ROSENBLATT: Your Honor, approximately four months ago, there was a cutoff date for filing motions in limine. There was never a motion in limine as to youth marketing. There was solely a motion in limine as to Joe Camel. And the basis for that – which we felt we refuted – was that, since that campaign started in the mid or late '80s, it wouldn't have affected particular class members.

And we felt – and I think the voir dire process established that even young smokers and smokers of three and four years who have chronic bronchitis, have disease entities, yes, it would.

Your Honor, this is an example – and I've prepared a – and it's not yet complete because we just got their memo. I saw it for the first time on Wednesday. It was filed on Tuesday. It's untimely. And the defendants seized upon Your Honor's comment at a side bar during voir dire.

I wasn't here. I read the transcript where Your Honor had mistakenly thought that there had been some kind of ruling by Judge Postman, brought it up, and the defendants said: Great. Let's file a motion. Judge, because this is an integral part of any tobacco

[Page 10478]

case, certainly our case.

It's very critical, and there are many, many documents on the issue of intent. And when it came up time and again in Broin, Your Honor excluded it. You said there's no nexus, and we argued. You said you're going too many steps. If this were an active smokers' case, totally different.

But you're saying, well, it's the tobacco company's intent to addict smokers. They do it by targeting and getting children, young smokers to smoke in order to get them addicted before they can make a choice. That replaces the smokers. And then those people are on the airplanes – no, no, that's too many steps, you said. We're not dealing with active smokers.

Well, we're dealing with active smokers. With the exception of two or three class reps, most of them started at 11, 12, 13 years of age. Most of the class statistically, our experts will show that the majority of the smokers, the vast majority start before they're 18.

And there's an intention through the documents. It's clear. And through the testimony, there's an intention on the part – an intent to create an addictive substance, to market and to also design

[Page 10479]

the cigarettes, to design them to appeal to youngsters in order to have people that are too young to make informed, mature decisions do that.

That's an integral part of the case, and I think a four-month late motion in limine based upon a comment by Your Honor, I don't think it's fair. I'm going to be submitting a subsequent – not subsequent

– my response to their memo because this just came up, and I think it is an important part.

I don't think it's going to be the focus in any way of opening statement, but it's part of the case. It's very critical on the issue of intent and on the issue of the intent to addict, on fraud, on conspiracy, on strict liability, on tort and basically every count in our complaint. And it's there. It wasn't – much of it was there.

There were very small portions that dealt with warnings that were preempted. The majority remains in the Engle second amended complaint or amended complaint, and it's part of this case, Your Honor.

THE COURT: I think maybe the comments made by the Court may have been taken out of the context. I think the meaning of the Court at that time was in reference to Joe Camel advertising. And I was under

* * *

[Page 11966]

I was involved in the development of that document. I was on that committee.

Q. Now, Doctor, you were an invited speaker at a conference of the National Cancer Institute on the FTC method for determining tar and nicotine and carbon monoxide levels in cigarettes. Tell us about that, please.

A. Okay. Well, the FTC, the Federal Trade Commission, has sponsored over many years a testing method for cigarette deliveries. Basically, there is a smoking machine which was developed which smokes a cigarette in a standardized way, which means that a cigarette is put in a holder, it's

lit, and then a certain volume that is supposed to be equivalent to a puff is drawn out in two seconds. That's repeated every minute until the cigarette is burned down to a certain length.

This method has been used for many years to get some supposed idea of the delivery of cigarettes to smokers. Now, it's been known since probably 1970 with increasing research over the years, including some that I've done, that the FTC method does not predict what smokers actually take in.

The reason is that smokers, when they're regular smokers, they smoke for nicotine, and they tend

[Page 11967]

to take in a certain amount of nicotine which they find suitable for while they're smoking.

So when you give a person a cigarette that has a lower supposed nicotine delivery, they don't smoke it the way the machine smokes it. Low-yield cigarettes – by machine – are engineered certain ways to be low yield by machine testing, and some ways for example are the paper burns faster, so the machine gets to take fewer puffs; those with expanded tobacco or puffed tobacco so the cigarette has actually less tobacco per cigarette.

One thing which is an important part of the FTC – of the yield is what is called ventilation. If a machine puffs from the tip of a cigarette and there are holes which are present in the filters of many cigarettes, that draws in outside air and dilutes the smoke. In fact, some cigarettes, there can be a 90 percent dilution, which means you only get 10 percent cigarette smoke and 90 percent air.

Those are some of the ways that – the reasons that explain a low-yield cigarette by machine.

Well, what a smoker does is, one, they can take bigger puffs than the one-ounce puff the machine takes. In fact, they do on average take about 50 percent bigger puffs.

[Page 11968]

Q. Than the machine?

A. Than the machine does. And they smoke faster than once a minute. On average, a person smokes once every 35 seconds, and they can smoke more than that. And most apparently for the low-yield cigarettes, smokers learn though not told about these ventilation holes, but the holes are placed down close to where the fingers or lips go on the cigarette. The smokers learn if they hold a cigarette a certain way, the draw is better, the taste is better. Or, if they put their lips a little further up the cigarette, the taste is better. What they are really doing unconsciously is blocking the ventilation holes.

So what's been known, as I said, since the '70s, is in fact what people really take in has got no relationship at all to the FTC method. So people can smoke a cigarette that supposedly delivers .2 milligrams of nicotine and get the same nicotine level and same tar exposure as well as somebody smoking a cigarette that delivers 1.5 milligrams.

Q. Depending how the individual smoked that cigarette?

A. Right.

Q. And the machine I presume smokes it the same way all the time?

[Page 11969]

A. That's right. And we and others have studied big populations of smokers and looked at the kind of cigarette smoke versus the kind of intake of nicotine, and there is virtually no relationship. So the FTC method was nothing that really predicted what people took in.

This conference then sat down and said: Okay, what do we do about this? And we talked about some suggestions about public education, about labeling, about giving the public information that if, in fact, you want to have a low-yield cigarette, you can't take big puffs, you shouldn't take frequent puffs, and the vent holes we said should be marked and should be explained to people. If you don't want to get more nicotine than you're supposed to, or more tar, then don't block these holes.

So it was a two-day conference basically trying to translate what we knew about the FTC method to help smokers, if they wanted to reduce toxic exposures, to do so.

Q. Now, you've talked about ventilation holes. Let me hand you a cigarette, and please describe to the jury exactly what we're talking about when we talk about these ventilation holes which smokers can either consciously or unconsciously cover up with their

[Page 11970]

fingers or with their mouth. (Handing)

A. Okay. This is a True cigarette.

Q. That's the brand, True?

A. That's the brand.

About two-thirds of the cigarette is the tobacco rod, which is where the tobacco sits, and it's covered with paper. The third, which would be near the smoker's mouth, has the filter and some paper which overlies the filter and connects it to the tobacco rod.

About half an inch or so from where the smoker would put the cigarette in their mouth, if we look carefully, you'll see little tiny perforations. They're hard to see if you don't look for them. But these are the ventilation holes.

If you put your finger – if you hold a cigarette, it's very easy to put your finger over these holes, or you can put it deeper in your mouth and block it with your lips.

If you block these holes, the yield of the cigarette might increase two or three times or more, depending how the ventilation is.

This is something that most low-yield cigarettes have, and it's something that cigarette smokers are never told about.

Q. Now, the ventilation holes are not in the

[Page 11971]

tobacco part of the cigarette; they're in the filter part of the cigarette?

A. They're in the filter, just about where you hold the cigarette or put your lips over the cigarette.

Q. Now, the FTC, that's the Federal Trade Commission?

A. Correct.

Q. And it's the Federal Trade Commission that uses the smoking machines or has ordered that the tobacco companies use them? How does that work?

A. Well, in the past, the Federal Trade Commission did the testing themselves. They had the machines. In recent years, they've stopped doing the testing. The tobacco industry does it, and the tobacco industry submits the test data to the Federal Trade Commission, which then publishes the data on an annual basis.

Q. Okay. Dr. Benowitz, you've been a consultant for the United States Occupational Safety and Health Administration, as well as for the United States – the FDA, Food and Drug Administration; is that correct?

A. Yes.

Q. Now, with respect to the 1998 Surgeon General's Report, the title of which is Report on Tobacco Use Among United States Racial Ethnic Minority

* * *

[Page 12044]

that has been published about smoking supports this idea.

Q. And then on Page 6, the middle of the page, Dr. Dunn says, quote – that's after he lists five items, but after Number 5, he says, quote: Smoke is beyond question the most optimized vehicle of nicotine, and the cigarette the most optimized dispenser of smoke.

Do you agree or disagree with that statement?

A. I agree. This really goes back to the paper that (discussed talking about arterial levels, high levels of nicotine going to the brain quickly, and this, I think, is widely accepted by scientists that this is true.

Q. I believe everybody recognizes that nicotine occurs naturally in the tobacco plant, but I'd like for

you to explain to the jury what the difference is, if there is a difference, between the nicotine which exists naturally in the agricultural tobacco plant and the nicotine that ultimately makes its way into the final cigarette that people put in their mouths and light up.

A. Well, when cigarettes are made, they're made from a combination of natural tobacco leaves that are shredded and then reconstituted tobacco. The different

[Page 12045]

types of tobacco leaves actually contain different amounts of nicotine, and they can be blended in such a way to achieve a desired level of nicotine.

The reconstituted tobacco is actually things like stems and parts that would not really work well, in terms of just shredded leaves, and they're processed in a way sort of like making paper. They're ground up or finely shredded nicotine and other substances are extracted from that. Then it's processed in such a way to make a sheet that can be also shredded.

Then nicotine and other substances are added back so one can adjust how much nicotine one adds back to also control levels of nicotine in cigarettes.

So, in fact, particular brands of cigarettes have highly controlled levels of nicotine. They're not just simply blended according to taste; they have consistent nicotine levels from cigarette to cigarette within a brand.

MR HEIM: Your Honor, objection. Move to strike.

Could we chat about this for a second?

THE COURT: All right. Sidebar

(The following proceedings were had at sidebar)

MR. ROSENBLATT: You know, I'd appreciate it

* * *

[Page 12131]

Q. And in the mid 1980s, you, yourself, thought that tobacco companies should be encouraged to continue bringing those tar and nicotine levels down?

A. Yes. And I still believe that's true.

Q. And you say that you still believe that that's true. What you mean is that you still believe that the lower tar and nicotine levels are something that should be sought?

A. Right. But I think that there also has to be some information provided to consumers as to how to smoke cigarettes to effectively reduce those yields. I think now low-yield cigarettes don't accomplish what they are purported to accomplish, which would be lower health risks.

Q. And, in fact, the government has actually issued pamphlets on that subject, haven't they, to try to explain to people how to get the benefit of lower tar and nicotine?

A. Actually it's been discussed. I've not seen those pamphlets. If they are available, I've not seen them.

Q. You know it's been discussed about the government informing people of how to better get the advantages of lower tar nicotine cigarettes?

A. Yes. And I've written about that myself,

[Page 12132]

about the sort of education the consumer needs to have to really reduce yields.

Q. Part of that education from the '70s have been that if people – that if smokers aren't going to quit, they ought to switch to lower tar and nicotine yields; correct?

A. Yes. I think the public health community did that. I think it turned out not to have the benefits that the public health community anticipated because of the compensation problem.

In fact, there's even some concerns that lung cancers, rather than decreasing, have shifted in type so that people inhale more deeply and they get different kinds of lung cancer than they used to.

So whether there's been a health benefit has really been questioned. The concern in the health community is whether giving people the alternative of a low-yield cigarette gave them an out, rather than quitting.

So, there's actually been a lot of debate in the health community whether this has been a good or bad thing.

Q. So some people said in the – in the health community, some people said, we're not so sure it's a good idea to have low-tar, low-nicotine cigarettes

[Page 12133]

because people may go there instead of discontinuing smoking. And other people in the public health community said, yeah, go there, go do it, get the tar and nicotine levels down.

So there was a debate over this subject; right?

A. There has been. And I just add that if someone is supporting low-yield cigarettes, one needs to support public information along with it, because the current low-yield cigarettes are not doing what they're supposed to.

Q. But in terms of you, Dr. Benowitz, which side of that debate are you on?

I know you say the consumer needs to have more information about this, but which side of the debate are you on?

Are you one that says, don't have lower tar, lower nicotine cigarettes, or are you one of the ones who are saying, yeah, do, keep those – you need to have low-tar and low-nicotine cigarettes?

Are you the former or the latter?

A. I think there should be a progressive reduction in tar exposure and other carcinogen exposure, but I think there needs to be education for how to effectively get there.

[Page 12134]

Q. So I gather what you're saying is you are not in the camp that says, don't have the low-tar, low-nicotine cigarettes?

A. No. But I think that we've all been sort of misled by the benefit we thought was going to occur. It has not occurred.

Q. But the message to the tobacco companies from the public health community, from the government, was, we want you to develop lower tar, low-nicotine cigarettes.

A. That's correct.

Q. Okay. And the tobacco companies responded to that message and have developed low-tar, low-nicotine cigarettes; correct?

A. Yes. They have done that.

Q. Now, Doctor, I wasn't sure when you were talking about a conference that you attended this morning, not a conference that you attended this morning, the conference that you referred to this morning, whether it was the Scarborough Conference on Preventive Medicine, but I wanted to ask you some questions about that conference.

Do you recall that conference that you attended?

A. I was at a conference at Scarborough either

* * *

[Page 13227]

question it's important to make a distinction. The distinction is between the tar and nicotine measured when the machine smokes the cigarette, and the tar and nicotine delivered to the individual smoker when the smoker smokes the cigarette.

There has been, for some time, interest in trying to reduce the tar actually delivered to the smoker.

What this report, however, demonstrates is that the people who smoke cigarettes, who have a greater than 50 percent reduction in tar when measured by machine, have nowhere near that kind of reduction in disease risk. There is essentially no reduction in lung disease risk or cardiovascular disease risk. There is a small reduction, in the order of about 15 percent, in lung cancer risk, provided the individual does not compensate by increasing the intensity or

the amount that they smoke when they use those cigarettes.

One of the principal concerns that came out, as we reviewed the scientific literature for this volume, is that when you smoke these cigarettes that deliver less tar and nicotine to the machine, people change the way they smoke them.

They increase the puff size. They take a bigger puff. They take more puffs. They shorten up

[Page 13228]

the interval between puffs, and they smoke more cigarettes per day.

If they do that, the small benefit that is produced by using these cigarettes in the same number per day disappears as you compensate for the lower nicotine delivery by increasing the number of cigarettes you smoke per day.

And so the purpose of the report was to make it very clear to the public that there is no safe cigarette and there is no safe level of consumption.

And that the changes in cigarettes, filters and substantial reductions in the machine measured tar did not produce cigarettes that had substantive reductions in the disease risk.

And by substantive, I mean ones that are consistent in magnitude or in size with the reduction in tar when the machine smoked the cigarette.

Q. Now, the explanation that you've just given the jury now, is all of that in the '81 Surgeon General's Report?

A. Yes.

Q. The concept of compensation –

A. Yes.

Q. – is discussed in here?

A. Yes.

* * *

[Page 13452]

at this point.

Your opinions are something different. I haven't read the articles. I don't know what's in it, and I don't know what you may want to make reference to in it. But follow the question carefully and then, if you're asked for your opinion about something, that's a different story, okay?

THE WITNESS: Yes.

THE COURT: All right.

THE BAILIFF: Come on in.

(The jurors entered the courtroom.)

