

Case No. SC16-218

SUPREME COURT OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Petitioner,

v.

PHIL J. MAROTTA, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF PHIL F. MAROTTA,

Plaintiff/Respondent.

On Discretionary Review from a Decision of the
Fourth District Court of Appeal

**APPENDIX TO REPLY BRIEF OF PETITIONER
R.J. REYNOLDS TOBACCO COMPANY**

Gregory G. Katsas
Florida Bar No. 89091
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
Telephone: (202) 879-3930
Facsimile: (202) 626-1700

Eric L. Lundt
Florida Bar No. 0861715
Robert C. Weill
Florida Bar No. 009962
SEDGWICK LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, Florida 33308
Telephone: (954) 958-2500
Facsimile: (877) 541-2740

*Counsel for Petitioner
(additional counsel listed on signature page)*

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<u>Exhibit*</u>	<u>Description</u>
A	Fourth District Opinion Under Review: <i>R.J. Reynolds Tobacco Co. v. Marotta</i> , 182 So. 3d 829 (Fla. 4th DCA 2016)
B	<i>Engle</i> Phase I Verdict Form (July 7, 1999)
C	<i>Engle</i> Trial Transcript Excerpt: Vol. 234, pp. 25740-50, 25760-68 (Mar. 2, 1999)
D	<i>Engle</i> Trial Transcript Excerpt: Vol. 299, pp. 32845-59 (Apr. 29, 1999)
E	Florida <i>Engle</i> Class Brief on the Merits, No. SC03-1856 (June 14, 2004)
F	<i>Engle</i> Phase II-A Verdict Form (Apr. 7, 2000)

*Exhibits B through F can be found on the *Engle* DVD which is a part of the record in this case (filed with this Court by the Clerk of the Fourth District on March 28, 2016).

Respectfully submitted,

/s/ Eric L. Lundt

Eric L. Lundt
Florida Bar No. 0861715
eric.lundt@sedgwicklaw.com
Robert C. Weill
Florida Bar No. 009962
robert.weill@sedgwicklaw.com
david.saltares@sedgwicklaw.com (secondary)
SEDGWICK LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, FL 33308
Phone: (954) 958-2500
Fax: (877) 541-2740

Gregory G. Katsas
Florida Bar No. 89091
ggkatsas@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700

Charles R.A. Morse
Florida Bar No. 0091561
cramorse@jonesday.com
preichert@jonesday.com (secondary)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
Phone: (212) 326-3939
Fax: (212) 755-7306

Counsel for Petitioner
R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I certify that on July 28, 2016, this appendix was e-filed with the Court and a copy was e-mailed to:

Richard B. Rosenthal, Esq.
Richard B. Rosenthal, P.A.
169 East Flagler Street, Suite 1422
Miami, FL 33131
rbr@rosenthalappeals.com
Counsel for Respondent

Robert E. Schack, Esq.
Law Office of Robert E. Schack, P.A.
9155 S. Dadeland Blvd., Suite 1412
Miami, FL 33156
reslegal@hotmail.com
iestevev4@hotmail.com (secondary)
Counsel for Respondent

Randy Rosenblum, Esq.
Philip Freidin, Esq.
Freidin Dobrinsky Brown &
Rosenblum, P.A.
One Biscayne Tower, Suite 3100
2 South Biscayne Blvd.
Miami, FL 33131
rrosenblum@fdlaw.net
ssorrentino@fdlaw.net (secondary)
pfreidin@fdlaw.net
Counsel for Respondent

Lora Damiani, Esq.
Lora Damiani, P.A.
c/o Law Office of Robert E. Schack
P.A.
9155 S. Dadeland Blvd., Suite 1412
Miami, FL 33156
loradlaw@att.net
Counsel for Respondent

Alex Alvarez, Esq.
The Alvarez Law Firm
355 Palermo Avenue
Coral Gables, FL 33134
alex@integrityforjustice.com
Counsel for Respondent

/s/ Eric L. Lundt

Counsel for Petitioner R.J. Reynolds
Tobacco Company

State, 802 So.2d 442, 446 (Fla. 4th DCA 2001) (“There is no impeachment exception to the *Richardson* rule. . . . In most cases, the decision whether a defendant will testify is a strategic call which can materially alter the outcome of a case. *A defendant’s ability to make an informed decision in this regard is certainly affected by the state’s nondisclosure of impeachment material discoverable under the rules.*”) (emphasis added).

Because we cannot say beyond a reasonable doubt that the defense was not procedurally prejudiced by the State’s discovery violation, we reverse appellant’s conviction for possession of a firearm by a convicted felon and remand for a new trial on that charge only.²

Sentencing

[15] Finally, we reverse appellant’s habitual felony offender sentences and remand for resentencing, as the State failed to enter into evidence proof that appellant had the qualifying prior convictions. Our reversal is without prejudice to the State attempting to prove on remand that appellant meets the requirements for sentencing as a habitual felony offender. *See State v. Collins*, 985 So.2d 985, 994 (Fla.2008) (“[W]e hold that when a habitual offender sentence is reversed because of insufficient evidence, on remand for resentencing the State may again attempt to prove that the defendant meets the criteria for such sentencing.”).

Affirmed in part, Reversed in part, and Remanded.

CIKLIN, C.J., and LEVINE, J., concur.



2. Because Counts I and II were tried separately from the firearm charge, this error does not affect appellant’s convictions for robbery

R.J. REYNOLDS TOBACCO COMPANY, Appellant,

v.

Phil J. MAROTTA, as Personal Representative of the Estate of Phil Felice Marotta, deceased, Appellee.

No. 4D13–1703.

District Court of Appeal of Florida,
Fourth District.

Jan. 6, 2016.

Background: Estate of cigarette smoker brought strict liability and negligence claims against tobacco company. The Circuit Court for the Seventeenth Judicial Circuit, Broward County, Jack Tuter, J., entered judgment for estate, and company appealed.

Holding: The District Court of Appeal, Ciklin, C.J., held that negligence and strict product liability claims brought against tobacco company were not preempted by federal law.

Affirmed; question certified.

1. States ⇌ 18.3

Whether a state law claim is preempted by federal law is dependent on the exact nature of that particular claim.

2. States ⇌ 18.3

Proper federal preemption inquiry calls for an examination of the elements of the common-law duty at issue, and it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action, a question, in any event, that will depend on a variety of

and assault that were obtained in the first trial. Nor would this error affect the violations of probation.

cost/benefit calculations best left to the manufacturer's accountants.

3. Antitrust and Trade Regulation

⌘132

Products Liability ⌘263

States ⌘18.65

Regulations, governing the labeling and advertising of cigarettes and banning states from imposing any separate regulations on the same activities, demonstrate an intent to prevent states from imposing differing laws on the labeling and advertising of cigarettes, but regulations do not indicate an intent to preempt states from banning the sale of cigarettes, a state right traditionally reserved within a state's police powers, or from permitting state tort claims relating to the production and sale of cigarettes. Federal Cigarette Labeling and Advertising Act, § 2, 15 U.S.C.A. § 1331.

4. Antitrust and Trade Regulation

⌘132

States ⌘18.65

Family Smoking Prevention and Tobacco Control Act (TCA), which grants the Food and Drug Administration (FDA) authority to regulate cigarettes, but specifically prohibits the FDA from banning cigarettes, contains no such prohibition to prevent the states from banning cigarettes, if they so choose. Family Smoking Prevention and Tobacco Control Act, Div. A, Title I, § 101(b)(3), 21 U.S.C.A. § 387.

5. Products Liability ⌘113, 263

States ⌘18.65

Negligence and strict product liability claims brought against tobacco company by estate of cigarette smoker were not preempted by federal law; federal tobacco laws expressly preserved a state's ability to regulate tobacco in ways other than manufacturing and labeling while declining

to modify or otherwise affect any action or the liability of any person under the product liability law of any State, and strict product liability claims did not amount to a ban on the sale of cigarettes.

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack Tuter, Judge; L.T. Case No. 07-036723 CACE (19).

Gordon James III, Eric L. Lundt and Robert Weill of Sedgwick LLP, Fort Lauderdale; and Gregory G. Katsas of Jones Day, Washington, D.C., for appellant.

Richard B. Rosenthal of The Law Offices of Richard B. Rosenthal, P.A., Miami; Philip Freidin and Randy Rosenblum of Freidin, Dobrinsky, Brown & Rosenblum, P.A., Delray Beach; and Alex Alvarez of The Alvarez Law Firm, Miami, for appellee.

CIKLIN, C.J.

In this *Engle* progeny case,¹ R.J. Reynolds Tobacco Company ("the defendant") appeals a final judgment entered in favor of Phil J. Marotta, as Personal Representative of the Estate of Phil Felice Marotta ("the plaintiff"), arguing that federal law implicitly preempts state law tort claims of strict liability and negligence based on the sale of cigarettes and that the use of the *Engle* defect finding resulted in a violation of due process. The plaintiff cross-appeals, contending that the trial court erred in precluding the jury from considering punitive damages on the products liability claim. We affirm on all issues pursuant to *Philip Morris USA, Inc. v. Douglas*, 110 So.3d 419, 424 (Fla.2013), *Engle v. Liggett*

1. See generally *Philip Morris USA, Inc. v. Douglas*, 110 So.3d 419, 422-25 (Fla.2013) (providing a concise summary of *Engle v.*

Liggett Group, Inc., 945 So.2d 1246 (Fla. 2006), and its progeny).

Group, Inc., 945 So.2d 1246 (Fla.2006), and *R.J. Reynolds Tobacco Co. v. Ciccone*, 123 So.3d 604 (Fla. 4th DCA 2013), *review granted*, 147 So.3d 526 (Fla.2014). However, we write to address the defendant's federal preemption argument, and to certify a question thereon to the Florida Supreme Court as one of great public importance.

The defendant very broadly argues that, because Congress has expressly sanctioned the sale of cigarettes, and because the practical effect of the *Engle* progeny litigation is to establish that all cigarettes are inherently dangerous and defective, strict liability and negligence claims are implicitly preempted by federal law allowing the sale of cigarettes.

This court explained federal preemption in *Liggett Group, Inc. v. Davis*, 973 So.2d 467 (Fla. 4th DCA 2007), as follows:

The doctrine of conflict preemption prevents state laws which conflict with federal statutes from being applied. Conflict preemption occurs where a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively or when state law is in actual conflict with federal law. Conflict preemption turns on the identification of actual conflict and not an express statement of preemptive intent. If Congress gives express sanction to an activity, the states cannot declare that activity tortious.

Id. at 471 (internal citations and quotation marks omitted).

[1] “[W]hether a state law claim is preempted is dependent on the exact nature of that particular claim.” *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1193 (11th Cir.2004) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). In *Cipollone*, the Supreme Court explained, “The central inquiry in each

case is . . . whether the legal duty that is the predicate of the common-law damages action constitutes a ‘requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion’ . . .” *Cipollone*, 505 U.S. at 523–24, 112 S.Ct. 2608 (quoting 15 U.S.C. § 1334(b)). *Cipollone* addresses causes of action of failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to misrepresent or conceal material facts, and a plurality of the Court “found that state laws which required a showing that warnings on cigarettes should have been more clearly stated, were preempted, and the state law claims based on the manufacturer’s practices of testing or research unrelated to advertising were not preempted.” *Davis*, 973 So.2d at 471. Accordingly, not all tobacco claims are preempted, “only certain ones.” *Id.* at 472.

Recently, in *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261 (11th Cir.2015), the Eleventh Circuit held that *Engle* progeny strict liability and negligence claims are implicitly preempted by federal law. *Id.* at 1280. Rather than defining a legal duty or duties imposed by Florida case law with respect to strict liability and negligence claims pursuant to the test propounded in *Cipollone*, the Eleventh Circuit identifies “[t]hree aspects of that litigation [that] inform how we characterize the duty it has come to impose on cigarette manufacturers”:

First, the *Engle* class definition does not distinguish among types of smokers, types of cigarette manufacturers, or types of cigarettes. It applies across the board. The class definition thus creates a “brandless” cigarette, one produced by all defendants and smoked by all plaintiffs at all times throughout the class period.

Second, the Phase I findings, given claim-preclusive effect by *Douglas* reading *Engle III*, concern conduct common to the class. . . . To avoid a due process violation, the Phase I findings must turn on the only common conduct presented at trial—that the defendants produced, and the plaintiffs smoked, cigarettes containing nicotine that are addictive and cause disease.

Third, the *Douglas* causation instruction removes the need to litigate brand-specific defects in *Engle*-progeny trials altogether. Progeny plaintiffs must only prove how their addiction to cigarettes containing nicotine caused their injuries, not how the specific conduct of a specific defendant caused their injuries.

Taken together, these three factors compel the conclusion that *Engle* strict-liability and negligence claims have imposed a duty on all cigarette manufacturers that they breached every time they placed a cigarette on the market. That result is inconsistent with the full purposes and objectives of Congress, which has sought for over fifty years to safeguard consumers' right to choose whether to smoke or not to smoke.

Id. at 1279–80. *Graham* concludes:

[A]s a result of the interplay between the Florida Supreme Court's interpretations of the *Engle* findings and the strictures of due process, the necessary basis for *Graham's Engle*-progeny strict-liability and negligence claims is that all cigarettes sold during the class period were defective as a matter of law. This, in turn, imposed a common-law duty on cigarette manufacturers that they necessarily breached every time they placed a cigarette on the market. Such a duty

operates, in essence, as a ban on cigarettes. Accordingly, it conflicts with Congress's clear purpose and objective of regulating—not banning—cigarettes, thereby leaving to adult consumers the choice whether to smoke cigarettes or to abstain. We therefore hold that *Graham's* claims are preempted by federal law.

Id. at 1282.

[2] We disagree with *Graham*, and we respectfully note what we believe to be flaws in its reasoning. First, *Graham* overstates the effect of the past ten years of Florida tobacco case law by equating it to a ban on cigarette sales. As one commentator notes, “tort verdicts (which are hardly uniform), do not always arise to a state law ‘standard’; sometimes they may only ‘motivate an optional decision’ for a defendant to behave differently.” Douglas J. McNamara, *What Were They Smoking? Why the Graham Court was Wrong*, LAW 360, May 14, 2015 (footnote omitted) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005)). “The proper [preemption] inquiry calls for an examination of the elements of the common-law duty at issue, see *Cipollone*, 505 U.S. at 524, 112 S.Ct. 2608 (plurality opinion); it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question, in any event, that will depend on a variety of cost/benefit calculations best left to the manufacturer's accountants).” *Bates*, 544 U.S. at 445, 125 S.Ct. 1788.²

Additionally, *Graham* suggests that state and presumably local governments cannot ban a product that Congress has

2. But see *Mut. Pharm. Co. v. Bartlett*, — U.S. —, 133 S.Ct. 2466, 2477, 186 L.Ed.2d 607 (2013) (holding that state design defect claims which turn on the adequacy of a drug's warnings are preempted by federal law and noting

that implied preemption is not “defeated by the prospect that a manufacturer could pay the state penalty for violating a state-law duty” (internal quotation marks and citation omitted)).

chosen to regulate. This blanket argument cannot withstand the test of experience and logic. For example, numerous so-called dry counties exist throughout the United States today despite federal regulation of alcohol.

[3] Furthermore, *Graham* relies in part on the 1965 Federal Cigarette Labeling and Advertising Act (“FCLAA”), *codified as amended at* 15 U.S.C. §§ 1331–1341, to conclude that Congress intended to preempt states from banning the sale of cigarettes. *See Graham*, 782 F.3d at 1277. In the “Congressional declaration of policy and purpose” of the FCLAA, Congress expressed its policy to ensure that “commerce and the national economy may be (A) protected to the maximum extent consistent with [the objective of adequately informing the public of the risks of smoking] and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.” 15 U.S.C. § 1331. It then imposed regulations for the *labeling* and *advertising* of cigarettes, and banned states from imposing any separate regulations on the same activities. We believe this only demonstrates an intent to prevent states from imposing differing laws on the labeling and advertising of cigarettes, which undoubtedly would have been cumbersome for cigarette companies to comply with, and would have in turn stymied interstate commerce of cigarettes. It does not, however, indicate an intent to preempt states from banning the sale of cigarettes, a state right traditionally reserved within a state’s police powers, or from permitting state tort claims relating to the production and sale of cigarettes. *See, e.g., Richardson v.*

R.J. Reynolds Tobacco Co., 578 F.Supp.2d 1073, 1077 (E.D.Wis.2008) (holding that the FCLAA did not implicitly preempt plaintiff’s strict liability claim and explaining that “Congress clearly intended to ‘protect the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations,’ *Cipollone*, 505 U.S. at 514, 112 S.Ct. 2608, but did not clearly intend to extend broad immunity from common law liability to cigarette manufacturers.”).

[4] *Graham* similarly relies in part on language from the 2009 Family Smoking Prevention and Tobacco Control Act (“TCA”), 21 U.S.C. § 387, which grants the Food and Drug Administration (“FDA”) authority to regulate cigarettes, but specifically prohibits the FDA from banning cigarettes. *See Graham*, 782 F.3d at 1278–79. However, it contains no such prohibition to prevent the states from banning cigarettes, if they so choose.

In fact, although the TCA expressly preempts states from regulating certain aspects of cigarette commerce such as labeling and manufacturing,³ it specifically acknowledges states’ rights to regulate other aspects of tobacco, including a state’s right to prohibit the sale of tobacco:

Preservation of State and local authority.

(a) In general

(1) Preservation

Except as provided in paragraph (2)(A), *nothing in this subchapter . . . shall be construed to limit the authority of . . . a State or political subdivision of a State . . . to enact, adopt,*

3. “No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this

chapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.” 21 U.S.C. § 387p(a)(2)(A).

promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age. . . .

. . . .

(b) Rule of construction regarding product liability

No provision of this subchapter relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State.

21 U.S.C. § 387p (2009) (emphasis added). These provisions of the TCA are curiously omitted from *Graham*.

[5] In sum, because *Engle* progeny cases do not support a conclusion that strict product liability claims amount to a ban on the sale of cigarettes, and because federal tobacco laws expressly preserve a state's ability to regulate tobacco in ways other than manufacturing and labeling while declining to "modify or otherwise affect any action or the liability of any person under the product liability law of any State," we find no conflict between the applicable state and federal laws. Accordingly, the trial court did not err in rejecting the defendant's argument that negligence and strict liability claims are preempted by federal law.

Recognizing the Eleventh Circuit's decision to the contrary, however, we certify this latest *Engle* progeny defense as a question of great public importance:

WHETHER FEDERAL LAW IMPLICITLY PREEMPTS STATE LAW TORT CLAIMS OF STRICT LIABILITY

AND NEGLIGENCE BY *ENGLE* PROGENY PLAINTIFFS BASED ON THE SALE OF CIGARETTES.

Affirmed; question certified.

GERBER, J., and JOHNSON, LAURA, Associate Judge, concur.



BEACON PLACE OF CORAL SPRINGS CONDOMINIUM ASSOCIATION, Inc., Appellant,

v.

NATIONSTAR MORTGAGE, LLC, Appellee.

No. 4D14-3655.

District Court of Appeal of Florida, Fourth District.

Jan. 6, 2016.

Background: Loan servicer brought foreclosure action against condominium association. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Peter Weinstein, J., granted summary judgment to servicer. Association appealed.

Holding: The District Court of Appeal, May, J., held that genuine issue as to servicer's standing precluded summary judgment.

Reversed and remanded.

1. Judgment $\approx$ 181(25)

Genuine issue of material fact as to whether loan servicer had standing to foreclose mortgage precluded summary judgment to servicer in foreclosure proceeding.

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

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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 ☐

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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				
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				
Before May 5, 1982	Yes	☒	No	☐
After May 5, 1982	Yes	☐	No	☐
Both before and after May 5, 1982	Yes	☒	No	☐
Liggett Group, Inc				
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.				
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.				
Before May 5, 1982	Yes	☒	No	☐
After May 5, 1982	Yes	☐	No	☐
Both before and after May 5, 1982	Yes	☒	No	☐
Tobacco Institute				
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
Tobacco Institute

Yes ☒ No ☐
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 Corporation, as

successor to American 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 ☐
 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-U.S.A	Yes ☒	No ☐
Tobacco Institute	Yes ☒	No ☐

SO SAY WE ALL, this 7th day of July, 1999

Neighton Anthony Finegan
FOREPERSON
NEIGHTON ANTHONY FINEGAN

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

25717

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W.
ANGELL, RAYMOND LACEY, FROZENE 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."), 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.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 234

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge,
at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on
Tuesday, March 2, 1999, at 1:30 p.m.

Miami, Florida **Taylor, Jonovic, White & Gendron** (305) 358-9047

W02065334

1 That compensation, if it occurs and to the
2 degree that it occurs, will be somewhere in the middle,
3 not complete; compensation is not zero. So it's
4 somewhere in the middle.

5 In any event, even with compensation, on the
6 average smokers as a group, if they're switched to
7 lower tar products, will get less tar and nicotine.
8 Not as much less as predicted by the FTC tar numbers
9 because that's an arbitrary standardized measurement,
10 but they still get less.

11 Q. Less than what?

12 A. Than if they were still smoking the higher
13 tar product.

14 Q. Now, let me change the subject again. It's
15 in this same area. I want to talk about pH and
16 ammonia.

17 There has been the allegation in this case
18 that the cigarette companies manipulate the nicotine in
19 a cigarette and they use ammonia as one way of doing
20 it. And there's also been testimony that the
21 defendants have raised the pH of the mainstream smoke
22 in order to increase the availability, bioavailability
23 of nicotine to the smoker, and one way it's been
24 claimed that it has been accomplished is by using
25 ammonia in the manufacturing process. Are you familiar

1 with those allegations?

2 A. Yes, I am.

3 Q. Is ammonia a natural constituent of tobacco?

4 A. There are ammonia compounds, ammonium
5 compounds in tobacco naturally, largely coming from
6 fertilizer application.

7 Q. Does the RJ Reynolds Tobacco Company use
8 ammonia or ammonium compounds in its reconstituted
9 tobacco process?

10 A. We have a number of different versions of our
11 reconstitution process. There are several versions
12 that use ammonia or ammonia compounds in that
13 processing, yes.

14 Q. Now, why do you do that?

15 A. We do that because ammonia and ammonia
16 compounds, we've known this for years, react with
17 sugars, particularly certain types of sugars that are
18 in the tobacco. They react to form a very flavorful
19 class of compounds called pyrazines, and some pyrazines
20 are also quite flavorful. So that's a well-known
21 series of reactions to form pyridines and pyrazines.
22 It affects the taste characteristics of the product.

23 Q. Now, when did Reynolds start using ammonia in
24 its reconstituted tobacco process?

25 A. The first commercial application was with

1 Camel in 1974.

2 Q. When was the next commercial application?

3 A. The next large commercial application was in
4 1979 with Winston.

5 Q. '74 was Camel, and '79 was Winston.

6 Now, was anything occurring in the
7 marketplace in 1974 that caused Reynolds to consider
8 using ammonia in its process?

9 A. Yes. One of the major things that was
10 happening in the market -- we had already done a lot of
11 research trying to understand the reactions between
12 ammonia and sugars and how those materials form
13 pyrazines, but in 1974 one of our competitors was
14 seeing increasing success in the marketplace and that
15 product was Marlboro.

16 And by trying to reengineer that product,
17 take it apart and understand how it's built, we believe
18 that Philip Morris was using ammonia and ammonia
19 compounds in its processing to improve flavor.

20 Q. Now, does ammonia affect taste?

21 A. Yes, very definitely.

22 Q. Dr. Townsend, I've handed you a document that
23 is marked as Defendants' Exhibit 20147 dated January
24 29th, 1976. It is titled: Effect of Treatment of
25 Tobacco with Ammonia or Various Ammonium Salts on the

1 Levels of Pyridines and Pyrazines in Smoke. Can you
2 tell us what this is?

3 A. This is an internal research report by
4 several RJR scientists who are looking at the chemistry
5 and the resulting taste effects of ammonia sugar
6 reactions.

7 Q. Was this document prepared and maintained in
8 the ordinary course of the business of Reynolds?

9 A. Yes.

10 MR. KIRBY: Your Honor, I would move this
11 into evidence under the business records exception.

12 THE COURT: All right. So admitted.

13 THE CLERK: Defendant's 20147 in evidence.

14 (Defendants' Exhibit 20147 was admitted into
15 evidence.)

16 BY MR. KIRBY:

17 Q. Now, Dr. Townsend, if you would turn to the
18 abstract of the article on Page 3?

19 A. Okay.

20 Q. And the abstract I believe you have told us
21 is intended to be a summary of the research that
22 follows?

23 A. Right.

24 Q. There are a lot of names of chemicals in here
25 that are unpronounceable. Without reading all the

1 chemical names, could you just explain the scientific
2 and chemical points that this abstract is discussing?

3 A. Sure, I don't agree that these names are
4 unpronounceable, but I will skip over them.

5 This abstract summarizes the research of the
6 reaction of tobacco, of ammonia and ammonia compounds
7 with sugars and tobacco to form a huge list of
8 pyrazines, primarily pyrazines, there's a few pyridines
9 in here. It says: In general the ammoniation of
10 tobacco products increases this class of compounds and
11 also talks about chemical mechanisms to explain why
12 that occurs.

13 Q. Now, if you would turn to Page 15, and there
14 is a discussion there of competitive brands?

15 A. Right.

16 Q. Do you see that?

17 A. Yes.

18 Q. And do you see the paragraph, the second
19 paragraph on that page that begins with "Examination"?

20 A. Right.

21 Q. Now, can you tell us what was observed in
22 this research study in this competitive brands
23 analysis?

24 A. Sure. What these scientists did was evaluate
25 various commercial products from the marketplace, and

1 they found that unfiltered Marlboro smoke had higher
2 levels of pyrazines and pyridines compared to
3 unfiltered Winston smoke, which was at that point not
4 ammoniated. Marlboro had high levels of pyridines,
5 Winston had low levels. Filtered Marlboro smoke also
6 showed higher levels of pyridines.

7 So again, one of our competitors showed
8 higher levels. It went on to evaluate unfiltered
9 Kools, which we believed were ammoniated commercial
10 products, and found that there really wasn't much
11 difference in pyridines from Kools compared to our
12 product Salem. But filtered Kool did show lower levels
13 compared to our Salem product at that point. So
14 Marlboro clearly had higher levels, Kools did not.

15 Q. Dr. Townsend, I've handed you a document that
16 is marked as Defendants' Exhibit 23661, dated March 20,
17 1980. It's titled: Method to Improve Quality of
18 Tobacco Via Sugar Ammonia Reactions. Can you tell us
19 what this document is?

20 A. This, again, is an internal research and
21 development report that summarizes the work of two of
22 our scientists in the area of sugar ammonia reactions.

23 Q. Was this prepared and maintained in the
24 ordinary course of the business of RJ Reynolds Tobacco
25 Company?

1 A. Yes, it was.

2 MR. KIRBY: Your Honor, I move admission of
3 Defendants' Exhibit 23661.

4 THE COURT: Admit it.

5 THE CLERK: Defendant's 23661 will be
6 admitted.

7 (Defendants' Exhibit 23661 was admitted into
8 evidence.)

9 BY MR. KIRBY:

10 Q. Dr. Townsend, could you explain the research
11 that was taking place here where they're talking about
12 sugar ammonia reactions?

13 A. Yes. In this work the scientists were
14 preparing various samples of tobacco that were treated
15 with different types of ammonia compounds and different
16 levels of ammonia compounds to cause that reaction to
17 form pyrazines.