THE COURT: Okay. Let's proceed.

BY MR. ROSENBLATT:

Q. Dr. Siegel, in the course of your career, have you had occasion to do research on and actually write articles which were published in peer review journals about the advertising effect or impact of tobacco advertisements on youth?

A. Yes.

Q. And what is your opinion on that subject, the impact or lack of impact of tobacco advertising on youth?

MR. KIRBY: Objection, foundation and relevancy.

THE COURT: Overruled.

[Page 13453]

THE WITNESS: My opinion is that it's clear from the research literature that cigarette advertising does have an impact on youth, and specifically cigarette advertising causes kids to start smoking. I think the best estimate from the literature is that approximately one out of every three kids who starts –

MR KIRBY: Objection, hearsay.

THE COURT: Overruled.

Go ahead.

THE WITNESS: The scientific literature well researched, well documented in peer-reviewed literature –

BY MR. ROSENBLATT:

Q. You had said one out of the three when the objection was made.

A. It indicates that approximately one out of every three children who start smoking start because of cigarette advertising. In other words, if you were to eliminate cigarette advertising, if there was no cigarette advertising, then we'd only have two-thirds of the smokers that we have now.

Q. So the research reveals, as to the other two-thirds, what causes most kids to begin smoking?

A. Well, there's a variety of factors including influences of parents and peers, social influences.

[Page 13454]

But the point I'm trying to make is that cigarette advertising is a big chunk of the cause for kids to start smoking.

Q. Based on the research that you've done in this area about the impact of tobacco advertising on nonsmoking youth who take up smoking – let me ask it – let me ask it another way.

Have you – now when you talk about youth, what age group? The one-third figure you gave in terms of youth, what age parameters are we talking about?

A. Well, we're talking about kids who are under the age of 18. When I say "youth," that's what I mean.

Q. Based on your research of tobacco advertising and its impact on nonsmokers, do you have an opinion on the subject of whether tobacco advertising is only used to get present smokers to switch from one brand to another?

MR KIRBY: Objection, foundation and relevance.

THE COURT: Overruled.

THE WITNESS: I think it's very clear that cigarette advertising is not merely intended to get people to switch brands. It's clear that cigarette advertising is intended to recruit new smokers, specifically among kids.

[Page 13455]

BY MR. ROSENBLATT:

Q. What do you base that on?

A. I base that on the bulk of the scientific evidence that I've reviewed and contributed to over the past 13 years.

Q. Have you written on the – written anything on the subject of marketing in the area of public health?

A. Yes.

Q. Tell us about that. What have you written, and how has it related to the issue of smoking and health and addiction?

A. Well, I've written several articles and one book on the issue of marketing and public health. I just published a book this past September on marketing and public health.

I've also written several articles that have been published on mass media and its effects on trying to keep people from smoking. So, in other words, the reverse of advertising: Can you do advertising to actually stop kids from starting to smoke? I've written from articles on that.

I've also written articles on the opposite, cigarette advertising and its impacts on kids and cigarette marketing practices and their impact on kids.

[Page 13456]

Q. What would you describe generally – I think everyone knows what we mean by "advertising." But when you talk about cigarette marketing practices that you've written about and that you've researched, what are we talking about?

What does that broad, general heading include?

A. Cigarette marketing is basically any activity that is designed or intended to try to promote the use of cigarettes. And the kinds of things that I'm talking about that the cigarette companies have done to try to promote cigarette use include things like advertising, the typical kind of advertising that we're all aware of like billboards and newspaper ads, television advertisements, things like that, that everyone understands represent advertising.

But it also encompasses other practices such as sales promotions, such as T-shirts that have cigarette logos on them, caps, other kinds of paraphernalia that attracts kids to smoke.

There are also other things that the tobacco industry has done to promote cigarettes, and they include things like public relations. How has the industry worked with the public relations? How has it portrayed smoking in the media? How has it used its

[Page 13457]

influence to try to convince smokers of the lack of health risks of smoking? How has it used its influence to try to convince smokers that smoking is not really addictive?

MR HEIM: Your Honor, I'm going to object to the latter part and move to strike that.

THE COURT: I'll sustain it unless we can get a different predicate.

MR ROSENBLATT: I'm not now on that subject.

BY MR ROSENBLATT:

Q. You mentioned a book that you've written, but it has not actually been published as yet?

A. No, it has been.

Q. It has been?

A. Yes.

Q. And the title of that is?

MR KIRBY. Objection, Your Honor. May we approach?

THE COURT: Yes, if you'd like.

(The following proceedings were had at sidebar:)

MR KIRBY: Now, Your Honor, we are with respect to the document we don't have a clue about. I've never seen the book. I don't have the book.

THE COURT: Never been revealed?

* * *

[Page 13475]

Q Had you completed –

A. No.

Q. Okay. Then continue.

A. I was talking about the information that – you had asked me what information the cigarette companies had that they didn't disclose –

Q. To the public health –

A. – to the public health community related to cigarette addiction and the health risks of smoking. And I already mentioned – the beginning part of my answer was they knew cigarettes were addictive and they knew the specific mechanism by which cigarettes were addictive.

What I was trying to say is that they also knew that they could tightly control the level of nicotine in cigarettes delivered to the smoker in order to enhance the addiction.

They knew, for example, in 1963 that they could tightly regulate the dose of nicotine delivered by the cigarette.

They knew in 1964 that there were two different forms of nicotine. There was a bound form and a free form that we sometimes called the freebase nicotine form. They knew that it was the freebase nicotine form that most rapidly entered the brain

[Page 13476]

creating a much stronger addictive effect.

They knew in 1966 that, by controlling the pH, by controlling the acidity of the cigarette, they could increase the amount of nicotine that was present in that free form in order to enhance the nicotine delivery to the smoker.

And they knew in the mid 1960s, at least one of the companies was using that technology to, again, manipulate the nicotine level in the cigarette. They were adding ammonia to cigarettes to enhance the addictive – to enhance the amount of nicotine in the free form and enhance the addictive nature of the cigarette.

The companies also knew back in 1953 that cigarettes were carcinogenic, that they caused cancer. They clearly knew this in 1953. That information was never disclosed to the public.

They also knew that cigarette smokers compensate for the amount of nicotine in a cigarette by inhaling more or less.

So, in other words, a smoker who smokes a low nicotine cigarette actually inhales the same amount of nicotine as a smoker who inhales a high nicotine cigarette because the smoker actually puffs deeper to bring more nicotine into the body. They knew that in

[Page 13477]

1974.

The public health community, on the other hand, didn't know that until the 1980s when research showed that. The cigarette companies knew that low nicotine cigarettes were not any safer because the

cigarette smokers were compensating to make up for the behavior. They knew that low nicotine cigarettes really didn't do anything for health because the smoker is going to smoke the same amount, get the same nicotine in the system.

The public health community didn't know that until the late 1980s, and, in fact, most doctors would actually advise their patients to switch to low nicotine cigarettes because the doctors – and if you look at medical textbooks, medical textbooks advised doctors that that was a way to –

MR. KIRBY: Objection.

THE WITNESS: The general consensus or the general feeling of the scientific community was that low nicotine cigarettes were safer. The companies knew this wasn't the case in 1974, continued to market and advertise the low nicotine cigarettes.

So there has been four decades, I believe, in which the cigarette companies, as early as 1953 in the case with the health effects and as early as 1962 with

* * *

[Page 13617]

the vapor phase. This would impact on the upper airway nicotinic stimulation and determine how much nicotine could be absorbed from the mouth. That is if you have high pH, you can absorb a lot from the mouth. Whereas when smoking the usual blond cigarettes, the smoke of which is of an acidic pH, you don't absorb anything from the mouth.

The higher the pH the more nicotine impact there would be on the throat. One would experience more irritation, more of a nicotine-type sensation. I don't think that differences in pH would make much of a

difference in bioavailability, although it would impact on how strong the cigarette tasted.

Do you see that, Doctor?

A. Yes. I see it.

Q. Have you reviewed that prior to coming into court today?

A. No.

Q. Now, Dr. Siegel, you testified yesterday concerning the topic of low-tar, low-nicotine cigarettes, correct?

A. Correct.

Q. And you understand and agree, don't you, Dr. Siegel, that for many years, and indeed up to the present time, that the government and other scientists

[Page 13618]

in the public literature have made statements to the effect that lower tar cigarettes may be less hazardous for smokers, correct?

A. That's correct.

Q. And, in fact, if you go back to the 1950s, when much of the controversy arose, there was a mouse skin painting test by Dr. Wynder; correct?

A. Yes.

Q. And Dr. Wynder took tobacco tar condensates and painted them on the backs of mice and measured what effects he observed, correct?

A. That's correct.

Q. And his conclusion was that tar was something that should be lowered, correct?

A. That's correct.

Q. And, in fact, he said that if you could lower tar 40 percent, that that would be a great advantage to smokers, correct?

A. Correct.

Q. And you understand that between the 1950s and the present time, there has been a reduction in tar by the FTC method of more than 66 percent, correct?

A. That's correct.

Q. For example, in the 1950s, tar was at 38 milligrams on a sales-weighted average basis, correct?

[Page 13619]

A. I don't know the exact numbers, but I agree that it is – that there has been a tremendous decrease in the tar levels.

Q. And the same is true with respect to nicotine. Nicotine in the 1950s was roughly at 2.7 milligrams delivery, sales-weighted average, and it's now down to 1 or below 1, correct?

A. That's not correct, in terms of the delivery to the smoker. And let me explain this, because I think it's important for people to understand –

Q. Well, Dr. Siegel, if you would answer my question, I was asking about FTC.

A. I'm trying to answer the question.

Q. No.

THE COURT: You asked him whether or not it's correct. "No, it's not." That's the answer to the question. He's entitled to explain.

BY MR. SCHNEIDER:

Q. All right. Go ahead.

A. The question is whether or not there's been a drastic reduction in the nicotine delivery. The answer is no, there's been no change to the nicotine delivery to the smoker, and I want to explain why that is.

This FTC method that's used for testing to see what the nicotine content of cigarettes is is

[Page 13620]

basically a machine. And what the machine does is take a certain puff mechanically of the smoke, and then that smoke that's puffed by the machine can be analyzed to see how much nicotine is in there.

And it's true that the cigarette companies have lowered over the years the amount of nicotine that is in that puff that the machine takes. However, smokers don't smoke – smokers are not machines, and there are many differences between the way a smoker smokes and the way a machine smokes.

Smokers do many things differently. For one thing, their fingers can block the filter vents, which drastically alters the delivery of tar and nicotine.

In addition, smokers don't necessarily smoke the same amount as the machine. And, in fact, what we now know is that the lower the nicotine level of the cigarette, the more the smoker inhales, the more the smoker smokes.

Because they're addicted to nicotine, they have to deliver a constant amount of nicotine to the body or they'll go into withdrawal and they won't be able to deal with stress and their receptors will be all off balance in their brain and their hormones will be all

off balance. So to correct that, the smoker smokes a constant amount.

[Page 13621]

So while it's true that the nicotine levels of the cigarettes have dropped as measured by this FTC machine, the amount that smokers are inhaling has been relatively constant.

Q. All right. Doctor, the concept you're talking about is compensation, correct?

A. That's part of the concept, yes.

Q. All right. We'll come back to that in a moment.

In terms of the deliveries measured by the FTC machine method, you agree, correct, that they have dropped?

A. As measured by the FTC machine, yes.

Q. For both tar and nicotine, correct?

A. That's correct.

Q. All right. Now, you indicated yesterday that the whole notion of compensation came as news to the public health community, and they didn't know about it until sometime in the '80s, correct?

A. I don't think there was a – no, I didn't say that. I think that there wasn't a full understanding in the public health community, a full awareness, a widespread awareness of this among physicians and public health practitioners, to the extent that they were truly aware that smokers were behaving this way,

[Page 13622]

that they were compensating.

So that I don't think the public health community truly understood that low-nicotine cigarettes really weren't much safer than high-nicotine cigarettes.

Q. All right. Well, let's discuss that topic of low-tar, low-nicotine cigarettes and what was being said by the public health community about whether or not they may or may not be safer, okay?

Let me show you a copy of Defendants' Exhibit 15023. Now, Dr. Siegel, Defendants' Exhibit 15023 is a Public Health Service technical report on tar and nicotine from November 25, 1966, correct?

A. Correct.

Q. And from your knowledge of the Surgeon General's Reports, do you understand that this technical report, from the Public Health Service, has been subsequently referred to in Surgeon General Reports in 1979 and 1981, for example?

A. I believe it has, yes.

Q. All right. Now, this technical report is addressing whether or not low-tar cigarettes may provide a benefit to smokers, correct?

A. Correct.

Q. And this was in 1966, correct?

[Page 13623]

A. That's correct.

Q. And if you look on Page 2, at the bottom, this document, released by the Public Health Service in 1966 says, paragraph number 1: The preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful would be that effect – be the effect.

Do you see that?

A. Correct.

Q. It then goes on to say, paragraph number 2: We recommend to the Surgeon General that action be encouraged which will result in the progressive reduction of the tar and nicotine content of cigarette smoke, correct?

A. Yes.

Q. So the public health community was recommending that cigarettes with lower tar, lower nicotine be created, correct?

A. Correct.

Q. All right. If you take a look at Page 3, paragraph number 2, but look at the introductory sentence: This judgment was arrived at with full recognition of the following:

And then paragraph number 2, it says: The potential benefit to the individual consumer who might

[Page 13624]

shift to a lower tar and nicotine cigarette would be negated if this shift were accompanied by an increase in the number of cigarettes consumed, or in the length of each cigarette used.

There is evidence that, by and large, this does not occur; that the shift to low tar and nicotine cigarettes tends to be accompanied by the same level of consumption or an even lower level rather than by an increased consumption. Correct?

A. Correct.

Q. And this is a public health document in 1966?

A. That's right.

Q. Now, you're familiar with a scientist from Great Britain by the name of M.A.H., three initials, Russell, correct?

A. Not offhand, no.

Q. Are you familiar with the journal, The Lancet?

A. Yes.

Q. Have you done a review of the Surgeon General Reports to find out how many times articles by M.A.H. Russell have been cited in the Surgeon General Reports?

A. No.

Q. You do recognize The Lancet as an authoritative journal, correct?

* * *

[Page 13649]

Human Services, correct?

A. That's correct.

Q. And if I could direct your attention to – this is an excerpt of the report. If I could address your attention to what's marked as Page 79 in Chapter 6. Do you see that?

A. Yes.

Q. Now, let me address your attention to the bottom of the page, Page 79. And before I do, let me ask you a couple of questions about compensation.

We've talked about the FTC tar and nicotine method for measuring cigarette deliveries, correct?

A. That's right.

Q. And one of the issues is whether or not a smoker that switches from a cigarette that has an FTC machine measuring delivery of, say – one figure

of, say, 30 milligrams of tar, whether, when they switch down to a lower-tar cigarette, whether they will have a benefit, correct?

A. I don't think that's the issue. I think the issue is whether or not when a smoker, who is clearly at increased risk of disease because of their smoking, wants to substantially improve their health, whether or not switching to a low-tar, low-nicotine cigarette is the appropriate action for that person to take.

[Page 13650]

Q. All right. Dr. Siegel, one of the issues is whether or not, if you took people who smoked, by FTC machine delivery, one brand of cigarettes with a level of 15 or 20, and compared them to people who smoked ten-milligram cigarettes or nine-milligram cigarettes, to see whether or not they appear to have less risk; that's one of the inquiries that science has made, correct?

A. That's correct.

Q. And you have been suggesting, have you not, Dr. Siegel, that because some people may compensate and smoke a high-tar cigarette – excuse me – smoke a low-tar cigarette, the same as they would a high-tar cigarette to get the same delivery, that that eliminates any possibility that they would be at less risk, correct?

A. No. That's not my testimony.

My testimony relates to the low-nicotine cigarette and the use of the term "low nicotine" as a suggestion that a cigarette will either improve your health by switching to a lower-nicotine cigarette, or that somehow it will be easier to quit smoking, and the – because – my point is that because smokers

compensate, because they smoke about the same amount of nicotine, it doesn't matter whether they smoke a

[Page 13651]

low-nicotine or a high-nicotine cigarette. They're going to bring in the same amount of nicotine.

Therefore, from the perspective of the health benefit, there's really not going to be as much of a health benefit as you would think from smoking a low-nicotine cigarette.

And in terms of trying to quit smoking, switching to a low-nicotine cigarette is really not going to help. And my testimony is that the tobacco companies had this information and that they didn't share it, and that despite having that information, they continued to suggest to their customers that –

MR. KIRBY: Objection. Preemption.

THE COURT: Sustained.

THE WITNESS: Okay. So my testimony is that the companies had this information and did not share it.

BY MR. SCHNEIDER:

Q. All right. Now, Dr. Siegel, we have been discussing whether or not moving from a high-tar cigarette to a low-tar cigarette might be associated with less risk. That's one of these topics we've been discussing, correct?

A. That's correct.

Q. And have you been suggesting that because

* * *

[Page 13697]

reflecting that consideration is to be given to designing low-tar cigarettes with a relatively higher yield of nicotine in the pursuit of what might be a less hazardous cigarette, correct?

A. That's right.

Q. And have you seen this document before you testified?

A. I have not seen this document, but I was well familiar with the concept of designing such a cigarette.

Q. And you call the efforts to focus on manipulation and see if you can – to focus on nicotine and make a low-tar, relatively medium-nicotine, you call that manipulation, don't you, Doctor?

A. No. That's not what I mean by manipulation.

What I mean by manipulation is when a cigarette company intentionally alters the level of nicotine in the cigarettes, alters the nicotine dose that smokers get, with the express purpose of trying to addict smokers and young children to their cigarettes. That's what I mean when I say "manipulation."

Q. And so, Doctor, to the extent that the companies explored techniques such as the ones being suggested by the public health community, to pursue efforts to monitor nicotine levels or to try to keep

[Page 13698]

nicotine at a medium level and tar low, in the pursuit of a less hazardous cigarette, you're not suggesting that's manipulation, correct?

A. No. What I said, when I refer to manipulation of cigarette levels, it means the cigarette companies alter the nicotine level in the cigarettes with the express purpose of trying to addict smokers and young children to maintain using their products.

Q. And with respect to public health suggestions, with respect to how to make a low-tar cigarette with a medium-nicotine delivery, or other suggestions that the public health community makes, those you do not call manipulation, correct?

A. As I said, the specific suggestion of the public health community talking about making a low-tar, high-nicotine cigarette, is not what I – what I'm referring to manipulation, that's not what I'm referring to.

I'm referring to the intentional control, regulation of the dose of nicotine in cigarettes to try to enhance the addictive quality of the cigarettes in order to sell more cigarettes and make more of a profit.

Q. All right. Now, Dr. Siegel, it is correct,

* * *

[Page 14926]

A. We had so many different means of doing that. I mean, as I mentioned, we had expanded tobacco, we had – first of all, when you go out to buy tobacco, you have a choice of the kinds to buy. So you can buy –

Q. Like burley –

A. Burley, bright. And even within the burley and bright, you have a knowledge of where you can get tobacco that has, for example, higher alkaloids, higher nicotine.

In some of the products, particularly the lower tar, Merit is a good example from Philip Morris where we increased the burley, we had a lower tar product with higher nicotine, and we did that by increasing the relative amount of burley in that particular blend.

So you could change by blend and by these various components that you used and by what you purchased.

Q. Did Philip Morris manipulate nicotine?

A. Yes.

Q. Were there many ways that it was able to manipulate nicotine?

A. There are dozens of ways of manipulating nicotine, and it's very complicated to describe all of

[Page 14927]

them. But I just gave you the simple one of just using higher alkaloid tobacco, that's a simple way. But many other ways in the design of cigarettes that you can change the nicotine delivery.

Q. Explain a couple of those, how can you change the nicotine delivery to the consumer, the smoker, by manipulating the nicotine?

A. Depending how you design a cigarette to produce lower tar. For example, one way to design it is simply to use less tobacco, then it would produce less tar, because when you burn a certain amount of tobacco you get a certain amount of tar. If I just use less tobacco, I would get less tar.

The other way to do it that we did is to use what they call dilution or ventilation where you put holes in the filter so that when the consumer draws on the cigarette, some of the air that you draw in comes

through those holes instead of coming down the rod to give you both nicotine and tar.

Now, you would expect that when you did that, that you would get an equal amount of nicotine and tar. That is, they would both be reduced about the same. And from the period from before 1975, that was, in fact, what was done. The tobacco was – the filters and the tobacco and the holes were put in such a way

[Page 14928]

that it came down, tar and nicotine came down together.

Around 1975, Philip Morris and also others in the industry changed the design of cigarettes such that the ventilation, dilution and that kind of change caused the tar to come down more than the nicotine. So you would end up getting more nicotine to maintain the satisfaction of smoking the product than you would get tar, which presumably contained the cancer-causing materials.

Q. Now, the concept of the tar following the nicotine, in other words, if you lower the tar, the nicotine automatically comes down, did Philip Morris have the technology to lower the tar and keep the nicotine high?

A. Yes, many. I just discussed several different ways.

Q. When you were at Philip Morris, did you know a scientist there by the name of Wakeham, W-A-K-E-H-A-M?

A. Dr. Helmut Wakeham, yes.

Q What was his position at Philip Morris?

A. Actually Dr. Wakeham was a former vice-president of research and development. And he actually preceded my initial boss, Dr. Seligman. And at the time that I joined, he had been recently

* * *

[Page 15400]

came from the ART process from the alkaloid-reduced alcohol. In the process of removing the nicotine, you also remove the nitrosamines. And the levels of nitrosamines in that particular cigarette were lower.

Q. On the subject of nicotine, are you familiar with the term "titrate"? I don't know if I'm pronouncing it right or not. I'm probably not.

A. I'm familiar with that term titrate, yeah.

Q. And what is that?

A. It would be a method by which you would achieve a certain level of a component in a substrate.

Q. Were you involved in any efforts to at least attempt to do research on titration levels related to cigarette inhalation and/or nicotine inhalation?

A. I was involved in some studies to determine, or develop procedures for the determination of nicotine retention as a function of various inhalation parameters, how deeply you inhale, how long you held the smoke in your lungs before you exhaled. There was some evidence that indicated that changing your smoking parameters tended to change the level of retention of smoke components.

Q. Then in lay person's terms, what does that mean?

A. In the early '80s there were some studies

[Page 15401]

that were done with regards to the, what we refer to as a full flavor cigarette or a Marlboro type cigarette, which delivered, say, 15 milligrams of tar and a milligram of nicotine. And then there were studies that were done with cigarettes that were highly filtered which delivered, like a Cambridge which maybe only delivered a milligram and a half of tar and a tenth of a milligram of nicotine. And the people that smoked those cigarettes, the low delivery cigarettes tended to intake them differently than people who smoked the higher delivery cigarette. They would tend to take a larger puff, more frequently, inhale it deeper and hold it in longer.

Q Do you know whether they'd also tend to smoke more cigarettes under those circumstances?

A. I think they did tend to smoke more, best of my recollection.

Q. And what was the research that you were involved in or attempted to implement that was related to this?

A. This study on the way that people smoked was being done by Jan Jones. And she had developed a vest that you could wear that would actually measure the way a person inhaled and smoked.

It was a vest with a portable recorder on it

* * *

[Page 15418]

report.

Q. Did you rely – in preparing your memorandum, did you rely in any way on the publication from Dr. Hoffmann?

A. I would assume, since I referenced it, that I did.

(Fast forwarding)

Q. Do you have an hypothesis of what the answer would have been had you done the research?

(Fast forwarding)

A. I have a hypothesis, yes.

Q. And what is that?

A. That we would have found that people would have – if they took larger puffs and inhaled it deeper, held it longer, they would absorb more nicotine, that the preliminary results that she had obtained, Jan had obtained, which indicated that that's the way people were tending to smoke when they went from high delivery cigarette to low delivery cigarettes, the conclusion I believe would have been that people were tending to titrate themselves to a certain level of nicotine.

(Fast forwarding)

Q. Were you ever told to edit scientific reports to omit reference to subjects that might be considered

* * *

[Page 15839]

Q. Now, don't you think, as the president and CEO of a company that sells that many billions of cigarettes to the American consumer – and you admit that it may cause lung cancer and heart disease – that you have a responsibility to read some of the independent literature so that you would know what the scientists and the medical doctors are saying?

A. Well, I'm aware of what medical science and the doctors are saying. I've spent time with our own

people in the organization that I manage, discussing these issues, and they are competent, ethical people.

We've spent a fair amount of time discussing the whole smoking and health issues, and I am very comfortable with my own personal belief that cigarettes are a risk factor to these diseases, and I'm comfortable with what we have done as a company to address the risks that are associated with smoking in terms of trying to improve the product over time; the lowering of tar and the other work that we have done over the years.

Q. So the lowering of tar makes cigarette smoking less of a risk factor?

A. I don't know if it makes it less of a risk factor, but for a number of years, up until, near as I understand this, until the late '70s, there was a –

[Page 15840]

sort of cooperative effort between the public health community and the industry to address tar as an issue with regard to potential of risk in cigarettes, a very concerted effort over a 20-or-so-year period to systematically work to deliver or to design and manufacture cigarettes that have substantial reduction in tar, which is the history of the industry and working with public health people up until I understand around the late '70s.

So there has been an effort over the years to reduce tar in cigarettes as the area that there tended to be a consensus of where the risk may lie with regard to cigarettes.

Q. Which of the Reynolds products has the highest degree of tar?

A. I believe the highest tar would be More 120s. It's a 120 millimeter, small circumference cigarette.

Q. Do you know the percentage of tar expressed in milligrams?

A. I believe it would be around 21 or so milligrams of tar.

MR. WEBER: Just for the record, I think you misstated. It's not a percentage of tar –

A. 21 milligrams.

Q. What is the Reynolds product in terms tar?

[Page 15841]

A. It would be a Now product, which would be about one milligram of tar.

Q. Well, are you telling us that Now, in your judgment, is much less of a risk factor than More?

A. No, I'm not saying that. I'm saying it has substantially less tar. I'm saying that over the years the industry, and working for a good period of time with public health people who said that reduction in tar was the right thing to do with the design of cigarettes, that we as an industry and we as a company worked hard on providing products that reduced tar; so that all cigarettes today are substantially less tar today than they were 30 or 40 years ago.

As to whether or not that product is less risky than a higher tar product, I don't know. I know that it has less tar, which is an area of focus that public health people have had for years.

Q. Which signifies what?

A. That there's less tar in the product. There's no – there's nothing about us following the government

regulation to indicate what the tar and nicotine levels in the product, saying that we're suggesting or saying there's less tar.

There's been or had been over the years joint effort between public health people and the companies

[Page 15842]

to create products that had less tar, because the consensus was that whatever the risk is in cigarettes, that a general reduction in tar would be the right thing to do.

So the industry, working in the earlier days, in a collaborative mode with public health people, reduced the tar.

Whether or not those products had less risk in them is something that would have to be determined over a long period of time. Maybe they do, maybe they don't. But the consensus was, for public health people, that the right thing to do was to reduce the tar level.

Q. You wouldn't want to mislead a friend. But aren't you, in fact, misleading the American public when you state under oath in 1997 that it is your view that the Surgeon General's warning on your packs of cigarettes, which say smoking causes lung cancer, you're saying that's not accurate; it's only a risk factor.

Isn't that misleading the American public?

A. I don't believe I'm misleading American public. I'm not sitting here in that context. You're asking me my point of view, and my point is view is that cigarette smoking is a risk factor for these

* * *

[Page 15983]

Morgan, who is a friend and colleague of mine, who are much more of an expert in that area. This is something a little – again, I'm not an expert in that area, but I did experiments in that area because of the projects I was involved in and learned about it in school 15 years before.

Q. Did you learn that nitrosamines were in fact being extracted from the product?

A. Yes, in a variety of ways, some better than others. Again, that's what Philip Morris did. It examined every possible way to do something. It didn't go off in a direction and look at one way to do something, because that's dangerous. So you may not make the right choice.

So, scientifically, it was doing what you would do: Explore three, four, five, whatever different ways to do the same thing and then choose the best way.

Q. Did Philip Morris R&D manipulate nicotine?

A. Yes. I mean, there were a variety of ways that can be done. And again, the manipulation or adjustment of things like nicotine levels in the cigarette was something that was researched, studied, explored and done by a variety of means.

Q. Explain some of the techniques whereby Philip

[Page 15984]

Morris had the technology to manipulate nicotine either up or down the scale.

A. Well, nicotine is in the leaf that's burned when you smoke and winds up in the smoke. And there are a lot of things that affect that or impact that.

The kind of leaf you use – because, I mean, leaf is not leaf. There are a lot of different kinds of tobaccoes in the world.

And Philip Morris, maybe more so than anybody else, studied the chemistries and mechanics and everything there was to study about leaves of a certain type grown wherever, in the United States, South America, Europe, Far East, wherever, and would know about things like nicotine levels in those types of leaves, sugar levels, because sugar has to do with the sweetness and flavor, and there were other flavor components also.

But when you burn this leaf, if you change anything, almost anything about the cigarette, if you change the amount of tobacco in the cigarette, the density of the packing of the tobacco, if you make it less, make it more, you can elevate or depress the amount of nicotine being delivered to the person.

If you change the amount of holes that are in the cigarette paper that's around the tobacco, you

[Page 15985]

dilute it more so there's more air coming in. You can change, elevate or lower it, depending upon how you change the perforations, by the structure of the filters that are on almost all cigarettes, all cigarettes I guess now.

The way those filters are designed both physically and chemically, you can change the way you either let nicotine pass or let it get trapped along with things like tars, all the gook that's in the smoke.

And a variety of other methods – I mean, there's a fairly long list. These were all being scientifically in

a detailed manner investigated by various people at a company like Philip Morris.

Q. And being done?

A. Yeah, all of these things I mentioned one way or the other were used in products.

Q. When we look at a Philip Morris document or hear an expert refer to, for example, lowered biological activity or the concept of biological activity as related to a cigarette, what are you scientists talking about? How is that term being used?

A. Well, very directly, I mean, to me, as a scientist, especially coming out of a medical background, biological activity is kind of a polite

* * *

[Page 16315]

He was actually doing research on looking at chemotherapy, agents that they could deliver to lung tissue for treatment, and he made an observation that he wanted to check out with me. He said: Did you ever hear of anybody inhaling a cigarette filter fiber?

THE COURT: I don't want to get into anything he was talking about. Just get into your research and what you found.

A. (Continuing) I said: I never heard of that, but I would review the literature.

I reviewed the literature and could not find anything within the literature about cigarette filter fibers being inhaled.