18 The researchers went on to evaluate the smoke
19 qualities, the taste qualities of those products in
20 taste panels, and in fact found that the ammonia
21 treated samples in general were smoother, there was
22 less harshness and had improved flavor.

23 So this was a product development effort
24 aimed at trying to figure out what attributes were
25 changed in the consumer's response to these products.

1 Q. In response to --

2 A. The ammoniation process, sorry.

3 Q. Let me ask you to turn to the last page, Page
4 3. Would you read the concluding paragraph?

5 A. Right. It is the author's belief that the
6 above-treated flue-cured tobacco produced a smoother,
7 more flavorful cigarette because of the low temperature
8 sugar ammonia reactions which were allowed to take
9 place on the surface of the tobacco leaf before
10 incorporation of the flue-cured tobacco into the blend.

11 That was a long sentence.

12 Q. Dr. Townsend, I've handed you a document
13 that's marked as Defendants' Exhibit 23679. Can you
14 identify that?

15 A. Yes. This is a quarterly report prepared by
16 Dr. Charles Green. It's to his supervisor, Mary Stowe.

17 Q. Do you know Dr. Green?

18 A. I know Dr. Green very well. He and I have
19 worked on many projects together.

20 Q. Did Dr. Green and others routinely prepare
21 similar quarterly reports in the course of their
22 regular business at Reynolds?

23 A. Yes, that was routine reporting.

24 Q. And this is such a document that was prepared
25 and maintained in the ordinary course of Reynolds'

1 business?

2 A. Yes.

3 MR. KIRBY: Your Honor, I would move the
4 admission of Defendants' Exhibit 23679.

5 THE COURT: Admit.

6 THE CLERK: 23679 into evidence.

7 (Defendants' Exhibit 23679 was admitted into
8 evidence.)

9 BY MR. KIRBY:

10 Q. What is the subject of this quarterly report?

11 A. Tobacco ammoniation.

12 Q. Looking at the page that is titled Tobacco
13 Ammoniation, could you go to the second full paragraph?

14 A. Sure.

15 Q. And read, if you would, the first few
16 sentences regarding Dr. Green's position as to the
17 effect of ammoniation on tobacco smoke?

18 A. Okay. There is general agreement that
19 ammoniation of tobacco has two general effects on its
20 smoking properties. Compared to an untreated control,
21 the smoke of an ammoniated product is milder and less
22 irritating.

23 A key step to observation of less irritation
24 from ammoniated products is the removal of excess
25 unreacted ammonia from the treated tobaccos. This has

1 been accomplished either by a waiting period between
2 ammoniation and use, or by steaming the ammoniated
3 tobaccos. Concurrent with the reduction in irritation,
4 ammoniated tobaccos produce a smoke with altered flavor
5 and aroma properties. The flavor becomes more
6 chocolate-like, and this is associated with the
7 presence of higher levels of smoke pyrazines. Because
8 of these flavor changes, ammoniated tobaccos are
9 generally regarded as being more burley-like.

10 This factor must be considered in the use of
11 treated tobaccos as part of cigarette blends. The
12 attributes of ammoniated tobaccos, less irritation and
13 more chocolate flavor, have also been used to describe
14 major product differences between our products and
15 those of our major competitor. We do not know if this
16 gives them a competitive advantage in the marketplace.

17 Q. Now, Dr. Townsend, what percentage of
18 Reynolds' products contain ammoniated reconstituted
19 tobacco sheet?

20 A. Today, only about 20 percent of the products
21 we make contain ammoniated tobacco.

22 Q. Now, if the purpose of ammoniation, the
23 manufacturing process is to produce these pyrazines or
24 pyridines because they taste good, why not ammoniate
25 all of your products?

1 A. Well, because the formation of these
2 pyrazines or pyridines improve the taste for some
3 smokers. There are some smokers who don't prefer that
4 taste.

5 So we provide different products for
6 different smoker wants. Some smokers prefer the more
7 flavorful, more chocolate-like taste that's less
8 irritating and less harsh. Other smokers prefer the
9 products that are not ammoniated and don't have that
10 high chocolate aroma.

11 Q. Now, what are Reynolds' two best selling
12 brand families?

13 A. The two largest brand families that we have
14 currently are Winston and Doral.

15 Q. Are they ammoniated?

16 A. No, they're not.

17 Q. Now, Dr. Townsend, we've seen some internal
18 research reports from Reynolds suggesting the use of
19 ammoniated tobacco to improve smoothness and taste.
20 Were there scientists at Reynolds that theorized about
21 using ammonia for reasons other than improving taste?

22 A. Yes.

23 Q. Who did that?

24 A. There were several scientists at Reynolds who
25 speculated that adding ammonia or ammonia compounds

1 the upper left-hand corner; and the figure there is
2 titled: Degree of Protonation of Nicotine in Relation
3 to pH.

4 A. Right.

5 Q. And then there's a reference to
6 Henderson/Hasselback. What is the Surgeon General
7 talking about here, what is this?

8 A. What this is is a calculation using the
9 Henderson/Hasselback equation that defines the amount
10 of free nicotine versus protonated or salt nicotine as
11 a function of pH. This is something that's defined
12 through basic chemical principles, the
13 Henderson/Hasselback equation.

14 Q. Now, how long has that equation been applied
15 to tobacco smoke?

16 A. Well, the equation has been around for quite
17 some time. It's been applied to tobacco smoke at least
18 as early as 1972 with the publication by Jerry Morrie
19 where he's applied this Henderson/Hasselback equation
20 to tobacco smoke and to nicotine.

21 Q. Now, Dr. Townsend, have you prepared a chart
22 that would assist the jury in understanding this
23 relationship between pH and free nicotine as set forth
24 in the 1979 Surgeon General's Report?

25 A. I have prepared a chart, and I hope it helps.

1 Q. Now, Dr. Townsend, this demonstrative exhibit
2 is titled: Calculated Percent Free Nicotine.

3 What does this chart tell us about the amount
4 of free nicotine in cigarette smoke?

5 A. Well, if I may step down?

6 MR. KIRBY: Your Honor?

7 THE COURT: I told him any time he needs to.

8 A. What this chart shows, actually this is just
9 a portion of the Henderson/Hasselback equation, which
10 is a basic equation useful in chemistry.

11 But this is a calculated amount or percent of
12 free nicotine or the volatile nicotine as a function of
13 pH. As the pH becomes more basic, as I've already
14 said, there's going to be more free nicotine or more of
15 the volatile form of it present.

16 As the pH becomes more acid down to lower
17 numbers, then there's going to be less free nicotine or
18 the volatile nicotine. What this shows -- and this is
19 the range for cigarette smoke, usually from about 5.5
20 pH units up to about 6.5 pH units. What this shows is,
21 even at 6.5 there's a very, very small fraction of the
22 total nicotine present as the free nicotine. And the
23 Surgeon General in fact said there's virtually -- the
24 nicotine is virtually all present as the protonated
25 form at this range.

1 Now this is for cigarette smoke. If you
2 compare this to cigar smoke, it turns out for several
3 reasons, mainly due to the tobacco wrapper, the
4 cigarette smoke from cigars is much more basic and it's
5 usually in the range of about seven-and-a-half to
6 eight-and-a-half pH units.

7 Well, at that pH range, you can see from the
8 Henderson/Hasselback equation that there was a lot
9 larger fraction of free nicotine or the volatile
10 nicotine. And it's in high fraction of volatile or
11 free nicotine that makes cigar smoke difficult to
12 inhale, makes it irritating and strong, because a large
13 percentage of the nicotine is present as the free form,
14 unlike cigarette smoke.

15 Q. Now, Dr. Townsend, can the use of ammonia
16 increase the pH of cigarette smoke?

17 A. Sure. If one puts large amounts of ammonia
18 in tobacco or in tobacco processing, it's entirely
19 possible to increase the pH of cigarette smoke.

20 Q. Now, does the level of ammonia or ammonium
21 compounds used by Reynolds in the 20 percent or so of
22 its cigarettes on the market that contain ammoniated
23 tobacco, does the level of ammonia that Reynolds uses
24 raise the pH of the mainstream smoke?

25 A. No. For those products that we ammoniate at

1 the levels of ammonia or ammonium compounds that we
2 use, they're not sufficiently high to increase the pH.
3 The pH of cigarette smoke of our products hasn't
4 changed over time.

5 Q. Dr. Townsend, do you still have there on the
6 witness stand the 1976 document titled: Effective
7 Treatment of Tobacco with Ammonia or Various Ammonium
8 Salts on the Levels of Pyridines and Pyrazines?

9 Let me ask you to look at Page 16 of that
10 document, and it is Defendants' Exhibit 20147 in
11 evidence.

12 A. Okay, I'm on Page 16.

13 Q. What is set forth in that table?

14 A. This is an analysis of competitive brands.
15 Actually, it's an analysis of Marlboro, Winston, Kool
16 and Salem commercial products. It's looking at smoke
17 yields, some individual constituents yields. It's also
18 looking at pH, among other things.

19 Q. Now, pH is reflected under the column that
20 says, "Analysis Smoke"?

21 A. That's right.

22 Q. And is it an analysis of the pH in the smoke
23 of Marlboro, Winston, Kool and Salem commercial
24 cigarettes?

25 A. That's right.

1 Q. Cigarettes that Real People Smoke?

2 A. That's right.

3 Q. Now, is the measurement for any of those
4 above 6.5?

5 A. No.

6 Q. Now, Dr. Townsend, I've handed you a document
7 that is Defendants' Exhibit 24655. It's dated January
8 15th, 1975, and it is titled: Smoke Balance, Factors
9 and Control, Updated Review and Analysis of 1974
10 Competitive Brand Data.

11 Is this similar to the other research reports
12 that we've seen today?

13 A. Yes, this is an internal research report.

14 Q. Was it prepared and maintained in the
15 ordinary course of the RJ Reynolds Tobacco Company?

16 A. Yes.

17 MR. KIRBY: Your Honor, I would move the
18 admission of Defendants' Exhibit 24655.

19 THE COURT: Admit it.

20 THE CLERK: 24655 admitted.

21 (Defendants' Exhibit 24655 was admitted into
22 evidence.)

23 BY MR. KIRBY:

24 Q. Let me ask you to turn to Page 5 of this
25 January 15th, 1975 report.

1 A. Okay.

2 Q. Do you see the section titled: Smoke pH and
3 Calculated Free Nicotine?

4 A. Yes.

5 Q. Now, does -- on that page, does that page
6 list a number of brands and the calculated pH of the
7 mainstream smoke of those cigarettes?

8 A. Yes. I'd say there's 20 or 25 commercial
9 brands here.

10 Q. And is this calculated in accordance with
11 this equation that you were telling us about that's set
12 forth in the same equation that the Surgeon General
13 used?

14 A. Well, there's two columns here. The smoke pH
15 number is a measured number. The free nicotine number,
16 which is the right-hand column, is a calculated number;
17 and it clearly says that calculated free nicotine --
18 calculated using the Henderson/Hasselback equation from
19 the measured pH number.

20 Q. And these report on measurements taken for
21 the year 1974?

22 A. That's right.

23 Q. Are these for filter cigarettes?

24 A. Yes, these are all filtered cigarettes, I
25 believe.

1 Q. Now, in 1974 did the Camel filter cigarette
2 have added ammonia as part of its blend?

3 A. In 1974 the Camel filter was ammoniated --
4 Camel filter cigarette was ammoniated.

5 Q. Now, is the pH of the smoke of that Camel
6 cigarette reflected in this document?

7 A. Yes. And the number is 6.19. I would round
8 that to 6.2.

9 Q. Now, in 1974, same year, was the Winston
10 cigarette ammoniated?

11 A. No, it wasn't. We didn't ammoniate Winston
12 cigarettes until 1979.

13 Q. And what is the pH of the Winston cigarette
14 that's not ammoniated?

15 A. This table shows it to be 6.16. Again, I
16 would round that to 6.2.

17 Q. The ammoniated Camel was 6.19?

18 A. Right.

19 Q. The nonammoniated Winston was 6.16?

20 A. Right.

21 Q. What is the difference in those two numbers?

22 A. I think there is no difference in those two
23 numbers. They're within the experimental error of the
24 test method.

25 Q. Are you familiar, Dr. Townsend, with the pH

1 data for Reynolds' cigarettes tracked over time?

2 A. Yes, I'm very familiar with it.

3 Q. Have you prepared a chart that would assist
4 you in reviewing with the jury the pH data for
5 Reynolds' brands over time?

6 A. Yes.

7 Q. Dr. Townsend, what does this demonstrative
8 exhibit demonstrate?

9 A. This is a comparison of the pH measurements
10 for Winston filter cigarette or Winston red pack over
11 time beginning in 1972 up through 1988.

12 I'd like to point out, if we go back and look
13 at our internal historical data on pH, there's a fair
14 amount of data, but it's not a measurement that we
15 routinely make in manufacture or quality assurance.
16 But we have some data, and I think the time frame is
17 limited. But this is the available time frame we have.

18 What this shows is that the pH, the measured
19 pH for Winston smoke, bounces around a little bit, is
20 pretty much around 6.0 to 6.1. What we also know is if
21 we make repeated measures of pH on the same sample,
22 exactly the same sample, the variability is about plus
23 or minus .2.

24 So there's really no substantial difference
25 or significant difference really among any of those

1 numbers. I would say that there's no change for pH in
2 Winston in spite of the fact that in 1979, right in the
3 middle of the chart, we ammoniated that product. So we
4 ammoniated the product, no difference in smoke pH.

5 Q. Now, the Winston cigarette, is that cigarette
6 ammoniated today?

7 A. No, it isn't.

8 Q. When did Reynolds stop using ammoniated
9 reconstituted tobacco sheet in Winston cigarette?

10 A. In 1997 --

11 COURT REPORTER: I'm sorry. What was the
12 year?

13 A. 1997. We changed the entire --

14 Q. In 1997 the ammoniation process stopped?

15 A. In 1997 we stopped ammoniating Winston.

16 Q. Let me ask you this: When that happened, did
17 the pH of the smoke change?

18 A. No, I went back and looked at it. We have --
19 the pH of Winston smoke before we took the -- before we
20 stopped the ammoniation was 6.0. After we stopped the
21 ammoniation, we took the ammonia out, the pH was 6.0.
22 So ammoniated or not ammoniated, same pH.

23 Q. How can that be? How can it be if you're
24 using ammonia and ammonia is a base, why doesn't it
25 raise its pH of the smoke?

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

32797

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W.
ANGELL, RAYMOND LACEY, FROZENE 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."), 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.

COPY

CASE NO. 94-08273 CA22

TRIAL
Volume 299

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Robert Paul Kaye, Circuit Judge,
at the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, on
Thursday, April 29, 1999, at 1:00 p.m.

Miami, Florida **Taylor, Jonovic, White & Gendron** (305) 358-9047

W03100276

1 10 is valuable and should be conducted.

2 Do you see that?

3 A. Yes.

4 Q. And if you go down to the next paragraph:
5 The source of the nicotine was questioned. Dr. Tso
6 stated the source could be a high nicotine tobacco
7 variety.

8 Do you see that sentence?

9 A. Yes.

10 Q. Going over to the paragraph on the top of
11 Page 2: As Dr. Tso, that's T-S-O, indicated, a
12 high-nicotine, high-tar tobacco could possibly deliver
13 a tar/nicotine ratio of less than 10. The discussion
14 then focused on the question of the tar quantity, as
15 well as the magnitude of the ratio.

16 Do you see that?

17 A. Yes.

18 Q. And was this the NCI -- the National Cancer
19 Institute Tobacco Working Group suggesting the
20 exploration of high-nicotine tobaccos?

21 A. Yes.

22 Q. Now, Dr. Boyse, did Brown & Williamson
23 attempt to make a low-tar, medium-nicotine cigarette
24 using high-nicotine tobaccos?

25 A. Yes.

1 Q. And when did that work first begin?

2 A. The work really began around 1980, 1981.

3 Q. What tobacco plants were used?

4 A. Tobacco plants that were named Y-1.

5 Q. And where did these tobacco plants come from?

6 A. They originally came from a breeding program
7 by a member of the U.S. Department of Agriculture.

8 Q. That's the United States Department of
9 Agriculture?

10 A. Yes.

11 Q. Is that a part of the federal government in
12 the United States?

13 A. Yes, it is.

14 Q. Was there a particular person at the United
15 States Department of Agriculture who developed this
16 high-nicotine tobacco?

17 A. Yes. It was a Dr. James Chaplin, who I
18 believe was the director of tobacco research, or
19 something similar, at one of the research institutes of
20 the USDA in North Carolina.

21 Q. I want to show you Defendants' Exhibit 15042.
22 I've put before you Defendants' Exhibit
23 15042. Can you identify this for us?

24 A. This is an article in World Tobacco that was
25 written by Dr. James Chaplin on the subject of

1 modifications to tobacco plants that could be made.

2 Q. And this was -- when was this published? Do
3 you see the date down there on the first page?

4 A. 1978.

5 Q. All right. 1978. If you look at, in the
6 first column --

7 MR. ROSENBLATT: Judge, I want to be heard on
8 this.

9 (The following proceedings were had at
10 sidebar:)

11 THE COURT: Okay.

12 MR. ROSENBLATT: I mean, they're on direct.
13 This is not an inhouse Brown & Williamson document.
14 This is classic bolstering, so that they can put their
15 spin on why they used a high-nicotine plant.

16 If they want to bring in as a witness the
17 author of this article, that's fine. But just to have
18 her on direct start reading from an article, which
19 supports her position, is just classic bolstering.
20 It's not something that could come into -- this is not
21 something authored by her, and it's not a business
22 record of Brown & Williamson.

23 THE COURT: Is there any difference between
24 that and these two, Russell?

25 MR. ROSENBLATT: Well, I think those, they're

1 in evidence.

2 MR. SCHNEIDER: No. The minutes of the TWG.

3 MR. ROSENBLATT: I believe I used them. So
4 that's one.

5 THE COURT: I'm just wondering, that sounds
6 familiar.

7 MR. ROSENBLATT: I was using them for a
8 different purpose.

9 MR. SCHNEIDER: Your Honor, this is not being
10 used for bolstering. This is being used to demonstrate
11 a fact. And the fact is this: In October 1978 -- this
12 is Dr. James F. Chaplin, if you look over here,
13 Dr. James Chaplin, director of the U.S. Department of
14 Agriculture, published this paper. And in this paper,
15 what he's saying is: I have developed some
16 high-nicotine tobaccos. That's what he says in this
17 document and he says --

18 THE COURT: Therefore, it's okay for you to
19 use it?

20 MR. SCHNEIDER: Whether it's okay or not, the
21 point is, this shows the fact that it was developed by
22 the government, and that's how we learned about it.
23 It's not there to bolster any opinion of hers; just to
24 show the fact.

25 THE COURT: She's already said that this was

1 something that was developed in conjunction with the
2 tobacco -- or Department of Agriculture.

3 MR. SCHNEIDER: Let me direct Your Honor's
4 attention to the page, Page 4 of the article. Has
5 "Piedmont" on the bottom of it. And there it has this
6 paragraph there: The manufacturers have means of
7 reducing tars, but most of the methods reduce nicotine
8 and other constituents at the same time; therefore, it
9 may be desirable to develop levels constant or higher
10 in nicotine.

11 THE COURT: Appreciate that, but sustain the
12 objection.

13 (The sidebar conference was concluded, and
14 the following proceedings were held in open court:)
15 BY MR. SCHNEIDER:

16 Q. In terms of this type of tobacco, Dr. Boyse,
17 did the USDA eventually share seeds from that tobacco
18 with Brown & Williamson?

19 A. Yes, it did.

20 Q. And did Brown & Williamson do further work to
21 try to develop that tobacco?

22 A. Yes.

23 Q. What work was done?

24 A. Well, they needed to improve a couple of
25 things or they needed to make a couple of changes to

1 the plants, the plants that they received from the U.S.
2 Department of Agriculture.

3 First of all, it was not very disease
4 resistant and that doesn't make it a good financial
5 prospect for the tobacco farmer. So they needed to
6 improve the disease resistance of the particular
7 strain.

8 Secondly, obviously they were investing in
9 something that they thought, like any other
10 modification to the product, might ultimately give us
11 some kind of advantage over our competitors. So they
12 wanted to induce what is called male sterility into the
13 plant, which basically means that the plant doesn't
14 produce seed that you can take and you can grow more of
15 the same plant. So it would stop your competitors from
16 taking the tobacco plant, taking the seed and growing
17 it for themselves.

18 Q. Dr. Boyse, in the United States, when tobacco
19 farmers grow tobacco, is that available for auction to
20 all of the tobacco companies in the country?

21 A. Yes, it is. If tobacco is grown by farmers,
22 it has to be offered up by auction to anybody who wants
23 to buy it.

24 Q. When you're referring to male sterility,
25 you're talking about developing a type of plant where

1 Brown & Williamson can control the seeds?

2 A. Absolutely, yes.

3 Q. Did Brown & Williamson grow any of this
4 tobacco experimentally on farms in the United States?

5 A. Yes, it did. For experimental purposes it
6 grew some here.

7 Q. Was the Y-1 tobacco grown in any other
8 locations?

9 A. Yes. For example, it was grown in Brazil.

10 Q. In Brazil, if tobacco is grown on farms, are
11 they subject to auction as they are in the United
12 States?

13 A. No, they're not. So, again, if you ask a
14 farmer to grow it for you, you can be sure to purchase
15 it rather than your competitor at the end of the day.

16 Q. And the tobacco was called what again?

17 A. Y-1.

18 Q. Was Y-1 a secret tobacco?

19 A. Not in the least.

20 Q. Did Brown & Williamson register Y-1 with the
21 United States Department of Agriculture?

22 A. Yes, it did. It registered it with the
23 Department of Agriculture, and also it applied quite
24 openly for a patent for Y-1.

25 Q. Dr. Boyse, I'm now handing you Defendants'

1 Exhibit 15046. I would ask if you could identify this
2 for us.

3 A. This is an application for a plant variety
4 protection certificate to the U.S. Department of
5 Agriculture, and they were making them aware of the
6 existence of Y-1 and asking for the certificate for
7 Y-1.

8 Q. And on the application form, you see up in
9 the upper right-hand corner where it's labeled as Y-1?

10 A. Yes, it is.

11 Q. Let me direct your attention to two pages
12 from the back, Exhibit D, where it's entitled:
13 Additional Description of the Variety Y-1. Can you
14 read that for us?

15 A. The variety Y-1 combines the high nicotine
16 content of Nicotiana Rustica with the morphologic
17 characteristics of NC 95 and SC 58, providing a
18 high-nicotine tobacco plant having good and productive
19 agronomic characteristics. The nicotine content of
20 variety Y-1 is significantly higher than the variety
21 SC 58. The smoking product produced from the leaf of
22 this plant still provides a pleasant taste and aroma
23 despite its high-nicotine content.

24 Q. Does this application for plant variety
25 protection, filed with the United States Department of

1 Agriculture in 1991, also describe how Y-1 was made on
2 Exhibit A?

3 A. Yes, it does.

4 Q. And if you would read us just the first
5 sentence on Exhibit A.

6 A. The variety Y-1 was obtained by conventional
7 sexual plant breeding process.

8 Q. Now, I noticed in that document, Dr. Boyse, a
9 reference to Nicotiana Rusticana?

10 A. Rustica.

11 Q. Now, tobacco that is typically used in a
12 tobacco plant, what is its Latin name?

13 A. Nicotiana Tabacum.

14 Q. One more time?

15 A. Nicotiana Tabacum.

16 Q. How was Y-1 made?

17 A. It was made by crossing these two varieties.

18 Q. Crossing Nicotiana Rustica with Nicotiana
19 Tabacum?

20 A. That's right.

21 Q. And Nicotiana Rustica, is that a
22 naturally-occurring higher nicotine tobacco?

23 A. Yes, it is, but it doesn't taste very good,
24 so you can't use it. It has very, very harsh flavor
25 characteristics. By crossing it, they hoped that some

1 of the good smoking characteristics of Nicotiana
2 Tabacum would combine with Nicotiana Rustica.

3 Q. Is that described in this plant certificate,
4 Defendants' Exhibit 15046?

5 A. Yes, it was.

6 MR. SCHNEIDER: I would offer Defendants'
7 Exhibit 15046 in evidence.

8 THE COURT: It will be admitted.

9 (Defendants' Exhibit 15046 was admitted into
10 evidence.)

11 BY MR. SCHNEIDER:

12 Q. Now, you also mentioned, Dr. Boyse, that the
13 company attempted to patent Y-1?

14 A. Right.

15 Q. Let me show you Defendants' Exhibit 15045.
16 Can you identify that for us?

17 A. It's a U.S. patent application.

18 Q. When was it filed?

19 A. In September 1991.

20 Q. Now, Dr. Boyse, how does this patent describe
21 Y-1?

22 A. It says it's a variety of tobacco plant on
23 the first page.

24 Q. If I could direct your attention to three
25 pages in, the page is entitled: New Variety of Tobacco

1 Plant?

2 A. Yes.

3 Q. If you could read to us the first couple of
4 sentences where it says: Summary of the invention.

5 A. The present invention relates to a new and
6 genetically stable variety of tobacco plant, and more
7 particularly to a new variety of flue-cured tobacco,
8 that combines both a high-nicotine content and good
9 agronomic and morphological characteristics.

10 In addition, when this new variety is cured
11 and processed in conventional ways and incorporated
12 into a cigarette, the smoking of the cigarette was
13 found to be a pleasant and acceptable in taste and
14 aroma, contrary to other high-nicotine content tobacco.

15 Q. Now, Dr. Boyse, did Brown & Williamson --
16 what happened to Brown & Williamson's patent? Did we
17 get a patent on Y-1?

18 A. No. The application was rejected.

19 Q. Why?

20 MR. ROSENBLATT: Well, I'm going to object to
21 why unless you --

22 MR. SCHNEIDER: I'll rephrase.

23 BY MR. SCHNEIDER:

24 Q. You've indicated that the patent was
25 rejected. To your knowledge, did the United States

1 government find that Y-1 was a novel tobacco plant?

2 A. No. It said it was not a novel tobacco
3 plant; it was not sufficiently unique.

4 Q. Now, did Brown & Williamson attempt to use
5 this Y-1 cross between Nicotiana Rustica and Nicotiana
6 Tabacum to try to make a lower-tar, medium-nicotine
7 cigarette?

8 A. Yes.

9 Q. And did you -- did Brown & Williamson
10 succeed?

11 A. We succeeded in producing the cigarette, yes.

12 Q. Was it tested experimentally inhouse at Brown
13 & Williamson?

14 A. Yes, it was. It was tested by research
15 panels, smoke panels.

16 Q. And what was the result?

17 A. People didn't like it.

18 Q. What was wrong with it?

19 A. Well, it seems, and we know this from other
20 experiments that have been carried out at BATCO, for
21 example, at other places, that if you change the
22 tar/nicotine ratio in the way that was being suggested,
23 if you alter the proportion of tar and nicotine in a
24 product, it has a significant impact on the sensory
25 characteristics of cigarette smoke, and people don't

1 like that.