We pursued this and developed some research related to the fact that cigarette filters, in fact, are

defective. The fibers literally dangle off the end of a cigarette. In fact, I brought some slides along today –

THE COURT: We'll get into that later.

A. – that could show, if you look under a high-powered microscope at a regular cigarette filter, a cigarette filter is made out of cellulose acetate which is basically a type of plastic. In fact, it's very much like film.

We began looking at the patents for cigarette

[Page 16316]

filters that existed back in the '50s, when they started the creation of cigarette filters. In fact, one of the earlier patents was by Kodak, because they make film. Eastman Tennessee has been a long-time producer of cigarette filters.

Film is translucent, by the way, clear; you can see through film. Cigarette filters, the cigarette filters on a pack of cigarettes, are white. They are painted with titanium dioxide, sort of like white shoe polish. It's a pigment with a milky white appearance.

But the original patent actually from Kodak talked about the fact that you would never want to block all the tar in a cigarette – that was one of the reasons that they created the filter, was to try to filter out some of the tar – because the tar is largely a taste component in a cigarette. That's why you get a lot of the taste from a cigarette.

So the fibers that are bundled together in a cigarette filter are literally microscopic to the eye. There are about 18,000 individual fibers bundled together, and they're not tight together. And, in cigarettes on a high-speed cigarette-making machine,

they cut the filter, and it creates a – it cuts the filter and creates fragments.

[Page 16317]

And the fragments, in fact, are loose and the fibers themselves are loose. So we undertook these experiments to see whether they come off; whether this thing that we observed in the lung of a smoker was, in fact, a cigarette filter fiber.

And you can do very simple tests: Tongue tests, if you touch a cigarette to your tongue and put a piece of scotch tape to your tongue and take the tape off and put it down on a microscope slide, you will find that the fibers have come off that easily.

Then we undertook a study, and Dr. Pauly has done these studies on autopsies of patients, where we harvested the filter fibers out of the lungs of cigarette smokers. And we only find them in smokers of filtered cigarettes, not in nonfiltered cigarettes, not in nonsmokers.

We've done sophisticated, basically forensic pathology techniques to demonstrate these, in fact, are cigarette filter fibers and not other kinds of fibers like from your clothes or in the air or whatever. And we published a number of studies on this topic.

We wrote a grant to the National Cancer Institute to document this, and we've been working on this grant for the last two and a half years.

And have looked at other defects: charcoal in

[Page 16318]

a Lark cigarette, which there is a little charcoal cavity, and the charcoal in fact migrates. We've

demonstrated that the charcoal granules in a Lark cigarette actually come off.

We've done studies to look at what smokers, when they inhale the cigarettes, how many of the fibers come off. This is not an easy thing to do, but we've been able to do and demonstrate that the fibers come off easily.

Q. You're talking about your own research?

A. Yes, of course. And then I've gone ahead and done some research to find out whether smokers are aware of this, and most smokers are not aware of the effect.

MR. KIRBY: Objection. Your Honor.

Preemption.

THE COURT. Not yet. Overruled.

A. (Continuing) Most smokers are not aware of this problem.

We did a study with people at the Department of Motor Vehicles. We went up, and there was an easy place to do interviewing with people, and identified smokers and ex-smokers and asked them whether they had ever heard of the fact that cigarette fibers come off the end of a cigarette.

* * *

[Page 16393]

The final set of slides that I have relate to the new products; and new products, one might even construe as potentially safer products that the industry has devised, and in fact, are even marketing right now.

This is a product called Eclipse. It's produced by the R.J. Reynolds Tobacco Company. Several years ago I was invited to a meeting at the R.J. Reynolds

Tobacco Company to be introduced to this product before it was launched in a test market in Chattanooga, Tennessee, where I spent the day having their scientists explain to me the benefits of Eclipse.

And, in fact, Eclipse offers some substantial benefits because it's not like any conventional cigarette that's currently being sold. This is a product that heats rather than burns tobacco. And as a result, when you heat it rather than burning it, you're not generating the pyrolysis products – the tar, in other words – that you get when you burn a conventional cigarette.

As a result of not burning anything, just heating – and what you heat is a carbon tip, which I will show you a picture of in a second – you are basically – when you are just heating it, you're basically not generating any tar or dirt or sidestream

[Page 16394]

smoke, which is why they can make the claim "less sidestream smoke."

This is what an Eclipse cigarette looks like. It actually looks like a conventional cigarette. The one labeled G is showing you the Eclipse cigarette unsmoked. The one that's labeled H is a completely-smoked Eclipse cigarette. That's what it looks like after it is done

So, because you are heating this material rather than burning it, you're not actually going to have anything to snub out. You have the spent item there, H.

The inside of it does not look like a conventional cigarette at all. In fact, this is not blending tobacco

in any way whatsoever. This is a completely nonnatural, completely manufactured product.

The carbon tip at the end is literally like a high-processed carbon, like you would find in your charcoal grill; carbon like that that you would light. It's the heat generator for this.

They wrap that with a sheath of tobacco. They do this because the sheath of tobacco, when you light the cigarette, will give you the smell of the smoke, and also the first two drags will give you a little bit of tar. So you get this tar a little bit

[Page 16395]

because of the first two drags of the cigarette, I was told when I attended the meeting at Reynolds, which is what dictates whether a smoker will like a cigarette or not.

The sheath of tobacco is wrapped in fiberglass. And that fiberglass is there as an insulator because the carbon tip, when it's burning, will lose mass, and it would fall out on the ground and you would have a lit charcoal briquet that would cause a fire. This would be a problem.

So they have fiberglass that melts around the carbon tip. That also prevents burning. When you put the product down, the carbon tip is not going to cause a fire. In fact, this product is probably a lot more fire safe than the conventional cigarette, because of the glass wrap.

E is tobacco. It's actually very light-colored tobacco. It's a reconstituted tobacco sheath that's impregnated with glycerin. The glycerol in this product is extensive, about 50 percent.

This is done because that's the carrying agent for nicotine in the vapor to the smoker. There's also – you can't see here, but on the inside of an Eclipse cigarette there is an aluminum foil on this part labeled E. There is an inner sheath of aluminum

[Page 16396]

foil almost like the aluminum foil you would find from a stick of gum. That is wrapped on the inside with what appears to be tobacco paper, and that is there as a result of preventing spotting of the glycerin, which is so moist on the paper.

And also acting as a heat conductor, because this super-heats the material. You generate a nicotine vapor, a few bits of tar that you get from the sheath of tobacco that's wrapped around the carbon tip. There's also tobacco bits impregnated inside the carbon tip, and then you pass it over the second column of genetically-engineered, reconstituted tobacco and then into the smoker.

So they're literally getting a nicotine vapor. This is a nicotine delivery device.

There's a little problem with this product, however. Actually, my interest, and one of the reasons I agreed to go down to the R.J. Reynolds Tobacco Company to meet with their scientists when they invited me to their meeting to learn about their product, was this product generates a lot less biological activity.

In other words, if you compare the tar from an Eclipse cigarette to the tar from a conventional cigarette, you would find that it's very different. It's different in terms of the chemicals that are

[Page 16397]

generated and the biological activity as measured by things like those mouse painting experiments.

None of the mice with Eclipse tar get the tumors, yet they get the tumors with the tar of a conventional cigarette. This is very important. This may actually be indicative if there is potentially a safer product out there.

Although none of the advertising tells consumers that the biological activity of the Eclipse cigarette is lower, which I find interesting, because secondhand smoke – well, smokers are concerned about that. The main thing they are concerned about is cancer and heart disease and emphysema. And if they could smoke and not get those things, that would certainly be a great benefit.

And none of that has been communicated to the consumers. Although, when I was at Reynolds, I learned that a large share of their employees have been smoking Premier cigarettes and Eclipse cigarettes. They get these free, at their plant.

MR NEWSOM: Your Honor, I object to what he says. It's hearsay as to what he learned at Reynolds.

THE COURT: Sustained.

Let's move on with what this shows.

A. (Continuing) Okay. I can move on to this

[Page 16398]

particular study. This relates however to the problem of the glass.

When I was at the meeting at Reynolds, we asked the folks there about the glass insulator, whether it breaks off and whether there might be any problem

from the heat source end migrating down to the filter tip.

If you look at an Eclipse cigarette, you can literally see the glass dangling right off the end of the heat source end. They make this product very similar to making a regular cigarette. High speed-making machines, they cut the carbon tip and the glass, and the glass shatters, and you get fragments, bits and particles.

So we were curious as to whether these glass fibers would end up on the filter tip end. And so we did a study to look at this. You can see some of the particles there from the glass.

We looked at the inside of the packs. We got some Eclipse cigarettes that were available in Chattanooga and also Lincoln, Nebraska, their two test markets.

We opened up the packs very carefully and basically counted up the glass fibers that were at the bottom of the pack. And there were thousands; in fact,

[Page 16399]

about – on an average of 7,000 bits, fragments of glass dust at the bottom of the pack.

Then we looked very carefully at the filters to see whether the cellulose acetate, the plastic matrix that a person is going to put into their mouth, actually had any of these glass fibers there.

We were told, by the way, at Reynolds, that this is a not a problem; that smokers would not get exposed to the glass.

Our study concluded otherwise. In fact, as you can see, out of the different cigarettes that we looked at,

the various packs, 95 percent of the cigarettes in the Eclipse packs were contaminated with glass. That means that every time a smoker puts an Eclipse cigarette in their mouth or even touches an Eclipse cigarette, they are getting exposed to glass.

Now, this is not glass you can easily see. It's broken-up dust, basically. Glass, by the way, is potentially a very dangerous thing to inhale into your lungs, and this is putting it directly into your body. So we believe that Eclipse smokers are ingesting and inhaling, in addition to plastic, cellulose acetate filter fibers, also glass with the Eclipse cigarette.

And this is just showing you, again, the glass material on the Eclipse. This is on the filter

[Page 16400]

end. A is on the inside of the filter. If you see an Eclipse cigarette, actually the filter is more of a holder, it's not a filtering device, because there is no tar or very little tar to filter.

So they actually have a hole they drill in it. It directs you right to the column. They do this so you can pull the nicotine with less resistance. One of the problems with earlier versions of Eclipse and Premier cigarette that preceded it was keeping the product lit and having to suck very hard. So they tried to address that problem by drilling a hole in the filter.

It's not a filter, really; it's a cigarette holder. But you can see the glass contaminating this.

We've done a study to look at all the marketing material that Reynolds has put out on Eclipse cigarette in Lincoln and Chattanooga, and we have not come across anything that mentions the issue of –

MR. KIRBY: Objection, Your Honor; preemption.

THE COURT: No. Overruled.

A. – the glass.

In fact, they talk about it as an insulating material. They don't talk about fiberglass, which is what it is, and smokers are not aware of the fact they

* * *

[Page 17804]

BY MR. ROSENBLATT:

Q. Dr. Mele, did Philip Morris, during the period of time that you were there, have the scientific technology to remove all the nicotine from a cigarette if that's what they chose to do?

A. Correct, yes, they did.

Q. And did they, in fact, make cigarettes, some cigarettes – I'm not talking about commercial necessarily, without –

A. They would make experimental cigarettes, as requested by Mr. Frank Ryan and Bill Dunn in the behavioral research unit. They could take out nicotine, they could add in nicotine, they could manipulate the levels of nicotine. These were all experimental cigarettes that were used in smoking studies with humans at the company.

Q. During the period of time that you were employed at Philip Morris, did Philip Morris, through its scientists, organic chemists, discover analogs, substitutes for nicotine, to meet the criteria of retaining the effects of nicotine on the brain and at the same time eliminating any possible adverse effects on the heart?

MR. HEIM: Well, objection, Your Honor. He has no expertise to – I would like to talk about this.

* * *

[Page 20812]

Q. Have any of your studies implicated tobacco in any way as being a risk factor for a disease?

A. That would be an epidemiological study. We've not conducted epidemiological studies.

(Fast forwarding.)

Q. Does the technology exist where if a tobacco company decided to add nicotine to its product, it could do so?

A. Well, I think the technology would exist, yes.

(Fast forwarding.)

Q. Can you conceive of any experiment, research, that would satisfy you and cause you to say that, yes, that experience proves to me that cigarette smoking causes lung cancer?

A. Can I conceive of an experiment? I don't know that I can conceive of a single experiment. I can certainly conceive of a number of experiments. One experiment that would be important is production of human-type lung tumors in animals. Lung tumors, I'm speaking of malignant lung tumors.

Another would be an in-depth understanding of the mechanism of the disease, and how tobacco smoke or its components would play a role in that mechanism.

Those are the critical missing areas in terms

* * *

[Page 25622]

And I'd like to move from selective now to general.

A. Okay.

Q What is general reduction?

A. General reduction is reducing all of the constituents in tar, pretty much to the same degree.

Again, if there are different theories about what in cigarette smoke needs to be reduced, and there's sometimes conflict about what ought to be reduced and what ought not to be reduced, general reduction has the advantage of reducing everything in smoke by virtue of reducing tar across the board.

Q. Did Reynolds explore general reduction techniques?

A. In detail.

Q. And, to your knowledge, was it the only company exploring such techniques?

A. No. Reynolds and all of our competitors have explored general reduction techniques in detail.

Q. Now, what is your understanding, Dr. Townsend, of the reaction of the public health community to general reduction techniques?

A. I think there was widespread acceptance among the public health community and among the scientific community about general reduction as a reasonable and

[Page 25623]

practical way to go, but that that was an important thing to do.

Q. You outlined for us a few moments ago the problems that were associated with selective reduction?

A. Right.

Q. Does general reduction in your opinion have advantages?

A. Yes, it does, very definitely.

Q. Have you prepared a chart that would assist you in describing those advantages?

A. Yes.

Q. Now, referring to this chart, Dr. Townsend, how did general reduction turn out to be superior to selective reduction efforts?

A. General reduction is better than selective reduction. It's been technically more successful because it's technically more practical. We have reduced means to reduce tar and nicotine across the board.

The other reason it's successful is it addressed all the potential compounds, every constituent in smoke is down. So you don't have to worry about the dilemma of which is the really important one to reduce when there are so many that are under consideration.

[Page 25624]

General reduction techniques don't add strangers to the smoke. It simplifies the smoke; doesn't add new things to smoke. And doesn't include unintended consequences, where you may reduce one compound and another go way, way up.

Very importantly, it doesn't change the character of the smoke taste. As probably everybody that smokes cigarettes knows, the lower the tar level, the lighter the taste, the less taste there is, but it doesn't change the character or the balance of the taste.

Q. Now, did Reynolds pursue more than one general reduction technique?

A. We've pursued a large number of general reduction techniques and so have our competitors.

Q. Do you have a chart that lists those techniques that would assist you in explaining each of them to the jury?

A. Yes.

Q. Now, with the Court's permission, this one is a little complicated. Would it help you, Dr. Townsend, to step down?

Could you briefly describe each of these general reduction techniques.

A. Yes. These are some of the major reduction,

[Page 25625]

general reduction techniques that have been developed.

The first and probably the most obvious is the use of filters. Turns out this is pretty complicated. Filters are very, very effective in general reduction, that is, the across-the-board reduction.

Reconstituted tobacco – and I'll talk more about that in just a minute. Reconstituted tobacco is a process that was originally developed to take pieces of tobacco that were too small to use in cigarette manufacture, and make them into the right size in cigarette manufacture, but it turns out that that's also a general reduction technique.