2 Q. Now, is there a general tar and nicotine
3 ratio when you use tobacco generally in cigarettes, a
4 range?

5 A. Average 12 to 1, 13 to 1.

6 Q. Okay. That's a tar/nicotine ratio?

7 A. That's correct.

8 Q. If you lower the tar/nicotine ratio to 4 to
9 1, do smokers perceive a lack of balance?

10 A. Yes, they do. The sensory balance of the
11 cigarette smoke is just thrown out of kilter.

12 Q. So after all of the effort -- you started on
13 Y-1 in 1981?

14 A. Yes.

15 Q. After all of the effort with it, trying to
16 patent it, register it, were you ultimately able to
17 make a low-tar, medium-nicotine cigarette using Y-1?

18 A. Not one that was acceptable to consumers, no.

19 Q. Was that the end of Brown & Williamson's use
20 of Y-1?

21 A. No.

22 Q. Had the company acquired a large volume of it
23 over time?

24 A. We had grown and acquired several million
25 pounds of it, I believe, over a period of time, yes.

1 Q. And recognizing it couldn't be used to make
2 the low-tar, medium-nicotine cigarette, was it
3 otherwise good tobacco?

4 A. It seemed to be perfectly good tobacco, yes.

5 Q. Did Brown & Williamson ever try to
6 incorporate some of that tobacco into some of its
7 blends?

8 A. Yes. Given that we had tobacco which was
9 generally acceptable in its smoking quality, even
10 though we couldn't use high amounts of it, what we
11 tried to do, rather than just throw it away, because it
12 represented a significant amount of money, is we used
13 it in very, very small proportions in some of our
14 less-smoked products, so that small enough that it
15 wouldn't cause the problems in sensory and balance that
16 we noted when we used higher levels.

17 Q. Now, when was small amounts of Y-1 used in
18 some of B&W's commercial products? What period of time
19 was that?

20 A. From around 1992 to 1994.

21 Q. When in '92?

22 A. The end of '92. September, I believe.

23 Q. So September of '92 to --

24 A. June of '94.

25 Q. What happened in June of '94?

1 A. There was a big public controversy about the
2 use of high-nicotine tobacco.

3 Q. What happened? Did Brown & Williamson, then,
4 cease using it in those blends?

5 A. We stopped using it, yes, in those blends for
6 a time.

7 Q. And what happened, was that the end of the
8 use of the tobacco or have we tried to use it up?

9 A. No. Again, several months later, we used it
10 in even smaller quantities in a minority of brands.

11 Q. And is this being done until the supply is
12 used up?

13 A. We still have a little bit of it, and it's
14 still being incorporated at levels, average of about 1
15 percent.

16 Q. Were you ever able to use Y-1 to make a
17 low-tar, medium-nicotine cigarette?

18 A. Again, not one that smokers would accept.

19 Q. Was Y-1 ever used to increase the nicotine
20 delivery of any cigarette?

21 A. No. Whenever it was used at whatever
22 concentration, it never significantly increased the
23 nicotine content of the products.

24 Q. I want to turn to the next area on your
25 board: Alternative technology cigarettes.

IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC03-1856

Lower Tribunal Nos.: 3D00-3400, 3D00-3206, 3D-00-3207,
3D00-3208, 3D00-3210, 3D00-3212,
3D00-3215

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

Petitioners,

vs.

LIGGETT GROUP, INC., et al.,

Respondents.

**PETITIONERS, FLORIDA ENGLE CLASS,
BRIEF ON THE MERITS**

STANLEY M. ROSENBLATT, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
(305) 374-6131

Stanley M. Rosenblatt, Esquire
Fla. Bar No.: 068445

Susan Rosenblatt, Esquire
Fla. Bar No.: 142163

Class Counsel

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ISSUES PRESENTED ON APPEAL

- I. Whether Post-judgment Decertification, Following a Two-year Trial, Violates Basic Principles of Class Action Law and Strips Floridians of Any Viable Remedy Against the Tobacco Industry; in Violation of Due Process of Law under the Florida and Federal Constitutions?
 - A. Whether The Trial Court Did Not Abuse its Broad Discretion in Denying Tobacco's Post-trial Motion to Decertify the Class?
 - B. Whether A Class Action Serves the Public Interest?
- II. Whether Extinguishment of All Punitive Damages Claims for Floridians Is a Misapplication of Res Judicata and Violates Due Process?
 - A. Whether The Trial Court Did Not Abuse its Broad Discretion in Instructing the Jury as to the Applicability of the Master Settlement Agreement and Florida Settlement Agreement? -- Whether The Instructions, as a Whole, Were Fair and Complete?
- III. Whether The Trifurcated Trial Plan Was Within the Broad Discretion of the Trial Judge and Comports with Due Process? -- Whether Requiring Individual Compensatory Damages Awards as Predicates for Individual Punitive Damages Awards, Was Error?
- IV. Whether The District Court Misapplied Florida and Federal Law Governing of Review of a Punitive Damages Award Challenged as Excessive?
 - A. Whether The District Court Improperly Sat as the Seventh Juror on Contested Issues as to Each Tobacco Company's Financial Resources and Ability to Pay a Punitive Damages Award?
- V. Whether The Three Verdicts and Judgment Against Liggett and Brooke are Fully Supported by the Evidence?

-
- VI. Whether Post-judgment Narrowing of Class, and Ordering That Defense Judgments Be Entered in Favor of Defendants, Against the Three Class Representatives, Was Error?
- VII. Whether Comments of Counsel Did Not Interfere with the Jury's Deliberations and Decisions?

INTRODUCTION

The district court decertified the Florida Class and reversed the final judgment entered pursuant to three jury verdicts in this two-year trifurcated trial in which the jury considered thousands of tobacco documents and the testimony of 157 witnesses.

The evidence presented during the trial portrayed decades of fraud and deceit by the tobacco industry, including the intentional targeting of children for tobacco use, deliberate engineering of its product to create life-long addictions, and its conspiracy of misinformation to undermine the work of public health officials. The evidence in the two-year trial was so compelling that the trial judge wrote:

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.*

Engle F.J. at *16 (A.3-4) (emphasis in original).¹

The trial court, based on a "mountain of evidence" concluded: "[A]fter sitting for two solid years in trial, it is inconceivable that this jury ignored or misconceived

¹*Engle v. R.J. Reynolds Tobacco*, 2000 WL 33534572 (Fla. Cir. Ct.) shall be referred to as *Engle F.J.* (the Final Judgment and Amended Omnibus Order of November 6, 2000) (A.3-4). *Liggett Group, Inc. v. Engle*, 853 So.2d 434 (Fla. 3d DCA 2003), shall be referred to as *Engle II* (A.1). *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d DCA 1996), shall be referred to as *Engle I* (A.2). The Appendix shall be referred to as "A."

the evidence or the merits of the case.” *Engle F.J.* at 31. The court below, however, disregarded the findings of the trial court and denigrated the jury’s efforts, labeling them a “runaway jury” that “ran amuck”, “obviously swept along in lemming-like fashion.” *Engle II* at 466-67.

The district court disregarded the evidence and distorted the law. It granted immunity to an industry that “kill[s] more people in this country every year than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides and fires *combined*.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 162 (2000) (Breyer, J. dissenting). The district court decertified the Class post-judgment, after seven years of litigation and after its own 1996 affirmance of a state-wide class. It also extinguished all punitive damages claims based on settlements of unrelated actions brought by Florida and other states for reimbursement of Medicaid expenditures, thereby stripping all Floridians of their claims for punitive damages. The district court opinion retroactively narrowed the *Engle* Class, and ordered that judgments be entered against class representatives whose causes of action arose after the new cut-off date, potentially barring the claims of thousands of Floridians who relied upon the class certification, *Engle I* and *Broin v. Philip Morris*, 641 So.2d 888 (Fla. 3d DCA 1994). The opinion should be quashed and the verdicts and judgment reinstated.

STATEMENT OF THE CASE AND FACTS

On May 5, 1994, Petitioners filed a class action on behalf of sick smokers and their survivors against the tobacco industry. A nationwide class was certified on October 31, 1994 as to all compensatory and punitive damages claims and the district court affirmed on January 31, 1996, but reduced the Class to Florida citizens and residents. *See Engle I* at 41, holding that "our recent decision in *Broin*, involving a similar products liability class action against various tobacco companies clearly compels this result." In reducing the national class action to a state class action, the district court held:

[W]e conclude that the subject class should simply be reduced to manageable proportions, namely, that the class should be restricted to Florida citizens and residents, rather than United States citizens and residents. In our view, this restriction will drastically reduce the number of class members so that the Florida judiciary can efficiently manage the litigation without undue burden to the taxpayers. . . . [W]ith this modification, the order appealed from is Affirmed.

672 So.2d at 42. Relying on that opinion, legal notice was given to all Floridians, a two-year trial ensued and a final judgment was entered.

On appeal, the district court reversed its earlier decision, decertified the class, barred all punitive damages, found the trial plan "unconstitutional" and in violation

of the *Engle I* mandate², ordered that judgments be entered against three class representatives, and acknowledged that “the fate. . . of close to a million Florida residents” rests on these proceedings. *Engle II* at 470.

A. A Brief Summary of the Two-Year Evidentiary Record.³

1. Tobacco’s Continuing Fraud and Conspiracy to Deceive the American Public. When faced with the growing evidence that tobacco was linked with cancer, each of the tobacco defendants⁴ met in New York City in 1954, with their public relations consultant, Hill & Knowlton, and published a full page *Frank Statement to Cigarette Smokers* in January, 1954, in over 400 newspapers throughout the United States (T.27344; 32323; 32650; 32651; PX 3057); (A.55). *A Frank Statement to Cigarette Smokers* was, frankly, a lie (T.18751-55). The tobacco

²But in 1999 this same court ruled the opposite, denying defendants’ motion to enforce mandate, in *R.J. Reynolds Tobacco Co. v. Engle*, 784 So.2d 1124 (Fla. 3d DCA 1999), having *sua sponte* vacated its earlier order that the trial plan did violate the mandate. *R.J. Reynolds Tobacco v. Engle*, 806 So.2d 503 (Fla. 3d DCA 1999).

³The Class relies upon the trial court’s detailed summary of the evidence in its Final Judgment and Amended Omnibus Order (A.3-4). Due to space constraints, the Class includes an abbreviated summary of the evidence during the two-year trial. A more detailed recitation of the facts is contained within the Class’ Answer Brief in the district court (A.6).

⁴Although Liggett was not part of the meeting and the formation of the Tobacco Industry Research Committee, it joined in 1964 and its counsel, Frederick Haas, became a member of the Ad Hoc Committee of Special Projects of TIRC. (PX 1993; PM 400; R.65822).

industry falsely asserted that cigarettes "are not injurious to health" when their own pre-1954 research established that cigarettes presented serious health risks for lung cancer and other diseases (T.13477-78; 13526-27; 13565; 13575; PX 78).

The cover-up continued when the companies pledged to support independent scientific research through the Tobacco Industry Research Committee [TIRC], later known as the Council for Tobacco Research [CTR], to find answers for the American public as to whether smoking cigarettes causes disease. Instead, TIRC and later CTR functioned as a front for tobacco, reassuring the public that smoking was safe, and undermining the work of public health officials (T.16607; 16651-52; 27234-35; 27254-55; PX 3416; PM 445). CTR formed a Special Projects Division, run by private counsel for each tobacco company, whose purpose was to fund scientific research to defend litigation brought by smokers against tobacco companies, and to hide unfavorable scientific research under the attorney/client privilege (T.27210; PX 1993; 4559; PM 425). CTR pressured researchers to avoid implicating tobacco as a cause of disease or death (T.17926-27; 17947-48) and members of CTR became spokespersons for the Industry, appearing in public forums and challenging the growing scientific research linking tobacco to disease (T.10917-18).

Defendants formed the Tobacco Institute [TI] in 1958, to serve as an advocate for the Industry in civic programs and in the media, again denying that cigarettes

caused any diseases or were addictive, despite mounting evidence to the contrary (T.12592-94; 16446; 16753-56; 18582; PX 1071; PX-PI 213). Former U.S. Surgeon General Julius Richmond testified that the TI undermined the issuance of his 1979 Surgeon General's Report by ridiculing the Report at defendants' press conference scheduled the day prior to the Surgeon General's Report's release. TI published its own report, *Smoking and Health: The Continuing Controversy*. (T.11234-35).

The Tobacco Industry, in concert, nurtured a fraudulent debate about tobacco and health, although their own internal tobacco documents established that each defendant knew that cigarettes caused disease and death and that nicotine was highly addictive (T.488-89; 14890-91; 18249; 18341; 21279-80); (A.37-39). Bennett Lebow, the principal of Liggett and Brooke, testified about the "party line" on smoking and health issues -- that he and other tobacco company officials had conspired to lie to public health authorities and the American public for decades (T.13831-39; 13981). Each of the CEOs of the tobacco companies continued the "party line" through Phase I of the trial, testifying that nicotine is not addictive, that any smoker who wants to quit can quit cold turkey, and that cigarettes do not cause lung cancer or any other disease. (T.16246-47; 20798; 20284; 19987; 20901). An official at TI was asked "What percentage of lung cancer victims do you think are smokers?" and he responded "I don't know if any are." (T.20039). The CEO of R.J. Reynolds testified

that "It has never been proven that cigarette smoking has caused a single person to die." (T.16250). When asked if heavy smoking has ever been the cause of any lung cancer deaths, Andrew Tisch, the then Chairman/CEO of Lorillard Tobacco responded "I take the position it has not been proven in a single case." (T.14227) According to the Chairman of Liggett, "I don't believe a woman's health or 'offspring' are going to be affected one iota if she smoked up until the day she gave birth to her child." (T.20967) And according to the Chairman/CEO of CTR, "There is no scientific basis to say smoking causes certain diseases." (T.19863).⁵

Defendants conspired to replace dying smokers with children, systematically targeting children for decades and conspiring to interfere with the efforts of the public health communities in educating children about the dangers of smoking (T.12052-54; 12058; 12129-33; 16324; 16326-28; 17573-79; PX 3013; 4761; 4744; 3024; 3025; 3026; 3016; (A.36, 40). The majority of smokers start at approximately fourteen years of age and lack the maturity to understand the consequences of their actions. (T.22078-79; 12128-33; 12044-45; 12063-64; 12082; 13697-98; 11974-75; 16643-48; 17210; 22078-79; 20943; PX 3208). One R.J. Reynolds representative boasted

⁵The Class presented testimony from public health officials, including former U.S. Surgeons General, that cigarette smoking resulted in the deaths of approximately 430,000 Americans and over 30,000 Floridians each year. (T.11192-95; 11200; 13289-90; 14201; 15277-78; 16639-40; 22075; PX 29, A.34-36).