The use of expanded tobacco, that is increasing the filling value or the volume of a particular amount of tobacco as a way to reduce tar and nicotine. This is a general way of reducing tar and nicotine by simply burning less tobacco. You burn less tobacco because there's less in the tobacco rod.

You can also alter the dimensions of the cigarette to burn less tobacco and consequently generate less tar and nicotine.

A very, very important technique is one we call filter ventilation. That's essentially, that together with more porous cigarette papers, are two

[Page 25626]

diluting mechanisms where you dilute the smoke with air from outside the cigarette, and you also reduce the amount of smoke generated as a result of these two techniques.

The use of faster burning cigarette papers is also important. That affects the puff count or the number of puffs that are taken, and consequently the tar and nicotine yield.

Q. Now, has Reynolds then, to your knowledge, and each of its domestic competitors, employed these general reduction techniques?

A. Reynolds and my competitors has employed every one of these techniques.

Q. Now, was each of those techniques successful in reducing the level of the various compounds found in cigarette smoke?

A. They've all been successful in effecting a general reduction or tar and nicotine reduction. Some of them are more important than others, but interestingly, some of them work together in an interacting way to get even greater reduction in tar and nicotine than you would expect just on the basis of the individual technique itself.

Q. Now, I'd like to go through each of these with you briefly. And on some of them, when you get to

* * *

[Page 25740]

That compensation, if it occurs and to the degree that it occurs, will be somewhere in the middle, not complete; compensation is not zero. So it's somewhere in the middle.

In any event, even with compensation, on the average smokers as a group, if they're switched to lower tar products, will get less tar and nicotine. Not as much less as predicted by the FTC tar numbers because that's an arbitrary standardized measurement, but they still get less.

Q. Less than what?

A. Than if they were still smoking the higher tar product.

Q. Now, let me change the subject again. It's in this same area. I want to talk about pH and ammonia.

There has been the allegation in this case that the cigarette companies manipulate the nicotine in a cigarette and they use ammonia as one way of doing it. And there's also been testimony that the defendants have raised the pH of the mainstream smoke in order to increase the availability, bioavailability of nicotine to the smoker, and one way it's been claimed that it has been accomplished is by using ammonia in the manufacturing process. Are you familiar

[Page 25741]

with those allegations?

A. Yes, I am.

Q. Is ammonia a natural constituent of tobacco?

A. There are ammonia compounds, ammonium compounds in tobacco naturally, largely coming from fertilizer application.

Q. Does the RJ Reynolds Tobacco Company use ammonia or ammonium compounds in its reconstituted tobacco process?

A. We have a number of different versions of our reconstitution process. There are several versions that use ammonia or ammonia compounds in that processing, yes.

Q. Now, why do you do that?

A. We do that because ammonia and ammonia compounds, we've known this for years, react with sugars, particularly certain types of sugars that are in the tobacco. They react to form a very flavorful class of compounds called pyrazines, and some pyrazines are also quite flavorful. So that's a well-known series of reactions to form pyridines and pyrazines. It affects the taste characteristics of the product.

Q. Now, when did Reynolds start using ammonia in its reconstituted tobacco process?

A. The first commercial application was with

[Page 25742]

Camel in 1974.

Q. When was the next commercial application?

A. The next large commercial application was in 1979 with Winston.

Q. '74 was Camel, and '79 was Winston.

Now, was anything occurring in the marketplace in 1974 that caused Reynolds to consider using ammonia in its process?

A. Yes. One of the major things that was happening in the market – we had already done a lot of research trying to understand the reactions between ammonia and sugars and how those materials form pyrazines, but in 1974 one of our competitors was seeing increasing success in the marketplace and that product was Marlboro.

And by trying to reengineer that product, take it apart and understand how it's built, we believe that Philip Morris was using ammonia and ammonia compounds in its processing to improve flavor.

Q. Now, does ammonia affect taste?

A. Yes, very definitely.

Q. Dr. Townsend, I've handed you a document that is marked as Defendants' Exhibit 20147 dated January 29th, 1976. It is titled: Effect of Treatment of Tobacco with Ammonia or Various Ammonium Salts on the

* * *

[Page 25749]

been accomplished either by a waiting period between ammoniation and use, or by steaming the ammoniated tobaccos. Concurrent with the reduction in irritation, ammoniated tobaccos produce a smoke with altered flavor and aroma properties. The flavor becomes more chocolate-like, and this is associated with the presence of higher levels of smoke pyrazines. Because of these flavor changes, ammoniated tobaccos are generally regarded as being more burley-like.

This factor must be considered in the use of treated tobaccos as part of cigarette blends. The attributes of ammoniated tobaccos, less irritation and more

chocolate flavor, have also been used to describe major product differences between our products and those of our major competitor. We do not know if this gives them a competitive advantage in the marketplace.

Q. Now, Dr. Townsend, what percentage of Reynolds' products contain ammoniated reconstituted tobacco sheet?

A. Today, only about 20 percent of the products we make contain ammoniated tobacco.

Q. Now, if the purpose of ammoniation, the manufacturing process is to produce these pyrazines or pyridines because they taste good, why not ammoniate all of your products?

[Page 25750]

A. Well, because the formation of these pyrazines or pyridines improve the taste for some smokers. There are some smokers who don't prefer that taste.

So we provide different products for different smoker wants. Some smokers prefer the more flavorful, more chocolate-like taste that's less irritating and less harsh. Other smokers prefer the products that are not ammoniated and don't have that high chocolate aroma.

Q. Now, what are Reynolds' two best selling brand families?

A. The two largest brand families that we have currently are Winston and Doral.

Q. Are they ammoniated?

A. No, they're not.

Q. Now, Dr. Townsend, we've seen some internal research reports from Reynolds suggesting the use of

ammoniated tobacco to improve smoothness and taste. Were there scientists at Reynolds that theorized about using ammonia for reasons other than improving taste?

A. Yes.

Q. Who did that?

A. There were several scientists at Reynolds who speculated that adding ammonia or ammonia compounds

* * *

[Page 25766]

Q. Now, in 1974 did the Camel filter cigarette have added ammonia as part of its blend?

A. In 1974 the Camel filter was ammoniated – Camel filter cigarette was ammoniated.

Q. Now, is the pH of the smoke of that Camel cigarette reflected in this document?

A. Yes. And the number is 6.19. I would round that to 6.2.

Q. Now, in 1974, same year, was the Winston cigarette ammoniated?

A. No, it wasn't. We didn't ammoniate Winston cigarettes until 1979.

Q. And what is the pH of the Winston cigarette that's not ammoniated?

A. This table shows it to be 6.16. Again, I would round that to 6.2.

Q. The ammoniated Camel was 6.19?

A. Right.

Q. The nonammoniated Winston was 6.16?

A. Right.

Q. What is the difference in those two numbers?

A. I think there is no difference in those two numbers. They're within the experimental error of the test method.

Q. Are you familiar, Dr. Townsend, with the pH

[Page 25767]

data for Reynolds' cigarettes tracked over time?

A. Yes, I'm very familiar with it.

Q Have you prepared a chart that would assist you in reviewing with the jury the pH data for Reynolds' brands over time?

A. Yes.

Q. Dr. Townsend, what does this demonstrative exhibit demonstrate?

A. This is a comparison of the pH measurements for Winston filter cigarette or Winston red pack over time beginning in 1972 up through 1988.

I'd like to point out, if we go back and look at our internal historical data on pH, there's a fair amount of data, but it's not a measurement that we routinely make in manufacture or quality assurance. But we have some data, and I think the time frame is limited. But this is the available time frame we have.

What this shows is that the pH, the measured pH for Winston smoke, bounces around a little bit, is pretty much around 6.0 to 6.1. What we also know is if we make repeated measures of pH on the same sample, exactly the same sample, the variability is about plus or minus .2.

So there's really no substantial difference or significant difference really among any of those

[Page 25768]

numbers. I would say that there's no change for pH in Winston in spite of the fact that in 1979, right in the middle of the chart, we ammoniated that product. So we ammoniated the product, no difference in smoke pH.

Q. Now, the Winston cigarette, is that cigarette ammoniated today?

A. No, it isn't.

Q. When did Reynolds stop using ammoniated reconstituted tobacco sheet in Winston cigarette?

A. In 1997 –

COURT REPORTER: I'm sorry. What was the year?

A. 1997. We changed the entire –

Q. In 1997 the ammoniation process stopped?

A. In 1997 we stopped ammoniating Winston.

Q. Let me ask you this: When that happened, did the pH of the smoke change?

A. No, I went back and looked at it. We have – the pH of Winston smoke before we took the – before we stopped the ammoniation was 6.0. After we stopped the ammoniation, we took the ammonia out, the pH was 6.0. So ammoniated or not ammoniated, same pH.

Q. How can that be? How can it be if you're using ammonia and ammonia is a base, why doesn't it raise its pH of the smoke?

* * *

[Page 27402]

He testified that in 1953 and earlier, the industry knew that cigarettes contained many carcinogens, and what totally backs that up is the 1953 document of Claude Teague.

Dr. Siegel said the industry knew that low tar, low nicotine cigarettes were a fraud since they all knew about compensation in the early '70s and the public health community did not truly understand it until many years later. He says: The industry deliberately hid information from the public health community. It was a fraud to get the American Medical Association involved in unneeded research simply to add prestige to the industry's false claim.

So I want to make it clear that Mr. Solberg's testimony on the subject of the AMA and the fraud of the tobacco industry is not standing alone because Dr. Siegel also testified on that subject.

Dr. Siegel said they have been deceiving the public on causation from 1953 and on addiction from 1962, and his specialty area was: What did the industry know and what did they tell the public about what they knew?

Dr. Ronald Davis was – he was our second witness. So you've got to have a pretty good memory to visualize him. He followed Dr. Richmond.

* * *

[Page 27650]

example, the Surgeon General, commented on this issue, as well?

A. Yes, they have. In the '84 Surgeon General Report he makes a comment to that effect.

Q. Let me show you Defendants' Exhibit 15825, and ask if you can identify that as an excerpt from the 1984 Surgeon General's Report?

A. Yes. That's what it is.

Q. And can you identify for us the page on which the Surgeon General states what you have set forth, that smokers do not compensate by increasing their cigarette consumption rate on average?

A. It's on Page 342.

Q. All right. Now, I'm going to go ahead and cross off cigarette consumption rate as the method by which smokers compensate, and ask you to look at number two, ventilation hole-blocking.

What is ventilation hole-blocking?

A. Well, it refers to ventilation holes in the cigarette. A modern-day, low-delivery cigarette has holes in the tipping paper of the filter. And this allows air, room air, to go into the filter and dilute the smoke that's formed during the combustion process. And that is referred to as filter-tip ventilation.

Now, obviously, those holes are designed to

[Page 27651]

reduce the delivery by air dilution, and if someone were to block those holes, either with their fingers or their lips, and if they were to block them in a very significant way, that would reduce the dilution through the filter, and, therefore, that could increase delivery of the cigarette.

And that has been suggested as one way in which people compensate, by blocking the holes with lips or fingers.

Q. Have you studied the issue of whether or not ventilation hole-blocking occurs in smokers who compensate?

A. Yes.

Q. Have you reviewed outside scientific literature with respect to that issue, as well?

A. Yes, I have.

Q. Now, can I ask you to come down one more time and ask you to draw for us this issue of ventilation hole-blocking, in terms of a cigarette?

A. Yes.

Q. There you are.

A. Thank you. Artist at work again.

I draw a cigarette.

Okay. This is the tobacco rod, the white you normally see on the cigarette. This is the filter. In

* * *

[Page 27753]

material that goes into the sheet. So that would give you a better quality for the manufacturing of the sheet. The sheet will be easier to cut and be more robust if that chemical was never used. That's number one.

Second, the ammonium part of the diammonium phosphate will react with sugars that are naturally present in tobacco or some products introduced through those casings, and the reaction between the

ammonia and the sugars is something called the Maillard reaction.

This releases what is called flavor compounds, and some of these flavor compounds can give rise to a slightly different edge to the flavor of a U.S. blending product. They will give a slightly more roasted, toasted note.

So that having some contribution for the overall aroma, flavor of the product, that is why they're used.

Q. Now, do all of Brown & Williamson and BATCO'S products use ammoniated reconstituted tobacco?

A. No, not at all. In fact, my company, BATCO, their biggest selling product, a Virginia product, very different in style to a U.S.-blended product, and that in fact is the world's biggest selling Virginia product, doesn't use ammonia at all because the style

[Page 27754]

of the product in terms of the sensory style is different to U.S.-blended.

And smokers of Virginia products are not looking for this sort of roasted, toasted notes; that's not what they're expecting from that product. Therefore, there is no point in using ammonia in that product. We don't have to do that.

Q Have you reviewed internal and external research on the basic issue of whether ammonia compounds, in the quantities used in reconstituted tobacco in the cigarettes in which they use, whether that does, in fact, increase the pH of the cigarette smoke?

A. Yes. I've reviewed a number of sources of information examining pHs of cigarettes that do or do not use commercial amounts of ammonia.

Q. What have you found with respect to whether ammonia in the quantities used to, in fact, increase pH?

A. It does not. In fact, the pH is remarkably the same with or without ammonia usage, across different brands.

Q, I want to assume for the moment for the sake of analysis that the pH of tobacco smoke was increased. Let's assume it was.

* * *

[Page 27920]

As I said earlier, in terms of the tar-related feel in the mouth, the nicotine-related feel in the throat, and if they're in balance, then you'll have a chance of a successful cigarette. If you have just the tar and no nicotine, then you've totally unbalanced it. You have some sensations but you miss a real aspect of sensation, like the Coca-Cola without the bubbles. And that is why I believe cigarettes not containing nicotine have never been successful.

Q. This, of course, this document, when we talk about the Ammonia Technology Conference Minutes, this is a scientific document?

A. If I could just look.

Most of those people there are scientists, yeah, who are working on aspects of ammonia technology, yeah.

Q. Let me just continue down the summary of Appendix A: RJR alone has ammonia emissions of 900,000 pounds a year in North Carolina.

Five of the six major U.S. cigarette manufacturers use ammonia technology in at least some of their products. Liggett is the one holdout.

Ammonia technology has been essential in Brown & Williamson's successful development of the nonmenthol cigarette products at or above parity with

[Page 27921]

Philip Morris brands.

So, based on what I've read to you and based on the thickness of this document and your familiarity with the science, ammonia technology was still and still is a big issue, correct?

A. It's still an important aspect of cigarette design, again, specifically for American-blended style of products. It's not used in many other product styles, simply because of the taste and flavor characteristics that people expect from a USB or U.S.-blended products, compared to other ones.

So, yes, it is important in terms of the reaction flavors and a lot of work is going on. It's the use of ammonia, the reaction with sugar, is to produce different flavor compounds, and that's what a lot of this research meeting was considering.

MR. ROSENBLATT: Judge, I think I'll be moving to another area, so I think I'll –

THE COURT: Okay. Let's take a short break.

(A brief recess was taken.)

(The jurors exited the courtroom.)

MS. ROSENBLATT: We're going to ask the witness to go outside while we discuss this.

MR. HEIM: Okay.

(The witness exited the courtroom.)

* * *

[Page 29051]

all you need to do is remind the jury of what general reduction is.

A. If you have a hard time getting rid of individual or reducing individual components, can you reduce a lot of things at one time? So you're generally trying to reduce a number of smoke components.

Q. What prompted the company to start to work on general reduction as opposed to selective reduction?

A. One of the things that became evident to me when I started speaking to people that were doing this work and reading what they had done was, they weren't going to put all their eggs in one basket. They were going to approach this thing from a number of different avenues in case something worked out. So this was another path to try to address some of the issues.