“[T]he base of our business is the high school student.” (PX 947; A. 40).

Public health officials were decades behind the Tobacco Industry in recognizing that nicotine is a highly addictive drug, even more addictive than heroin and cocaine (T. 12283; 13747-48; 11495-96; 12015; 13560). The Industry's early knowledge of addiction was not shared with public health officials, despite the industry's promise in *A Frank Statement* (T. 11559; 12028-30; 13557-58; 13546-47).

Tobacco internal documents revealed that since the 1950's, the industry knew that nicotine is an addictive drug (T. 13546-47; 13557-59; 13477-78; 13505; 13562; PX 3198; 545; 835; 3172; 1950); that cigarettes are a nicotine delivery device (T. 11985-88; 12009-10; 12011; PX 1950; 3280; 3411), and a dispenser for a dose of nicotine (T.12403-04). The companies knew a cigarette pack is a day's supply of nicotine and a storage container for nicotine (T.16432; 18561-64; PX 9) and that people smoke for nicotine. (T.16375; 16480-81; 17727; PX 3262; 3217; 3182; 3198).

Internal tobacco documents further revealed that for decades the industry knew that nicotine addiction can be maintained and enhanced through cigarette design and the manipulation of levels of nicotine (T. 13471-72; 10893; 13475-76; PX 3128; 3383; 264; 249; 250; 3385; 252; 3152; 3084; 3220; CA 96). Defendants also knew for decades that health conscious smokers would be captured by low tar, low nicotine products, although the tobacco industry knew that these products were not safer and

could actually be more dangerous (T.13475-79; 13487; 13505; 13621-22; 13630; PX 3086; 3182; 3072; 3021; 514; 3413; 5323; 14970; 15402; 15411-12; 15992-93). There was technology to design a safer cigarette with less nicotine (T. 11988-89; 11989-90; 11996; 12092-93; PX 1817; 3217), or no nicotine (T. 17084).

Recognizing the need for replacement smokers for those smokers that had died or quit, defendants' lower yield cigarettes provided fraudulent health assurances to smokers and persuaded would-be quitters to keep smoking (T.16326; 16328; 11739-40; 12263; 12064-68; PX 481; 4473; 4530; 4593). Low tar/low nicotine cigarettes were designed to deliver the same amount of tar and nicotine as the high yield, although falsely promoted to do the opposite (T. 13239; PX 3185; 3164; 3140; 3017; 5199; 3215; 3286; 3288; 3213). The companies manipulated levels of nicotine and the dose of nicotine by altering the pH of the cigarettes, thereby converting the nicotine to the free form and creating a greater addictive effect on smokers (T.13612; 13613-14; 13617; 14926-28). For over thirty years the tobacco companies, unknown to the public health community, had researched and altered the chemical forms of nicotine in order to increase the percentage of free base nicotine delivered to smokers (T. 13477-78; PX 3080; 3017; 3385; 3433; 3215; 3056; 3293; 3062; 3213; 291).

Whenever internal tobacco research showed promise in developing a safer cigarette, the projects were either promptly terminated or shipped overseas to

Germany or Switzerland, to hide them (T.17745-54; 17776-80; 18258; 14879; 14897; 14909-13; 15426-27; 16011; 16016-17; 16024). Defendants systematically destroyed all tobacco research and documents that implicated cigarettes as a serious health risk and cause of disease (T.14913-14; 14929-30; 15386-88; 15389). There was a “gentlemen’s agreement” among the companies that there would be no testing of *production cigarettes* (those cigarettes actually smoked) within the United States and all such testing must be conducted in Europe to keep it secret. (T.29404; 36705-06; 36712-13; 36741-43; 14913-14; PX 26; 4600). United States data and research were destroyed or shipped abroad and adverse surveys were hidden (T.15382; 15386-89; 15450-51; 15424; 14913-14; 14929-30; 25175). The tobacco industry confounded and obfuscated science in a fashion that was destructive and abusive to the scientific process. (T.23007; 22107; 23084; 23090-91). The industry attacked valid scientific studies linking tobacco with disease (T.23078) and deliberately misled the public health community (T.13547).

2. **The Phase I Verdict.** The Jury deliberated for seven days and answered ten questions with 242 subparts (A.3a). The jury found that 24 diseases, including subcategories, were caused from smoking cigarettes but that asthmatic bronchitis, infertility and bronchioloalveolar carcinoma (BAC), a type of lung cancer, were not. The jury further found that the defendants’ cigarettes were “defective and

unreasonably dangerous”; that each of the defendants (i) made a false statement of material fact with the intention of misleading smokers; (ii) concealed or omitted material information or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes; (iii) 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; (iv) 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; (v) 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; (vi) and that defendants’ conduct rose to a level to permit an award of punitive damages (A.3b).

3. **Phases IIA and II B.** The jury considered the compensatory damages claims of class representatives Mary Farnan, Angie Della Vecchia and Frank Amodeo, three long-term heavy smokers. Farnan started smoking at age 10 and contracted lung cancer in 1995. Defendants asserted her lung cancer was BAC, a lung cancer the jury found in Phase I was not caused from smoking. (T.40224-25; 40240) Della Vecchia started smoking at age 11 and died in 1999 from lung cancer

that metastasized to her brain. Defendants asserted it was scar tissue rather than cigarettes that caused her lung cancer and death (T.42681-82). Amodeo was diagnosed with laryngeal cancer in 1987 and has had nothing to eat or drink by mouth since that time, receiving all nourishment through a feeding tube (T.41336; 41339; 41351). Defendants asserted that it was "wood dust" that caused his throat cancer. (T.38740; 41360). The jury awarded compensatory damages to each of the class representatives, tempered by findings of comparative fault (A.3b).

In the punitive damages phase defendants withdrew all financial experts as to the company's financial resources and ability to pay. The trial court noted:

[N]one of the defendants produced an "expert" witness. The Court would have welcomed and . . . valued the opinions of defendants' financial experts, and/or corporate financial officers. 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.

Engle F.J. at *22. The jury found each defendant liable in differing amounts for a total of \$144,871,473,549.

STANDARD OF REVIEW

This Court should review *de novo* each of the rulings of the district court. *Escobar v. State*, 699 So.2d 988, 995 (Fla. 1997). All factual determinations by the trial court should have been subject to an abuse of discretion standard. The district court erroneously applied a *de novo* standard of review. This Court should apply an

abuse of discretion standard to the trial court's rulings on: class decertification (*W.S. Badcock Corp. v. Myers*, 696 So.2d 776 (Fla. 1st DCA 1997)); the MSA jury instruction (*Goldschmidt v. Holman*, 571 So.2d 422, 425 (Fla. 1990)); the trifurcated trial plan order (*Microclimate Sales v. Doherty*, 731 So.2d 856, 858 (Fla. 5th DCA 1999)); the motion for remittitur/ motion for new trial (*Cloud v. Fallis*, 110 So.2d 669 (Fla. 1969)); sufficiency of evidence as to Liggett/Brooke (*Castillo v. E.I. DuPont de Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003)); motion to strike punitive damages (*Thomas v. Thomas*, 589 So.2d 944, 947 (Fla. 1st DCA 1991)); motion for mistrial (*Murphy v. Int'l. Robotic Systems, Inc.*, 766 So.2d 1010, 1031 (Fla. 2000)); and standing of class representatives/scope of the class (*Arvida/JMB Partners v. Council of Villagers, Inc.*, 733 So.2d 1026, 1030 (Fla. 4th DCA 1998)). This Court should conduct a *de novo* review of the trial court's punitive damages analysis, except that this court should defer to the trial court's factual findings. *See Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424, 440 n. 14 (2001).

SUMMARY OF THE ARGUMENT

In May, 2003, the district court decertified the *Engle* Class, holding that Floridians cannot sue Tobacco as a class; each victim must bring an individual suit for compensatory and punitive damages. *Engle II* was an about-face from *Engle I*, where the same court held in 1996 that class certification was "compelled" by its

earlier decision in *Broin v. Philip Morris*.⁶ This eleventh hour decertification was unwarranted because it left thousands of Floridians without a remedy. *Tenney v. City of Miami Beach*. There were insufficient grounds for the departure from the law of the case (*Fla. Dept. of Transportation v. Juliano*), and the court erroneously applied a *de novo* rather than an abuse of discretion standard of review. *W.S. Badcock Corp. v. Myers*. The decertification of the class action, after close to a decade of litigation, including an appellate opinion certifying the class, and after a two-year trifurcated trial before one jury and entry of a final judgment, was erroneous. *Tenney; Broin*.

The district court improperly granted immunity to the tobacco industry by extinguishing all punitive damages claims in Florida against tobacco companies, holding that the State of Florida had "settled" all Floridians' punitive damages claims in 1997 through the settlement of its Medicaid recoupment lawsuit. This was a misapplication of *Young v. Miami Beach*, *res judicata* and a violation of due process. *See Young; Albrecht v. State and Key Citizens v. Florida Keys Aqueduct*.

The district court improperly extinguished the causes of action of thousands of Floridians by retroactively imposing a new 1994 cut-off date for class membership, and ordering that defense judgments be entered against two class representatives whose causes of action accrued after 1994. This was relief not even requested by

⁶Full citations are contained within the Argument section.

defendants and violated the due process rights and the right to a jury trial of the *Engle* Class. See *Diamond v. E.R. Squibb*, *Southland v. Smith* and *Lance v. Wade*.

The district court served as a seventh juror, re-weighting the evidence against *Liggett/Brooke*, in violation of *Castillo v. E.I. DuPont* and failed to give the trial court the deference due with respect to rulings on argument of counsel, viewing a handful of invited comments out of context. *Murphy v. Int'l. Robotic*; *State v. Jones*. The court below failed to follow *Ault v. Lohr*, erroneously requiring individual compensatory damage awards as a predicate for individual punitive damage awards.

The district court opinion disregards the findings of the trial court and the evidentiary record. It fails to give the requisite deference to the trial court, substitutes its judgment for that of the jury, reevaluates the credibility and weight of the evidence, ignores doctrines of harmless error, invited error, waiver, estoppel and the presumption of correctness of a verdict and misapplies *res judicata* law. It ignores the binding precedent of *Broin*, side-steps its earlier *Engle I* decision by holding that the *law of the case* does not apply to class actions, and reviews each issue *de novo*, although Florida law requires review by an abuse of discretion standard. The district court also fails to apply the U.S. Supreme Court *BMW v. Gore/State Farm* criteria for the review of a punitive damages award challenged as excessive under the U.S. constitution.

Disagreement with the size of the verdict did not give the district court the right to abandon long-established rules of substantive law and nearly every appellate review principle.

ARGUMENT

I. Post-judgment Decertification, Following a Two-year Trial, Violates Basic Principles of Class Action Law and Strips Floridians of Any Viable Remedy Against the Tobacco Industry, in Violation of Due Process of Law under the Florida and Federal Constitutions.

The district court's disagreement with the verdict did not justify post-judgment decertification. The trial court denied defendants' motion for decertification, finding:

. . . [A]fter 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. . . . [C]laimants' rights are preserved through this action which otherwise would have precluded tort claimants from 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. *Engle F.J.* *11, 12.

A. The Trial Court Did Not Abuse its Broad Discretion in Denying Tobacco's Post-trial Motion to Decertify the Class.

The district court failed to apply the appropriate abuse of discretion standard and reviewed the denial of decertification without deference to the trial court. See *Florida Dep't. of Agric. and Consumer Servs. v. City of Pompano Beach*, 829 So.2d

928, 929 (Fla. 4th DCA 2002) (“[a]bsent an abuse of that discretion, the trial court’s order must be affirmed”); *North Florida Women’s Health & Counseling Services, Inc. v. State*, 866 So.2d 612, 626 (Fla. 2003) (“application of the wrong standard of review may tilt the playing field and irreparably prejudice a party’s rights.”)⁷

The criteria for decertification following a trial on common issues and entry of a final judgment is different from the criteria governing initial class certification proceedings. See *Langley v. Coughlin*, 715 F.Supp. 522, 552-53 (S.D. N.Y. 1989). Rule 1.220(d)(1) Fla.R.Civ.P. provides that “[a]n order under this subsection may be conditional and may be altered or amended before entry of a judgment on the merits of the action.” Trial courts routinely decline to decertify cases at late stages of the proceedings, after legal notice has been disseminated to the class and class members relied to their detriment; late decertification has been reversed under far less compelling facts. See *Birmingham Steel Corp. v. Tennessee Valley Auth.*, 353 F.3d

⁷The district court further erred in finding that class certification violated Rule 1.220(a), and specifically “commonality” (*Engle II* at 445), where defendants failed to raise any points in *Engle I* “challenging the trial court’s determination that the basic prerequisites for class representation under Fla.R.Civ.P. 1.220(a) have been satisfied in this case”) *Engle I* at 40-41. Nor did the defendants in *Engle I* challenge class treatment for entitlement to punitive damages and the award of punitive damages (A.14-16), although class treatment of the punitive conduct of the Industry was the very purpose for class certification (A.15, 19). This constituted an abandonment and waiver of those issues. See *Fla. Dept. of Transp. v. Juliano*, 801 So.2d at 101, 107 (Fla. 2001).