Q. Have tar and nicotine levels generally throughout, not just Philip Morris, but Philip Morris and other companies, have the level of tar and nicotine declined over the course of years between, say, the '50s and the '90s?

A. About 60 percent or so.

Q. And have you selected an exhibit that just gives a sense of how that decline has taken place over the course of years?

[Page 29052]

A. Yes.

Q. Let me see if I have a different exhibit. I'm going to show you, just marked for identification, Defendants' Exhibit 15977.

Doctor, let me put one up so the jury can see it at the same time, if I can find it.

What does this chart show?

A. This chart, which I think comes from FTC Monograph Number 7, but originally comes from Dr. and Mrs. Hoffman's '94 article entitled The Changing Cigarette, shows the reduction in tar and nicotine over the decades from 1950 something to about the present.

Q. Can you look on this – and by looking at the chart, it's probably easier for you to see it, the one that I gave you to look at. But can you describe what that decrease has been?

A. It starts at around close to 38 milligrams of tar, just focusing on the tar, and comes down to about 12 milligrams of tar. And this is machine-derived numbers, that is, Federal Trade Commission numbers. So from 38 to about 12.

Q. 38 up here and down to about 12?

A. Uh-huh.

Q. And how about for nicotine?

A. It more or less parallels the reduction in

[Page 29053]

tar from something less than 3 milligrams down to, it says here, less than 1.

Q It says: Filters, porous papers and RT. What is this referring to, this steep curve down here in the 1950, 1960 period?

A. This is where, as a result of some work that was done by one of Dr. Hoffman's colleagues, Professor Wynder and others, there was a dramatic sense, based on his observations and conclusions, of trying to reduce the amount of tar that was delivered to the smoker.

And so filters, porous papers and RT – stands for reconstituted tobacco – were all cigarette design changes that were implemented to try to reduce the amount of tar that the smoker would get.

Q. How about tip ventilation, what does that mean?

A. With tip ventilation, now you're starting to really see an attempt to get down into the low, low delivery products, cigarette products. And tip ventilation provides a cigarette design modification that helps you move in that direction.

Q. And as its curve continues down, ET is what, expanded tobacco?

A. Yes.

Q. And what does that do to bring it down

[Page 29054]

further?

A. Well, you end up using less tobacco. Expanded tobacco is puff tobacco, like puff rice or puff wheat. It still has the same filling power as regular tobacco, but you use less tobacco.

And again, that was a concern raised early on, that if we could reduce the amount of tobacco, we could reduce the tar and reduce the risk. And that's where that came from.

Q. It goes very steep all the way down, then there's this tiny little spike up. See that little movement up where I'm looking at? Just curious, do you know what caused that? It looks like it went from maybe 23 to 24 for a year, then it went dramatically down again.

A. I look at this in a macro – a big-picture way. At least I don't focus on little bumps and squiggles. I look at the whole trend, and the whole trend overall is a continuing reduction in tar and nicotine.

Q. So you don't know what this little squiggle is?

A. That's true too, yes.

Q. The answer is, I don't know; right?

A. I don't know.

[Page 29055]

Q. Now, do you have a chart with you that shows what the average tar and nicotine levels have been in Philip Morris products over the course of time?

A. Yes.

Q. I don't know whether this is helping at all, but I'm having fun.

MR. ROSENBLATT. You may be alone.

MR. HEIM: Probably am.

BY MR. HEIM:

Q. Dr. Carchman, what does this chart show with regard to Philip Morris products over the period of '54 to '97?

A. It basically captures two points on that graph you just had up, showing for tar it was in '54, it was 35 and a little bit, and in 1997 it's less than 12; and for nicotine it ranges from a little over 3 to less than

1. So it looks at the beginning and sort of the end of that chart for Philip Morris products.

Q. So Philip Morris products seem to go in the same direction –

A. We fit right on that curve.

Q. The Philip Morris brand offerings, are they across the spectrum of higher tar down to lower tar?

A. Generally speaking, but not as high as that high there.

[Page 29056]

Q. Well, currently, just so the jury can see this, back here in '54 it was basically 36 milligrams was the high?

A. That's right.

Q. And 12 milligrams roughly – I mean, I'm sorry, 36 milligrams of tar, 3.3 milligrams of nicotine. Do you have a chart that shows what Philip Morris' nicotine and tar offerings are today?

A. Yes.

Q. Now, what are – as you look at them. Dr. Carchman, how does this fit in with what we just saw before on the tar and nicotine levels from the '50s and '60s down to today?

A. The highest tar delivery product on here is a little less than 16 milligrams, and that's the Marlboro Red. And then the lowest in terms of tar is less than 1 milligram of tar, and that's the Merit Ultima. So the highest tar today on here is less than half of the highest tar on the top part of that chart we had up before.

Q. The Merit Ultima is the lowest tar and nicotine product that Philip Morris is selling today on a national basis?

A. Yes.

Q . .9 milligrams, that's just under 1 milligram

[Page 29057]

of tar; and .2 milligrams, is that just a little bit over 1/10th of 1 milligram of nicotine?

A. Yes.

Q. Are these representative of Philip Morris products?

A. Yes.

MR. HEIM: Judge, I think this would probably about a good time to stop.

THE COURT: Why don't we take our lunch break here. Come back at 1:30.

(The jury exited the courtroom.)

THE COURT: All right, we'll be in recess until 1:30. Same rules apply, Doctor, as far as your testimony.

(A lunch recess was taken at 12:15 p.m.)

* * *

[Page 35813]

specific causation, all that.

THE COURT: Yeah, I can anticipate taking a particular plaintiff in Phase II and, since you're trying to relate, as defense, as you should, trying to relate the particular conduct to that individual, trying to find out what it was about the conduct of the defendant that relates to that individual, in order to do that, you're going to have to run through the

litany of the conduct. Okay? And you're probably going to have to figure out whether they saw this particular – and there are hundreds of them.

MR REID: Sure.

THE COURT: Whether they heard a statement. There are thousands of them. Whether they read something, and there are hundreds of thousands of them.

So, basically speaking, in all practicality, you're going back and going over the same ground regarding the conduct for each one to say: Ah-hah, they didn't meet that test.

MR REID. No. I have a suggestion as to why you don't have to do that.

THE COURT: I –

MR REID. You wouldn't have to do that. In fact, this is a different issue we've talked about, from time to time, whether it makes sense to have fraud

* * *

[Page 35892]

tried as to each class member, principally the issue of damages, the basic issues of liability common to all members of the class, will predominate over the individual issues."

And the trial plan, under Stage 1, states that common issues of liability and causation for all class members shall include, inter alia, issues involving, A, scientific and statistical testimony/evidence, and B, common class issues concerning plaintiffs' causes of action.

We're talking about the claims, and as you go through the plan, the whole point was the causes of

action. And our question covers that because we're saying: Was the product defective, unreasonably dangerous and a legal cause of injury, loss or damage to some smokers?

And it's clearly: If, in fact, it's defective, it was a cause of loss, injury or damage to some smokers. We haven't identified which ones, and that's what Phases II and III are all about, and we're following the format of the standard charges.

If we were going to start breaking it down, alternative design is one, then there's failure to warn, which is recognized under strict liability prior to July 1, 1969. There are other subcategories we're

[Page 35893]

going to have. If we're going to start breaking down each of the counts, we're going to have a very, very lengthy verdict form.

If Your Honor wants me to present another draft, I will breakdown strict liability into sub issues.

But design is – you know, an alternative safer design is one issue. There are other issues under strict liability in defective product. I don't think it's necessary, I think that's what the argument will be about; and the jury instructions, I don't think it's necessary to complicate this, and I think the standard proposed instructions are fine and the verdict form, which is the format I've used.

MR. KIRBY: Your Honor, Mr. Moodhe is going to come back to our questions 2A and 2B, which is the safer alternative design. But before he does that, I would like to respond to Mrs. Rosenblatt's argument about why it is appropriate to just carte blanche use

the Florida standard jury instruction with respect to strict liability.

The question, if you have the plaintiffs' form there, includes the phrase: "And a legal cause of loss, injury or damage to some smokers." That's what has not been tried in Phase I as a common issue.

* * *

[Page 35915]

argument as to why you can't try negligence when all the elements aren't being tried, and why you can't decide legal cause of damage when that's not being tried in this case.

I'll set that aside and respond to the argument that what we're doing here is trying to create a meaningless verdict. If that were true, we would not have asked the Court to put on the verdict form, "Was there a commercially available, feasible alternative design? And if so, what was it and when?"

The reason that we asked that question, and we're urging Your Honor to put that on the verdict form, is so we do in fact have a meaningful determination by this jury that can be imported into Phase II and Phase III. Because without that degree of specificity, that's when we truly have a meaningless verdict form.

If the jury in this case were to simply answer the question, "Have one or more of the defendants, during whatever time period, manufactured a cigarette that is defective and unreasonably dangerous?" and the answer to that is "Yes," what in the world are we going to do with that in an individual case? We won't know what the defect was.

We won't know when or during what period of time, what brand or

[Page 35916]

brand style. What in the world are we going to do with that finding?

And I know we deferred fraud until tomorrow, but there couldn't be a better example there. When you look at our verdict form, you'll see we are begging for specificity in order to have a meaningful determination.

Let's say the jury checks "Yes" to the following question: "Have one or more of the defendants made a material misrepresentation of fact?" Yes. What in the world –

THE COURT: We'll take that up tomorrow. I understand your position. We'll save that one for tomorrow.

MR. ROSENBLATT: I think if you analyze all the arguments, what I've heard here today, I haven't been listening as closely as Susan, but I've been listening closely enough to have my suspicion confirmed beyond a shadow of a doubt that what their experts have told them, and since their whole game in the last half century of litigation is that they are – what they are pretending to the Court and what they are essentially misrepresenting to the Court is that they are so concerned about a proper tie-in between the verdict reached in Phase I and subsequent verdicts, when the

* * *

[Page 35953]

MS. ROSENBLATT: We had objected yesterday. Your Honor, when we originally discussed this and submitted our verdict forms before the trial started, Your Honor had stated that it was clearly not your intention to start having the jurors fill in information; that that's not – it's absolutely contrary to the standard verdict forms, and especially when you're talking about many hundreds and hundreds of things, to expect them to have photogenic memory and to do that.

This is not a college examination. The appropriate way is, if you're going to be specific, you give them the question, and then they answer it "Yes" or "No," based on the evidence in the case.

I mean, it's very unfair, and it would be very unusual and very unfair to the plaintiffs to present it this way.

MR. KIRBY: Your Honor, consistent with the discussion that we had yesterday about the need for a verdict form in Phase I that we can carry into Phase II and Phase III, so that it has meaning, we believe that there has to be some degree of specificity.

If you merely ask this jury whether the defendants made a misstatement of a material fact, and they are not required to identify what it is, when you

[Page 35954]

go into the Phase II and Phase III trials of the individual smokers' claims, that finding will have no meaning.

So we believe that, for it to have meaning going forward, it needs specificity.

So how do we go about doing that?

I think what is incumbent upon all of us is to identify what are the claimed misrepresentations of material fact; and if those are going to be enumerated then so be it. But without doing that, for the life of me, I can't figure out what we do with a finding that some defendant at some time made some misstatement of fact.

I would also point out, Your Honor, that the plaintiffs' proposed question makes reference to members of the public. We think that is an inappropriate reference. It's defined on a tag line on their Question No. 4.

There is no such thing in Florida as fraud on the public. And the public is not a party; the plaintiffs in this case are current or former smokers who claim to have been injured by reason of their addiction to cigarettes that contain nicotine.

Secondly, plaintiffs' question makes reference to concealment of a material fact. And under

[Page 35955]

Florida law, there is no independent cause of action for concealment unless you owe a fiduciary or other form of special duty.

What you're really talking about here is claimed misstatements of fact. And now I would readily concede to Your Honor that what can make an affirmative statement misleading is the failure to disclose something else. But the issue of failure to disclose or concealment never arises unless an affirmative representation is false.

So we also don't believe that reference to concealment of a material fact is an appropriate question under Florida law. And we can argue that in more detail if Your Honor cares, even now or when we get to the proposed jury instructions.

MS. ROSENBLATT: Well, concealment is very much a part of this case because the defendants have published and uttered thousands upon thousands of statements about their product, the relationship of smoking to disease over periods of years.

And once they start discussing and being interviewed on shows and appearing before Congress and presenting booklets by the Tobacco Institute and articles by CTR officers and employees of CTR, it's got to be truthful, and it's got to reveal everything

[Page 35956]

relevant to the subject.

So if con – concealment is very much a part of it. That's why I went into some detail that Florida law recognizes that once a manufacturer speaks, he must speak truthfully.

And yes, it's misleading; but it's also a matter of concealing; half truths, not telling everything, not providing the information. So concealment is very much a part of the fraud.

MR. HEIM: I would add, Your Honor –

I'm sorry, Rick, maybe we both have the same thought.

Not only is concealment not properly part of this question, but when we get to jury instructions, we will, of course, as I know Your Honor expects us to do and maybe plaintiffs have, although I haven't

checked, submit an instruction – a proposed instruction on preemption. Preemption would apply to concealment; it would not apply to an affirmative misrepresentation.

But a concealment after the operative date would be part of the preemption issue. But in any event, it shouldn't be in this question.

MR. KIRBY: Also, Your Honor, I would point out that in Plaintiffs' Proposed Question No. 4, you will see the phrase "or being without knowledge as to

* * *

[Page 36479]

I don't think I ever have.

Now, the next doctor I'm going to talk about I know you're going to remember because he was very unusual. We talked about some doctors who were in their 80's. Dr. Michael Siegel, from the Boston University School of Public Health, is a guy about 34 years old, and he's a tiny guy and has a little bit of a squeaky voice. Appears even younger, but he is a brilliant, brilliant doctor. Shows you across the spectrum there are dedicated people. There are dedicated people who are asking: Not what my country can do for me, but what I can do for my country and for my fellow Americans. And we're grateful to have such people.

He was a Phi Beta Kappa graduate from college. He got his MD from Yale; worked for the San Jose California County Health Department, managing the addictions of heroin and cocaine addicts.

And Dr. Michael Siegel, who had that hands-on experience, with heroin and cocaine addicts, said: Nicotine addiction is worse. You very seldom see a

heroin or cocaine addict in their 60s or 70s, but nicotine addicts in their 60s or 70s are very, very common.

That was from his hands-on experience. For

[Page 36480]

13 years he has researched and studied and written about tobacco industry behavior, the main focus of this trial, tobacco industry behavior.

What was he looking at? Were they honest? Were they honest with the public? And his answer was a resounding no, they were never honest with the public; they constantly lied to the public to increase their bottom line.

And he studied for years child psychiatry as it relates to smoking. He is the author of a book on marketing and public health.

So we go to this issue. We go to this issue and I just – I grit my teeth. I grit my teeth. And I say to myself: Can anyone buy this –

MR. REID: Objection, Your Honor. Counsel's opinion.

THE COURT: Overruled.

MR. ROSENBLATT: Can anyone believe this when this incredibly rich industry that spends billion, billion, $5 billion a year on advertising and promotion, they come in and they dance in here and smile and tell their little: Yeah, but we're not after new smokers. We don't want new smokers. No, we don't want to replace the dying and the quitters; we just want switchers. We just want – so I asked Dr. Siegel,

[Page 36481]

an expert, Line 14 : Dr. Siegel, in the course of your career, have you had an occasion to do research on and actually write articles which were published in peer-reviewed journals about the advertising effect or impact of tobacco advertisements on youth?

Answer: Yes.

And what is your opinion on that subject, the impact or lack of impact of tobacco advertising on youth?

Next page. So he starts his answer at the top of this page: My opinion is that it's clear from the research literature that cigarette advertising does have an impact on youth and specifically cigarette – here's the bottom line. Here's the bottom line which just blows away the nonsense: Specifically, cigarette advertising causes kids to start smoking. I think the best estimate from the literature is that approximately one out of every three kids who starts, the scientific literature, well researched, well documented in peer-reviewed literature, going to Line 16, indicates that approximately one out of every three children who start smoking start because of cigarette advertising.

Do a lot of kids start to smoke simply because their buddies smoke, simply because they think it will make them more popular with the opposite sex?

[Page 36482]

Of course. Of course. We don't say that 100 percent of new smokers do it because of advertising.

Dr. Siegel says about a third. And they say zero, which is an insult to your intelligence, just an insult to your intelligence. Zero.

Dr. Siegel goes on in Line 18: In other words, if you were to eliminate cigarette advertising, if there was no cigarette advertising, then we'd only have two-thirds of the smokers that we have now.

Question on Line 22: So the research reveals, as to the other two-thirds, what causes most kids to begin smoking?

Answer: Well, there's a variety of factors, including influences of parents and peers, social influences, but the point I'm trying to make – but the point I'm trying to make is that cigarette advertising is a big chunk of the cause for kids to start smoking.

Then my question on Line 13: Based on your research, the tobacco advertising and its impact on nonsmokers, do you have an opinion on the subject of whether tobacco advertising is only used to get present smokers to switch from one brand to another?

Answer: I think it's very clear that cigarette advertising is not merely intended to get people to switch brands. It's clear that cigarette

[Page 36483]

advertising is intended to recruit new smokers, specifically among kids.

Now, ladies and gentlemen, that's got to be consistent with your common sense and it's got to have a ring of truth to it. And you know – and if it doesn't, there's nothing – there's nothing that I can say. But it truly must.

You're getting good at this.

Line 17 on this page: Dr. Siegel, based on your reading of the scientific literature, based on all your

research, what was it that the tobacco industry did not turn over to the public health community in the areas of disease, causation and nicotine addiction?

And he answers the question, starting on Line 24: Basically, the tobacco industry failed to turn over all of the information that they had, starting at the top, that they had about the health risks of cigarettes and about tobacco addiction.

And going to Line 5 – and this is a researcher and a writer on this very subject, who says, beginning on Line 5, Dr. Siegel says: They knew in the early 1950s nicotine was the specific agent that addicted. They knew in 1962 the mechanism by which nicotine works, specifically on the hypothalamus and pituitary in the brain. They knew of the mechanism of

[Page 36484]

nicotine addiction that specifically nicotine changes the receptors.

Then he continues with his answer on Line 16: The companies knew specifically the mechanism by which nicotine was addictive and acknowledged this and explained it in the early 1960s, specifically that nicotine changes the receptors to the brain so that the body cannot respond to stress. And without nicotine in the body, the body cannot have a normal reaction to stress. It creates an unconscious desire among the individual to have to take more nicotine into the body in order to be able to appease those receptors, to satisfy the receptors in the brain.

Looking at Line 2, talking about the tobacco companies: They knew in 1966 that by controlling the pH, by controlling the acidity of the cigarette,

they could increase its amount of nicotine that was present in that free form in order to enhance the nicotine delivery to the smoker.

Then the next paragraph he's talking about how they knew how to add ammonia to enhance the amount of nicotine in the free form and enhance the addictive nature of the cigarette.

And continuing on Line 14. The companies also knew back in 1953, 1953, that cigarettes were

[Page 36485]

carcinogenic; that they caused cancer. They clearly knew this in 1953. That information was never disclosed to the public. They also knew that cigarette smokers compensate for the loss of nicotine in a cigarette by inhaling more or less.

So they knew everything.

So Dr Siegel is asked on cross examination this question – getting back to the concept, well, everybody is entitled to their opinion, that's right. I suppose within certain boundaries, everybody is entitled to their opinion, but intelligent people who are studying an issue are entitled to make a judgment that this person doesn't know what he's talking about. This person just doesn't know what he's talking about, compared to that person. I mean, that person has the qualifications and the background to speak about something.

If somebody says – somebody is entitled to the opinion that Mark McGwire is not a good home run hitter, but no one who knows anything about baseball is going to spend five seconds talking to that person, because that person obviously doesn't know what they're talking about. They're entitled to an opinion,

they shouldn't go to jail for expressing an opinion, but obviously they don't know anything about baseball or

* * *

[Page 36659]

Plaintiffs' Exhibit 3172, a one-page document, August 24, 1978, talking about: What did consumers know about nicotine?

This was an in-house tobacco company document which states a very simple basic truth. People today, people back in the '70s, smokers, they heard about nicotine. They heard the expression "nicotine fix."

Did the average person know that you inhale the smoke and the nicotine goes into your lungs, gets to your heart, gets to your blood circulation and hits receptors, binds to receptors in the brain within ten seconds?

Very few Americans understood that, and this in-house document recognizes that, when they say: Very few consumers are aware of the effects of nicotine, it's detective nature, and that nicotine is a poison.

So you've got Addison Yeaman acknowledging in 1963 that nicotine is an addictive drug, and here you have H.D. Steele acknowledging in 1978 that nicotine is addictive.

Then he says: Most smokers view nicotine as the number that follows the tar figure on cigarette packs, making the point that most smokers aren't interested in and they've never studied. They don't really have a clue as to what nicotine is all about.

* * *

[Page 36664]

So I know I may be jumping around from one topic to another topic to deal with certain of these exhibits, but I think it's obvious to you now from your review of the testimony and from your recollection of the documents what any given document relates to.

Is Plaintiffs' Exhibit 3502, where there are certain conclusions. And this is in 1973:

A historical review of smoke pH of competitive brand cigarettes has shown that the Marlboro and Kool cigarettes have had higher smoke pH than the other competitive brands since 1964.

Over the years studied, there was a very strong positive correlation between smoke pH and sales. An even better correlation was observed between free nicotine in the smoke and sales. The physiological strength of a cigarette which may be controlled to some degree with smoke pH is extremely important.

What they're saying in this document is that the most successful cigarettes, Marlboro and Kool, have a higher smoke pH, which is the ammonia regulation.

And the bottom line of that is getting more free nicotine into the mix, which gets to the brain faster and has a greater impact on the brain than the bound form of nicotine. And they're using obviously there is a relationship between the amount of free

[Page 36665]

nicotine present in the smoke and sales. And sales.

Plaintiffs' Exhibit 3550, dated January 23, 1975. You've heard the term "young adult." Young adult. And they know what they're talking about when they

say young adult. It's a code word. It's a code word for teenagers. And look how it's defined in this tobacco industry document:

To increase our young adult franchise, to ensure increased and longer term growth for Camel filter, the brand must increase its share penetration among the 14 to 24 age group, which have a new set of more liberal values and which represent tomorrow's cigarette business.

And that's acknowledged time and time again: The base of our business is the high school smoker. Tomorrow's business is dependent upon kids. It's just a reality.

People – it's the very rare person who has been a nonsmoker and is 28 years old and starts smoking, or 32 years old. That's almost unheard of. The great majority, 90 percent or more of people who become regular smokers, start as teenagers.

That's where the money is, and no one knows it better than them.

Plaintiffs' Exhibit 4446, dated March 21,

* * *

[Page 36673]

You sold more of your poison than the other guy's poison, and you put your conscience on hold and you can become a great success and very wealthy in the tobacco business.

I said this was low tech, but I didn't realize how low.

THE COURT: If you need a minute, take a couple of minutes.

MR ROSENBLATT I need a minute. But I don't need –

Okay. This is Plaintiffs' Exhibit Number 3013, marketing plans presentation at Hilton Head, September 30th, 1974. And it has to do with marketing plans, Plaintiffs' Exhibit 3013:

Our paramount marketing objective in 1975 and ensuing years is to reestablish RJR's share of marketing growth in the domestic cigarette industry. We will speak to four key opportunity areas to accomplish this.

And number one is: Increase our young adult franchise. First, let's look at the growing importance of the young adult in the cigarette market. In 1960, this young adult market – and here they are defining again the young adult is 14 to 24 – represented 21 percent of the population. As seen by this chart, they

[Page 36674]

will represent 27 percent of the population in 1975.

They represent tomorrow's cigarette business, they represent today's cigarette business, and they represent yesterday's cigarette business. These kids.

And these shameless purveyors of an unhealthy, unnecessary product have historically done everything they could to hook these kids. And they have been incredibly successful.

As this 14 to 24 age group matures, they will account for a key share of the total cigarette volume for at least the next 25 years.

It's so great to get the 14 or 15-year-old smoking your brand, because by the time he's 60, look – at all

the years. If he's a two-pack-a-day smoker, boy, that's profit. That's profit.

And that's the reality. That's when people start smoking cigarettes.

And when you go over these documents, you will be struck by the fact that because the tobacco industry in this country learned early on how to play the political game, and they were very skillful at it, they weren't afraid of anybody. They weren't afraid of anybody.

If a president or a vice president came down or said bad things about cigarettes, they would send

* * *

[Page 36720]

And even with respect to Europe, they are underhanded and they don't deal directly with the laboratory in Germany, but they use the laboratory or the facility in Switzerland and a go-between to get the information to Germany.

Plaintiffs' Exhibit 1608, a document to Dr. Robert Hockett, who is the director of the Council for Tobacco Research. This is in handwriting. It's authored by Dr. Helmut Wakeham, and basically it says: You know, after you get this, throw the paper away. Throw it away. Destroy it.

Plaintiffs' Exhibit 3277, dated – this is a 1958 document which says: The guilt complex is a simple matter. We tend to suffer from the externally repressed fear that our opponents are right and we are wrong on the health question, and that we are thus devoting our business lives to the propagation of lung cancer.

The man is saying this in 1958. And then he says: Benzopyrene must go. This compound must be removed from Marlboro and Parliament, or sharply reduced.

Benzopyrene, nitrosamines, phenols, polycyclic hydrocarbons, 1999, are still in all these products. Still in all these products. And the

[Page 36721]

average smoker has no idea. Carbon monoxide and nicotine, that's what the average smoker knows.

Plaintiffs' Exhibit 3383. This is a document dated 1978. Notes on group research and development conference, which says: There has been no change in the scientific basis for the case against smoking. Additional evidence of smoke dose-related incidence of some diseases associated with smoking has been published, but generally this has long ceased to be an area for scientific controversy.

1978. You heard witness after witness after witness: There's no controversy. No controversy. Cigarette smoking causes this whole host of diseases.

Plaintiffs' Exhibit 5676. This is a 1967 exhibit of Brown & Williamson, enunciating the company position on cigarettes and health. And this document says: In view of the concern by many regarding the health of cigarette smokers, Brown & Williamson is constantly on the alert for new knowledge from our laboratories and elsewhere about anything that might be harmful in cigarettes. We have found no connection between cigarettes and any sickness, nor has anyone else.

Now, here is someone that's aware of the 1962 Report of the Royal College of Physicians. It's been

* * *

[Page 36729]

Esty Advertising in 1958: The Study of Attitudes Toward Cigarette Smoking Among High School Students.

And ladies and gentlemen, the only thing that's changed in recent years, as the tobacco industry has become more sophisticated and more slick and more politically correct, is they realize they can't admit to the American people that they are targeting kids, that they are going after kids.

And they use every torturous device to try to avoid that.

Give me a minute.

Believe me, I know this is not fascinating. But if it serves that when you're – we have no idea how long you're going to take to deliberate. And if this assists you, if this assists you that when you're having a discussion in the jury room and someone refers to a document or someone refers to their notes, and you can go to one of the exhibit numbers that you've written down, hopefully – hopefully that will be valuable. And I'm going to be stopping in a half hour or so.

Now, the next group of tobacco documents I will address have to do with addiction issues, and this includes the manipulation of nicotine levels by increasing nicotine in cigarettes through adjustments

[Page 36730]

of pH, or the addition of ammonia; and it also includes research on nicotine establishing its addictiveness.

Now, during the 1970s and 1980s, Lorillard conducted an extensive research program wherein nicotine was manipulated through adjustments in pH and the addition of ammonia.

And I'm not going to go through each of these lengthy reports, but I will give you the exhibit numbers and the title of each report.

262: Nicotine Augmentation Project, which simply means how to increase nicotine;

Exhibit 3213: Application of Free Nicotine to Cigarette Tobacco and the Delivery of That Nicotine the Cigarette Smoke;

Exhibit 3000. PH of Smoke: A Review;

264: Final Report, Intermediate Stage, Nicotine Augmentation Project;

3062: Nicotine Manipulation, Migration and Reaction Mechanisms;

3092: Vapor Phase Removal and Nicotine Augmentation With All Air Dilution Cigarettes.

And just the titles alone and the testimony from some of the scientists you've heard show you the incredible level of sophistication at which the tobacco companies operate; and how easy it is for them to

[Page 36731]

manipulate nicotine to get the desired result, to get that free nicotine to the brain quickly and to have an impact, the basic goal and purpose being to keep the smoker smoking. It's no more complicated than that.

There are a large number of Brown & Williamson tobacco documents that reveal the ammonia technology at Brown & Williamson that increases the smoke pH, and thereby the free nicotine.

And this, in turn, increases the impact of nicotine on the brain on the smoker. It enables lower nicotine tobacco blends to have the impact of a much higher nicotine level, because even though the nicotine number is lower, if the percentage of free nicotine is greater, it has a greater – it has a greater impact on the brain.

And a few of the many documents that address these issues of manipulating levels of nicotine through ammonia and pH from Brown & Williamson would include 3076, 1677, 3189, which is a handbook of ammonia technology. That's how sophisticated they are: ammonia technology.

One of the ways that Brown & Williamson has manipulated nicotine levels so as to alter the normal tar-to-nicotine ratio is through the genetically altered Y-1 tobacco that yields higher nicotine with

[Page 36732]

lower tar and was grown in Brazil.

And some of the Brown & Williamson documents that address the Y-1 tobacco included: 3492, 3481, 3537, 3466, and 3195, which is a presentation by Brown & Williamson on Y-1 tobacco.

After all the lawyers get done talking, what happens next in this eight-month marathon is that Judge Kaye will read to you the instructions on the law. He will tell you what the law is.

But, you know, it's an interesting division and a lot of people are confused. A lot of intelligent people are confused. What is the role of the judge and what's the role of the jury? You would be amazed how many intelligent people are confused about that.

Obviously, you've learned in the last eight months you are the judges of the facts. The Judge doesn't decide, but you decide: Do I believe Witness A, or do I believe Witness B, or do I disbelieve both of them? That's the jury's decision. That's the jury's decision.

You've learned in the last eight months, however, the Judge decides what you hear and what you see. Because if the Judge decides that a piece of evidence – he decides not to admit it, it doesn't get in and you never see it. If the Judge sustains an

* * *

[Page 37048]

been many theories.

Those are just a few you heard about in this trial. There have been many theories over the years, yes.

The key point is these companies, every time science suggested one, they tested it and tried to do something about it. Conduct. Conduct. Caring about the health of its customers. That's what that's about.

Now, there was something else you heard about called general reduction.