1331, 1337 (11th Cir. 2003) ("earlier certification of the class could have triggered reliance among members of the class, such that the decertification could have created an injustice"); *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984) (order of decertification during late stage of proceedings reversed because "it is an extreme step to dismiss a suit simply by decertifying a class. . . [where there is] possible prejudice to members of a class who failed or were unable to take independent steps to protect their rights precisely because they were members of the class."); *Scott v. City of Anniston, Ala.*, 682 F.2d 1353, 1357 (11th Cir. 1982) ("[T]o decertify at this late date actually has the effect of denying the class adequate representation rather than ensuring it."); *White v. Bowen*, 835 F.2d 974, 979 (2d Cir. 1987) (motion to amend class denied when it was after entry of judgment); *Langley v. Coughlin*, 715 F.Supp. at 552 ("At a minimum, in such circumstances, the court must take into consideration that an eve-of-trial decertification could adversely and unfairly prejudice class members who may be unable to protect their own interests"); *Doe v. Karadzic*, 192 F.R.D. 133, 136 (S.D. N.Y. 2000) (same). *See also, Ford v. United States Steel Corp.*, 638 F.2d 753, 754-61 (5th Cir. 1981), reversing a decertification after four years of class certification:

... Although we agree that the requirements of Rule 23 may have been strained by the district court's certification of this class, we believe that the decertification of the class and dismissal of the case may work an

injustice on those who may have relied on that certification. . . . Of central concern are those who may have relied on the district court's certification. . . . Some may not have acted to protect their interests, believing they were properly and adequately represented.

A district court may reconsider the *law of the case* only in "exceptional circumstances" where a prior ruling would result in "*manifest injustice*." *Florida Dept. of Transp. v. Juliano*, 801 So.2d 101, 105-06 (Fla. 2001). Where thousands of Floridians placed their trust in *Engle I* and *Broin* and relied to their detriment, *stare decisis* and *law of the case* are at their "zenith." Absent the most compelling and exceptional circumstances, the *Engle I* decision should never have been reversed and the Class decertified, seven years later, after a two-year trial. See *North Florida Women's Health*, 866 So.2d at 637-38. Nothing significant changed between *Engle I* and *Engle II*. The Court in *Engle II* stated "[A]t the time of certification. . . plaintiffs estimated the class size at approximately 300,000 people. . . . The plaintiffs have now more than doubled their original estimate of class size from 300,000 to at least 700,000" (*Engle II* at *442-43). But defendants in *Engle I* argued that a national class would exceed 50 million Americans; when the *Engle I* court reduced the case to a more manageable Florida Class, eliminating 49 states, defendants argued on rehearing that a Florida Class would still exceed one million Floridians; (A.14, 16, 28, 29). Clearly, there has been no material change of circumstances as to numerosity,

that could form a principled basis for failing to follow *Engle I*.⁸

Choice of law concerns were yet another basis for decertification. However, there are no choice of law issues remaining. The trial court ruled, in a ruling never challenged by defendants, that Florida law would apply to all Floridians whose medical conditions were diagnosed in Florida (A.41). There are no choice of law issues as to the three class representatives whose conditions were diagnosed in Florida. As to a limited number of Floridians who may have been diagnosed elsewhere, given Florida's significant contacts with the claims, Florida law should nonetheless apply. *See Renaissance Cruises, Inc. v. Glassman*, 738 So.2d 436, 439 (Fla. 4th DCA 1999). Subclasses can also be established. *See Broin*, 641 So.2d at 891, n.2; *Paladino v. American Dental Plan, Inc.*, 697 So.2d 897 (Fla. 1st DCA 1997). Finally, if potential choice of law issues cannot be accommodated, the solution is to remove those Floridians from the Class whose medical conditions were diagnosed outside of Florida, thereby avoiding all choice of law issues.

⁸The district court found that the length of the *Phase IIA* Class Representatives' trial also warranted decertification. *Engle II* at *445 n.8. But that proceeding was longer than a typical absent class member's case because numerous class issues were addressed in these "test" cases. If future compensatory hearings are required, (*see discussion, infra, Ault v. Lohr*), the proceedings will be streamlined. The trial court noted in its final judgment that future claims of absent class members "will be tried before different judges and different juries" and "will not be concerned with the general causation issues of the previous trials, nor the conduct or behavior of the defendants, or punitive damages." *Engle F.J.* *12.

The opinion found that decertification was required due to recent foreign decisions in smokers' class actions. But none of those cases involved a case that was seven years in litigation, with an appellate decision affirming class certification, legal notice to hundreds of thousands of Floridians, a two-year trial, and entry of a final judgment. See *Owner-Operator Ind. Drivers Ass., Inc. v. Arctic Express, Inc.*, 288 F.Supp.2d 895, 902 (S.D. Ohio 2003) (the mere fact that a court in another circuit recently reached the opposite conclusion as to class certification was not grounds for decertification.) Nor did those jurisdictions have *Broin*, a case never distinguished or even mentioned in *Engle II*. The district court also ignored *In re: Simon II Litigation*, 211 F.R.D. 86 (E.D. N.Y. 2002), where U.S. District Court Judge Jack Weinstein granted national class certification (excluding the *Engle* Class), in a non-opt-out punitive damages only action against Tobacco.

The record reflects that each "change" relied upon by the district court for decertification in *Engle II* was raised, argued and rejected in *Engle I* in opposition to the initial class certification (A.14-16; 27-29). *Juliano, supra*, is dispositive and precludes the *Engle II* decertification. Thousands of Floridians placed their trust and relied on the *Engle I* class certification and *Broin*. The *Engle II* court was not entitled to ignore the *law of the case*, or to decertify a class action after a final judgment was entered, nor does its rationale for doing so have any merit. Accordingly,

decertification should be reversed.

B. A Class Action Serves the Public Interest.

The U.S. Supreme Court has said: "Tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to the public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 161.

Absent class treatment, victims of Tobacco have no redress.⁹ As the court found in *Broin*, the non-smoking flight attendant nationwide class action against Tobacco, citing *Tenney v. City of Miami Beach*, 11 So.2d 188, 189 (Fla. 1942):

"The very purpose of a class suit is to save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist." (*Tenney*) Here, as in *Tenney*, if we were to construe the rule to require each person to file a separate lawsuit, the result would be overwhelming and financially prohibitive. Although defendants would not lack the financial resources to defend each separate lawsuit, the vast majority of class members, in less advantageous financial positions, would be deprived of a remedy. We decline to promote such a result.

In accord, Thayer v. Liggett & Meyers Tobacco Co., 1970 U.S. Dist. Lexis 12796 *60 n.33 (W.D. Mich.) (A.47) (the trial judge in an individual smoker's action suggested

⁹The district court's assumption that class members will be able to proceed individually, is belied by the fact that tens of millions of Americans have contracted diseases, suffered and/or have died from smoking cigarettes but only a small number of victims have been able to get to trial. It is further belied by defendants' acknowledgment in their Initial Brief in *Engle II* that "although dozens of smokers cases have gone to trial, so far only *one* has resulted in a final pro-plaintiff judgment after the resolution of all appeals." (A.46)

the use of a class action for a fairer proceeding); *Smith v. R.J. Reynolds Tobacco Co.*, 630 A.2d 820 (N.J. Super. Ct. 1993); *Haines v. Liggett Group, Inc.*, 814 F.Supp. 414 (D. N.J. 1993). Decertification, with an invitation to Floridians to file "close to a million" individual lawsuits, conflicts with *Tenney, supra*; and *City of Miami v. Keton*, 115 So.2d 547, 552 (Fla. 1959) ("a quarter of a million cases. . . would create chaos in the courts [a]nd impose a useless and insufferable burden.")

Floridians were unable to proceed individually, even before all punitive damages claims were extinguished in *Engle II*. The record reflects that during the *Engle* trial many Floridians filed motions to "opt-in" the Class because their counsel withdrew from their individual cases. The trial court addressed the problem of multiple motions for readmission, including those filed in proper person (T.31885-93; 33172-81; 35242-46; A.43).¹⁰

Nor is there any prohibition against class actions seeking punitive damages. The trial plan in each of the following class actions provided for an award of punitive

¹⁰Several prominent Florida attorneys including Sheldon Schlesinger (Ft. Lauderdale), Glen Mayfield (Ormond Beach), Woody Wilner and Greg Maxwell (Jacksonville), Robert Kerrigan (Pensacola) and Howard Acosta (St. Petersburg) withdrew from individual cases with the understanding from defense counsel that upon a dismissal, their clients' would be readmitted to the *Engle* Class. (A.43) Judge Kaye recognized "there is no other way for these people to prosecute their case on an individual basis, because of the nature of the case and the fact that they allege that they could not get representation. . . . Sometimes life is cruel." (T.31891).

damages prior to any compensatory damages award. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996); *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 474-45 (5th Cir. 1986); *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992); *In re: New Orleans Train Car Leakage Fire Litigation*, 795 So.2d 364 (La. Ct. App. 2001); *In re: Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1217 (6th Cir. 1988); *Simon II, supra*; *Equal Employment Opportunity Comm. v. Dial Corp.*, 259 F.Supp.2d 710 (N.D. Ill. 2003).

II. Extinguishment of All Punitive Damages Claims for Floridians Is a Misapplication of Res Judicata and Violates Due Process.

The district court held:

The punitive award is precluded by the settlement agreement which resolves all claims asserted by the states, as well as the final judgment resolving the State of Florida's suit against the tobacco industry. . . . Florida's settlement and release, and the *res judicata* effect of the resulting final judgment, preclude the plaintiffs' punitive-damage claims here. *Engle II* at 467-68.

That result was wrong. The State of Florida settled a different claim with different parties for recoupment of Medicaid expenses. *See Agency for Health Care Admin. v. Assoc. Indus.*, 678 So.2d 1239 (1996) and *American Tobacco Co. v. State*, 697 So.2d 1249, 1251 (Fla. 4th DCA 1997). There can be no *res judicata* effect where there is no identity of parties and where the claims were not actually litigated in prior proceedings. *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1994). "Plaintiffs" are

defined by the Florida Settlement Agreement [FSA] as the Governor, Department of Business and Professional Regulation, the Agency for Health Care Administration, and the Department of Legal Affairs (A.8 at 4-5).

Floridians were not parties to that case.¹¹ Floridians could not object to the terms of the settlement nor its distribution. To bar all Floridians from punitive damages based on the Florida and Master Settlement Agreements [MSA] violates Article I, §9, Fla. Const. and U.S. Const. Amend. XIV, because those settlements were not by a party which could be said to represent the Class. *See Richards v. Jefferson County*, 517 U.S. 793 (1996) and *Hansberry v. Lee*, 311 U.S. 32 (1940). It also presents conflict with the meaning of due process. *See Keys Citizen for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001).

Different claims were at issue. Florida's action was filed in 1995 and sought reimbursement of Medicaid expenditures to recover health care costs incurred by the State in treating various diseases of Medicaid smokers. *American Tobacco*, 697 So.2d at 1251. The Settlement occurred more than two and a half years before the

¹¹Some of the defendants were different. The State's lawsuit included American Tobacco, RJR Nabisco, BAT, PLC, BATUS Holdings, Philip Morris Companies, Loews, U.S. Tobacco, UST, Hill & Knowlton, and British American Tobacco, none of whom were defendants in the *Engle* trial (A.9 at 1). Liggett and Brooke were defendants in *Engle* but not sued by the state (A.13c).

Engle defendants moved to strike punitive damages based on the MSA and FSA (A.9). If defendants believed that the settlement of Florida's action extinguished punitive damages on behalf of all Floridians they would not have not waited years to assert that position. Prior to the State Settlement, the Palm Beach Circuit Court granted Tobacco's motion for partial summary judgment as to Florida's punitive damages claims, holding that no further amendments to those claims would be permitted (A.13). Thus, since the State did not have the right to recover punitive damages at the time of settlement, it could not possibly have settled that claim and foreclosed all Floridians from recovering punitive damages. *See Medicaid Third Party Liability Act*, Fla.Stat. §409.910 (A.13a, 13b). The specific terms of the FSA precludes its use by defendants in *Engle*:

[N]either this Settlement Agreement nor any evidence of negotiations hereunder, shall be offered or received in evidence in this Action, or any other action or proceeding, for any purpose, other than in an action or proceeding arising under this Settlement Agreement. (A.8 at 4-5).

See Williams v. Philip Morris, Inc., 48 P.3d 824, 842-43 (Or. Ct. App. 2002) ("By its own terms . . . the settlement was not admissible for the purpose for which defendants seek to use it in this case.")

The decision below misapplied *res judicata* and *Young v. Miami Beach Improvement Co.*, 46 So.2d 26, 30 (Fla. 1950), in its zeal to preclude punitive

damages. *Young*, which precluded the public from reasserting an easement in an oceanfront strip of land that the city had previously litigated and lost, clearly does not bar injured plaintiffs from seeking punitive damages where the State settled a different claim with different parties for recoupment of Medicaid expenses.

A. The Trial Court Did Not Abuse its Broad Discretion in Instructing the Jury as to the Applicability of the Master Settlement Agreement and Florida Settlement Agreement -- The Instructions, as a Whole, Were Fair and Complete.

The district court held:

[T]he trial court committed further reversible error by instructing the jury not to consider the MSA and FSA with regard to the issue of punishment and deterrence. *Engle II* at 468.

Over Class' objections, the trial court admitted evidence as to the MSA and FSA during the punitive damages phase. Defendants were permitted to argue that each Company had "changed its conduct" and had incurred enormous continuing financial obligations, adversely impacting their ability to pay a punitive damages award in *Engle* (T.57789; A.18; 1333). But Tobacco wanted more -- it wanted to also argue that its voluntary settlement payments constituted punishment and deterrence, precluding a punitive damages award in *Engle*. It is improper to consider sums paid in other settlements as evidence of prior punishment when assessing punitive damages, particularly where the settlement does not specify what portion, if any, is

allocable to punitive damages. *See Dunn v. HOVIC*, 1 F.3d 1371, 1390-91 (3d Cir. 1993); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281-82 (2d Cir. 1990).