Since we don't know which component is the bad actor, science developed this concept: Well, if you reduce everything, then whatever's bad will be reduced and that will be good.

So they went about general reduction. And this follows this whole idea of less is best.

And Dr. Townsend had a chart for you about general reduction techniques.

General – I don't want to take your time today to remind you of all the evidence. Certainly you

remember filters. This industry invented filters back in the '50s. That was an important thing.

You heard about reconstituted tobacco. That was a technique using the stems, that you could use that product and make reconstituted tobacco. The

[Page 37049]

industry invented that; expanded tobacco.

Remember, that's like popcorn. Sometime during the trial we had two jars, and one had expanded tobacco, one had regular. If you remember, the expanded took the whole jar, and the regular just took part of it.

Design changed. Reduced circumference was one of the possibilities.

Then the whole idea of ventilation. The idea there was, if you mix the smoke with air, it would reduce the compounds in the smoke. And the use of more porous paper and the use of faster burning paper.

So this industry went step by step and – you know, it's difficult – we talked about this a little yesterday. It's difficult to sometimes think that things are not like they have always been in our experience.

I mean, now as you look around, you see cigarettes, they all have filters, it seems they all have these things.

But you have to realize, and your job in this case, when you go back, as you're required under these claims, to 1954 – I'm pointing to the Frank Statement over there so you know where I'm pointing to. I put the board over there – you have to go back and

[Page 37050]

remember that things weren't always the same. Somebody had to invent these things. Somebody who cared about the health of its customers had to invent them, and those are the things that the tobacco companies invented.

So I think a fair question now – that's the conduct that you heard about. So the question is: How do you judge that conduct? Are they doing the right things?

Well, you heard testimony about that probably from a surprising source. You heard that testimony from witnesses that the plaintiffs brought in Dr. Richmond, a Surgeon General, that you heard about, he talked about this subject. And during the questioning back in – gee, that's a long time – 10/21. He might have been the first day. He talked about changes in production technology, tobacco sheet reconstitution, improvements in filtration, other changes, manipulating the tobacco to make it less hazardous.

Dr. Richmond told you about all of those types of things.

Dr. Benowitz, plaintiffs' expert witness, who testified about addiction and other things. Again, he talked about some of the same things, filters. He said

[Page 37051]

that was probably the most important stuff.

Other design changes have taken place. Reconstituted tobacco he thought was important.

Expanded tobacco. These have been used to reduce tar and nicotine yields. More porous paper, design technique to bring the tar and nicotine down.

So you heard from Dr. Benowitz what this industry was doing. And even before the Surgeon General, even before the '64 Surgeon General's Report, so you don't think this company was ignoring the science and sitting on its hands, started in the '60s with filters. So there was some work even before the Surgeon General's, and you heard about that.

So, ladies and gentlemen, this industry was doing what these people, the professionals in the health community, thought they should be doing.

And, so, now I think it's fair to talk about what was the result of this work, and I want to show you a board.

Can everybody see that?

Ladies and gentlemen, that board is the result. Now, if you remember, the way to read that board is the tar levels are on the left side and the yellow line going down. So the 40 is tar, down to 5 and zero. And then nicotine is a different scale on

[Page 37052]

the right side, starting with 4 and going down. It is in the orange.

What you see there is, in 1954, the average was 38 milligrams of tar, and today the average is down to 12.

And with, nicotine – and you remember nicotine naturally follows tar. Generally, if you reduce one, you reduce the other. The nicotine went from 2.7, if

you look on the right side, and bring it across, about 2.7, down to .09.

And if you figured it up, what you would find is that that is a 68 percent reduction, 68 percent reduction in tar and nicotine.

And is that a lot? Well, Dr. Wynder again, said 40 percent would be a good goal to shoot for.

And this industry exceeded that. And as Dr. Townsend told you, that today the highest-tar product which his company sells is lower in tar than the lowest-tar product Reynolds sold in 1954.

And today the companies have offered consumers a wide range of products.

In fact, you heard testimony, some all the way down to. 01 – that's completely at the bottom there of tar – and .002 of nicotine.

Now, in thinking about this evidence, there

* * *

[Page 37162]

not manipulated up, went down. And I'm going to discuss how plaintiffs' ammonia theory that they heralded so much in their opening statement and mentioned in closing was rejected even by their own witness. And I'm going to show you the testimony on that.

And I'm going to add to Ben Reid's remarks when he talked about the efforts of the companies, and I'm going to focus specifically on what Brown & Williamson has done and what American Tobacco Company has done to respond to the smoking and health issue. The plaintiffs are wrong in their

claims, ladies and gentlemen, because the evidence shows that the companies did all that could be done.

Now, let me preview point two for you: The risks of smoking are known. Beyond their claims of negligence, strict liability, the claims make the inherently incredible claim that they did not know the risks of smoking; that the risks were hidden; they were fooled. And that's the claim: The defendants committed fraud, concealed unknown facts and conspired to keep smokers from knowing the risks. They claim the defendants somehow hid from smokers that it would be somehow difficult to quit. Of course, it's the smoker that's smoking; the smoker that's finding it difficult

[Page 37163]

to quit, but somehow that was hidden from the smoker. And really, that's the essence of their case: They didn't know the risks.

Now, ladies and gentlemen, one of the greatest assets you have in deciding this case is your own common sense. And by common sense we mean your good, old-fashioned ability to tell what makes sense and what doesn't, what's logical and what's not, what people really do and what they don't do.

And ask yourselves, ladies and gentlemen, ask yourselves, in light of your experience and common knowledge, in light of your own experience and common sense, and in light of the evidence, wasn't there widespread common knowledge of the risks of smoking before any of us walked into this courtroom? And doesn't that in and of itself prove that the risks were not hidden? Of course it does.

And how did the risks become known? Because the companies funded research, because the governments researched this issue extensively, and because the risks were continuously, constantly, widely publicized.

So the defendants didn't hide the risks. They couldn't. It would be impossible. You can't hide what's already known.

So the fundamental premise of their claim

[Page 37164]

that they didn't know the risks makes no sense. It's defied by the overwhelming evidence, and I submit it's defied by your own common sense.

Now, realizing that they could never convince you that the risks of smoking were not known, what the plaintiffs' claim in this case is that there was some particular facts they didn't know, which was somehow concealed or hidden from the public health community, which plaintiffs claim would have made a difference to them.

They assert that we hid the health effects of smoking, and we hid the effects of nicotine, and we hid the very claim that nicotine might be classified as addictive.

And even though you heard in this case that there were articles in the public literature for decades and decades and decades, they suggest they never heard of the idea of addiction until 1994.

Now, these claims all come under the banner of fraud and concealment and conspiracy, and I'm going to address them under point two.

Contrary to the plaintiffs' allegations, the evidence shows, and I'm going to show this to you very directly, that each of the things that they say were hidden was not; it was known to the public health

* * *

[Page 37211]

want to just go to the third sentence there – well, let me read you the whole question: I'm going to come to that part of what you talked about yesterday. But I want to stay with what we know in terms of evidence and facts that support charges and theory. And my question to you doctor is, simply, you have not seen any imperical evidence, any fact factual data that shows that the ammonia used by Philip Morris in making its commercial cigarettes has any effect on the pH of smoke?

Answer: Dr. Benowitz, that's correct.

So you had a theory and in practical application, ammonia did not increase pH. And in addition, all the witnesses agree that spoke about it, had knowledge, Dr. Benowitz, Dr. Dixon that free nicotine that gets absorbed in the throat, doesn't get to the brain faster; it gets there slower. Bound nicotine goes into the lungs, gets into the brain faster. That's why Dr, Benowitz said bioavailability, absorption rate wasn't increased.

And finally, ladies and gentlemen, there is no evidence that there's any correlation between ammonia and sales. If that was the case, all products would use ammonia. They don't.

You heard Dr. Dixon say that BATCO's products

[Page 37212]

don't use it, Kool cigarettes, 1960s, '70s, never used any ammonia. No correlation between pH and sales.

And you may recall this chart that you saw with Dr. Towsend, 798, in which shows the pH varying over time as the blends vary up and down between 6 and 6.3; which, by the way, now that we're all pH experts, is acid, 0 to 7 is acid, 7 is water, above 7 is base. And the acid range, remember what I said, acid, acidic, very low free nicotine. Sales going down, pH of the blend moving up and down. No correlation.

So in the end, as Shakespeare said: A lot of sound and fury signifying nothing.

Now, ladies and gentlemen, plaintiffs' allegation about cigarette design, about manipulation, fell apart in this case. The evidence shows that the companies responded to smoking and health issues. They pursued every possible technique to lower tar. They pursued novel devices, and they did exactly what you would expect a company to do with a product with known risks: They tried to find ways to lower the risks and give consumers a choice.

You heard the plaintiffs suggest in this case that companies didn't live up to their responsibilities, but we did. What are our responsibilities? The plaintiffs argued that because

* * *

[Page 37558]

that have come to trial, and before instructing you on the law, I want to discuss with you your role as jurors in this case.

In a typical lawsuit, the jury hears testimony from the litigants, including the plaintiffs, the parties bringing the lawsuit. Ordinarily, the plaintiffs would testify about their claims and describe their medical conditions and their damages. However, this case is not typical, because it is not brought on behalf of one or two individuals, but rather on behalf of a group or a class of individuals.

The Florida class is a state-wide class consisting of all Florida citizens and residents and their survivors who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.

Because the size of the Florida class and the complexity of the issues, the Court has determined that all common liability issues would be tried before a jury in a single trial. This common issue trial has addressed the conduct of the tobacco industry. This trial did not address issues as to the conduct or damages of individual members of the Florida class. Those issues are not relevant during this trial.

[Page 37559]

The Court has determined that the conduct of class members is not relevant to the issues presented in this common liability trial, and therefore, you did not hear testimony from any members of the Florida class who are plaintiffs bringing the action. You should not hold it against any of the class representatives or class members that they did not testify before you or provide you with their medical records or other information, because that was the decision of this Court.

You will not determine any issues regarding the conduct of individual class members of the Florida

class, including any issues as to compensatory damages for individual class members. You will, however, consider the issue of entitlement to punitive damages, since punitive damages address only the conduct of the defendants.

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only the issues that I submit for determination by your verdict. And in reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to the facts as you find

* * *

[Page 37564]

Committee, to create a false controversy regarding cigarettes and disease, and to create doubt in the minds of smokers as to whether smoking is hazardous to health and whether smoking is addictive.

Plaintiff class members further allege that there's been a conspiracy to entice new smokers, consisting of underage smokers, women and minorities to make up for the smokers who are dying or who have been able to quit.

On the claim of negligence, the issues are whether one or more of the defendants were negligent in manufacturing, designing, marketing, selling and distributing cigarettes which defendants knew or should have known would cause serious and fatal diseases, including lung cancer, or dependence-producing substances; in negligently not testing tobacco and commercial cigarettes to confirm that

smoking causes human disease; in failing to design and produce a reasonably safe cigarette with lower nicotine levels; in negligently measuring and understanding – excuse me – understating nicotine and tar levels in low-tar cigarettes; and in failing to warn smokers of the dangers of smoking and the addictiveness or dependence-producing effects of cigarettes prior to July 1 of 1969.

* * *

[Page 37571]

and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer, or the risk of danger in the design outweighs the benefits.

If you find against one or more of the defendants, you are also to consider whether the defendants' conduct occurred before or after July 1, 1974.

On the Florida class claim for fraud and misrepresentation, the issues for your determination are:

1, whether one or more of the defendants made a false statement concerning a material fact;

2, whether one or more of the defendants knew the statement was false when it was made, or made the statement knowing that said defendants were without knowledge of its truth or falsity;

3, whether in making a false statement, or in concealing material facts, one or more of the

defendants intended that another rely on the false statement or misrepresentation;

[Page 37572]

If you find against one or more of the defendants, you are to consider whether the defendants' conduct occurred before or after May 5, 1982.

On the plaintiffs' claim for fraud by concealment, the issues for your determination are:

1, whether one or more of the defendants omitted or concealed material facts that would be necessary to make statements by said defendants not misleading;

2, whether one or more of the defendants knew the statement was false when it was made, or made the statement without knowing – excuse me – or made the statement knowing that said defendant was without knowledge as to its truth or falsity, or knew of the existence of material facts that were not disclosed; and

3, whether in making the false statement, or in concealing material facts, one or more of the defendants intended that another rely on the omission or concealment.

Intentional concealment exists where a party knows of defects in a product and intentionally conceals them, or, while under no duty to speak, nevertheless voluntarily does so, but does not speak honestly or makes misleading statements or suppresses

* * *

[Page 37577]

A, whether one or more of the defendants engaged in extreme and outrageous conduct;

B, whether one or more defendants acted with the intent to cause severe emotional distress or with reckless disregard of the high probability of causing severe emotional distress.

Extreme and outrageous conduct is behavior which, under the circumstances, goes beyond all possible bounds of decency and is regarded as shocking, atrocious and utterly intolerable in a civilized community.

Emotional distress is severe when it is of such intensity or duration that no ordinary person should be expected to endure it.

The issue for determination on the negligence claims of the plaintiffs against each of the tobacco companies is whether one or more of the tobacco companies were negligent in designing, manufacturing, testing, or marketing of cigarettes. Another issue for your determination is whether one or more of the defendant tobacco companies were negligent prior to July 1, 1969 in failing to warn smokers of the health risks of smoking or the addictiveness of smoking.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a

* * *

[Page 50207]

Examples of exhibits that demonstrate that these class representatives smoked cigarettes with ammonia to increase the impact of nicotine, I'm going

to just give you some numbers now: Plaintiffs' Exhibit 3015, 264, 3502, and these exhibits relate to these three class representatives.

MR. WEBB: Your Honor –

THE COURT: He made a statement. He says these exhibits relate to his class reps.

MR. ROSENBLATT: To what they smoked and the time frame they were smoking it. Plaintiffs' Exhibit 3056, 1677 and 3076.

And these exhibits are examples that we introduced during Phase I that demonstrate the use of ammonia to enhance and increase the impact of nicotine in the very cigarette brands smoked by Mary, Frank and Angie. And specifically including the low-tar Reynolds Winston Lights that were smoked by Angie and Mary, and the Marlboros that were smoked by Frank during the last 20 years of his smoking career.

Now, defense counsel argued that it was unreasonable for Mary and Angie to assert in this case that the light cigarette advertising and promotion told them that lights were safer.

And I want to refer you to a series of

* * *

[Page 50223]

of people successfully quit without assistance. Let me explain that 50 million, and he went through a whole thing, and that will be in their notes.

Also, Your Honor, we can't change the rules at the end of the game, at the end of this trial. Our understanding – and now defense counsel says: We

were all wrong. It's like comparative fault wasn't an issue until a couple of days ago. We were all wrong.

Our understanding is we were not going to relitigate the issues in Phase I. To give you a specific example, ammonia. These people don't have a clue about ammonia. We're not about to put them on the stand and say to them: Well, this exhibit shows that ammonia was used to increase the impact of nicotine in Winston Lights, and there is such an exhibit, and we're well aware of it. But these people weren't aware of it.

THE COURT: When you say "these people," who are you talking about?

MS. ROSENBLATT: The class representatives. It's a concealment. It is in Phase I. It shows that ammonia was used to increase the impact of nicotine in Marlboros, Winston Lights in the '60s; Marlboros, the '60s, '70s, '80s; Winston Lights, starting in the '70s.

There are many exhibits like that. We

* * *