The MSA and FSA were brilliant economic and public policy decisions for the tobacco industry -- the antithesis of punishment. Plaintiffs' public health experts testified that defendants' costs incurred from the MSA and FSA were passed on to smokers/consumers through increased prices that actually enhanced the profitability and financial wealth of the tobacco companies. (T.52281-83; 52301-02; 52313; 53003-04) As cigarette sales increase, payments under the MSA increase (T.53621). Lorillard's CEO testified that its net income rose about 85% from 1998 to 1999 and revenue increased 41% (*Engle F.J.* at 56).

Jury instructions must be viewed as a whole; here the instructions were fair and complete and defendants have no cause to complain. The jury was advised four times that it could decline to award any punitive damages (T.57788; 57790; 57785-86). There was no abuse of discretion. *See CSX Transp., Inc. v. Whittler*, 584 So.2d 579, 586 (Fla. 4th DCA 1991); *Holiday v. State*, 753 So.2d 1264, 1269 (Fla. 2000).

III. The Trifurcated Trial Plan Was Within the Broad Discretion of the Trial Judge and Comports with Due Process -- Requiring Individual Compensatory Damages Awards as Predicates for Individual Punitive Damages Awards, Was Error.

In *Ault v. Lohr*, 538 So.2d 454, 456 (Fla. 1989), this court held: "an express

finding of a breach of duty should be the critical factor in an award of punitive damages.” The jury found that the companies acted in concert and breached duties *vis a vis* the Class. Those findings constitute a sufficient predicate for awarding punitive damages under *Ault* and *Lassiter v. Int’l Union of Operating Eng’rs*, 349 So.2d 622, 626 (1977). The district court erroneously relied on a concurring opinion in *Ault*. See *Horizon Leasing v. Leefmans*, 568 So.2d 73, 75 (Fla. 4th DCA 1990) (punitive damages can be awarded “where the fact finder has found a breach of duty but no compensatory or actual damages have been proven”); *Russin v. Greminger*, 563 So.2d 1089 (Fla. 4th DCA 1990); (punitive damages awarded in action for tortious interference with business relationships where there were no compensatory damages); *Mortellite v. American Tower, L.P.*, 819 So.2d 928, 934-35 (Fla. 2d DCA 2002) (Plaintiff “was entitled to punitive damages for. . . breach of fiduciary duty, irrespective of a compensatory damage award. . . [A]n express finding of a breach of duty should be the critical factor in an award of punitive damages. . . [W]e conclude [Plaintiff] will ultimately be entitled to a punitive damage award even if, after remand, it is again determined that he is not entitled to compensatory damages.”)¹²

¹²Nor did the trial plan violate the district court mandate in *Engle I*. In *R.J. Reynolds Tobacco Co. v. Engle*, 806 So.2d 503 (Fla. 3d DCA 1999) (A.22), the court initially quashed the trial plan order authorizing the class-wide punitive damages trial for an aggregate lump sum. The September 3, 1999 opinion found that the *Engle I* decision required “the issue of damages both compensatory and punitive, must be

Due process is a flexible concept. *Connecticut v. Doebr*, 501 U.S. 1, 10 (1991); *Rosenthal v. Scott*, 150 So.2d 433, 439-40 (Fla. 1963); *Hynes v. New York Cent. R. Co.*, 131 N.E. 898, 900 (N.Y. 1921) (Cardozo, J., “[maxims] must be reformulated and readapted to meet exceptional conditions.”) Courts have found that trial plans adjudicating damages on a class-wide basis prior to compensatory damages, comport with due process. E.g., *Sterling*, *supra*; *Hilao*, *supra*; *Jenkins*, *supra*; *In re: New Orleans Train Car Leakage Fire Litigation*, *supra*; *In re: Simon II*, *supra*; *Watson*, *supra*; *In re: Exxon Valdez*, *supra*.

IV. The District Court Misapplied Florida and Federal Law Governing the Review of a Punitive Damages Award Challenged as Excessive.

The district court, in conflict with *St. John v. Coisman*, 799 So.2d 1110, 1114 (Fla. 5th DCA 2001), failed to consider “the degree of the reprehensibility of defendants’ misconduct.” Nor did it consider “the disparity between the actual or potential harm suffered by the plaintiff [Class] and the punitive damages award.”

tried on an individual basis.” Then that order was vacated, *sua sponte*, by the district court, and oral argument was scheduled. (A.23) The district court issued *R.J. Reynolds Tobacco Co. v. Engle*, 784 So.2d 1124 (Fla. 3d DCA 1999), holding “the motion to enforce mandate is denied,” citing *City of Miami Beach v. Arthree, Inc.*, 300 So.2d 65 (Fla. 3d DCA 1973). (A.24) In *Arthree*, the district court denied a motion to enforce mandate stating “it affirmatively appears that the trial court has proceeded properly in this manner.” *Id.* at 57. The only conclusion is that the district court found the trial plan consistent with the *Engle I* mandate. The turn-around in *Engle II* is legally and logically inexplicable.

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003), citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The district court held that absent individual compensatory damage awards it was “impossible” to determine “whether punitive damages bear a ‘reasonable’ relationship to the actual harm inflicted on the plaintiff, and required by. . . *Bankers Multiple Line Ins. Co. v. Farrish*, 464 So.2d 530, 533 (Fla. 1985)” (*Engle II* at 451).¹³

Under both Florida and federal law, compensatory damages are not the *sine qua non* for punitive damages. *Ault*, 538 So.2d at 456 (“[A]n express finding of a breach of duty should be the critical factor in an award of punitive damages”); *State Farm*, 538 U.S. at 418. The Supreme Court noted in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-61 (1993):

. . . [B]oth State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant’s conduct would have caused to its

¹³*Bankers Multiple Line* said just the opposite: “We adhere to that holding. . . ‘that there is no rule of law that punitive damages must bear some reasonable relationship to compensatory damages.’” *Id.* at 533. *In accord*, *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So.2d 1039, 1042-43 (Fla. 1982) (“punitive damages. . . are to be measured by the enormity of the offense entirely aside from the measure of compensation to the injured plaintiff.”) *See also* Florida Statute §768.73(1)(A) (1994) excluding class actions from any legislative statutory limitations on punitive damages awards. The district court’s repudiation of the statute’s express exception for class actions, conflicts with *Holley v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

Nor are compensatory damages even required in order to measure harm or potential harm. The Court in *TXO* noted that under West Virginia law a defendant may be liable for punitive damages “even if the jury did not award the plaintiff *any* compensatory damages.” *Id.* at 465.¹⁴

Federal and Florida law are uniform in holding that “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *State Farm*, 538 U.S. at 419-20, citing *Gore* at 575; *Owens Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483 (Fla. 1999).¹⁵

¹⁴Defendants have been on notice for over fifty years that a substantial punitive damages award could be assessed against tobacco companies for the hundreds of thousands of diseases and deaths of Floridians caused by the Industry’s egregious misconduct. A comparable “penalty” is the punitive damages award to a single smoker’s estate in Oregon of \$79.5 million. *Williams v. Philip Morris, Inc.*, 2004 WL 1259675 (Or. Ct. App. 2004) (A.58). During the applicable time frames, there have been no monetary limitations on punitive damages recoverable in Florida; class actions were excluded from former Florida Statutes §768.73(1)(a) (1994).

¹⁵*State Farm* sets forth the criteria for determining reprehensibility, including “whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *Id.* at 419. Here, each of the indicia for reprehensibility has been met, as reflected by the trial court’s application of the *BMW* factors in its final judgment. *Engle F.J.* (A.3).

The court in *St. John*, 799 So.2d at 1114, wrote:

... [A] court must look at the evidence adduced in the case in a light most favorable to the plaintiff. The trial court is in a better position than an appellate court to make this kind of assessment, and it would be helpful if it did so first.

And that is precisely what the trial court did in rendering its 67 page final judgment (A.3). But the district court ignored the record and Judge Kaye's findings as to the reprehensibility of Tobacco's misconduct, the reasonable relationship between the punitive damages award and the harm done, and each defendant's financial resources and ability to pay a punitive damages award. The trial court was owed due deference by the district court. *See Ballard* (noting "the deference due to the trial judge, who has had the opportunity to observe the witnesses and consider the evidence in the context of a living trial rather than upon a cold record.") This Court should now conduct the requisite *de novo* review of the trial court's application of the *Gore* factors, particularly the evidence of reprehensibility of defendants' misconduct. If the Court finds the punitive damages verdict to be excessive, then it should enter a remittitur. *See, e.g., Campbell v. State Farm*, 2004 WL 869188 (Utah 2004) (upon remand from the U.S. Supreme Court, the Utah Supreme Court recalculated punitive damages and entered remittitur to \$9,018,780.75).

Nor did the district court follow the criteria established by this Court in *Ballard*

for awarding punitive damages. The *Ballard* criteria are strikingly similar to those of *Gore* and *State Farm*. The *Engle* jury instructions included the criteria of *Gore*, *State Farm* and *Ballard*. The jury was instructed to consider the reasonable relationship between the punitive damages award and the harm likely to result as well as the harm that did result from defendants' misconduct; the degree of reprehensibility; the duration of the harmful conduct; any concealment by defendants; the profitability to defendants; the financial condition of each defendant and the impact of a particular judgment; the seriousness of the hazards to the public; the number and level of employees involved; and the duration of the misconduct (T.57786-87). The district court rejected the Rule of *Ballard*, *Gore* and *State Farm* by failing to apply the appropriate criteria for review of the punitive damages award.

A. The District Court Improperly Sat as the Seventh Juror on Contested Issues as to Each Tobacco Company's Financial Resources and Ability to Pay a Punitive Damages Award.

A district court may not substitute its view of the evidence for that of the jury. *Castillo v. E.I. DuPont De Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003) ("It is a basic tenet of appellate review that appellate courts do not reevaluate the evidence and substitute their judgment for that of the jury"). Here, the district court's disregard for the evidentiary record and the findings of the jury in three jury verdicts, spanning two years of evidence, rose to a level that deprived the *Engle* Class of their

right to a trial by jury. See *U.S. v. Horton*, 622 F.2d 144, 147 (5th Cir. 1980) (the court should not “merely substitute his judgment for that of the jury and thereby deprive the litigants of their right to a jury trial.”) Art. I, §22, Fla. Const. The district court improperly accepted as dispositive the CEOs’ claimed book value/net worth, in conflict with *Atlas Properties, Inc. v. Didich*, 226 So.2d 684, 690 (Fla. 1969) (“[T]he jury could have reasonably disbelieved the financial statements . . . entered at cost instead of the actual fair market value”); *Tennant v. Charlton*, 377 So.2d 1169, 1170 (Fla. 1979) (“It is the height of naivete to suggest that a sworn statement of ones net worth must be accepted as the final word”); *Int’l Union of Operating Eng’rs v. Lassiter*, 295 So.2d 634, 644 (Fla. 4th DCA 1974) (“[financial resources] encompasses many capabilities and potentials other than naked assets and liabilities.”)

The Class presented the testimony of two highly qualified experts who rendered opinions based upon accepted methods of valuation. (*Engle F.J.* at *17-*23; A.31). In contrast, defendants withdrew all financial experts during the punitive damages phase, including each company’s comptroller, relying solely on the testimony of CEOs, with limited financial background and enormous self-interest. (A.3 at *22-*28; A.18). The trial court noted in its final judgment “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.” *Id.* at *28. “What we have in the instant case is a conflict in the evidence of net worth and actual worth.” *Id.* at *29. The district court’s rejection of the Class’ evidence in the punitive damages phase is inexplicable and wrong.

The district court improperly excluded any consideration of each tobacco company’s trademarks, such as *Marlboro*, *Winston* and *Kool*, although highly relevant on defendants’ financial resources and ability to pay. When Philip Morris’ CEO was asked “What is the *Marlboro* trademark worth?”, he responded: “I think that it’s kind of asking what is the company worth.” (T.54152). Yet the district court called book value “net worth” and excluded admittedly valuable trademarks, research and development, goodwill, infrastructure and all of the other valuable intangibles that comprise the value of each tobacco company. Defendants’ financial statements contained only shareholders’ net equity/book value, a bookkeeping entry that does not reflect a company’s financial resources (T.52920).

V. The Three Verdicts and Judgment Against Liggett and Brooke are Fully Supported by the Evidence.

The district court improperly re-weighed the evidence in a *de novo* consideration. *See Castillo*, 854 So.2d at 1277; *Odoms v. Traveler’s Ins. Co.*, 339

So.2d 196, 198 (Fla. 1976). Liggett was a member of CTR and TI, industry controlled organizations that deceived and misled the American public about smoking and health and the addictiveness of nicotine. Bennett Lebow, the principal of Liggett/Brooke testified during the punitive damages phase that he agreed with the jury verdicts in Phases I and II -- the jury got everything "right." (T.55348; A.25). These admissions are binding under Florida law. *Dicus v. Dist. Bd. of Trustees*, 734 So.2d 563, 564 (Fla. 5th DCA 1999); *Curr v. Helene Transp. Corp.*, 287 So.2d 695 (Fla. 3d DCA 1974). He testified that Liggett had known the truth about causation for years and had deceived the public; there was a "party line" as to smoking, health and addiction and that Liggett and the other tobacco companies had conspired to lie to the public health authorities and the American people on these critical issues. Lebow admitted that Liggett should have disclosed the tobacco documents and told the truth earlier (T.13831-39; 13980-81; 13967-68).

The district court erroneously reasoned that since Lebow, Liggett and Brooke cooperated with the State Attorneys General, Liggett must be relieved of all liability for its past misconduct. While Liggett's recent cooperation was a mitigating factor, it did not absolve Liggett from liability. See *Johns-Mansville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984) (where a legal basis for punitive damages is established, evidence in mitigation is not considered in determining

whether the case is one in which punitive damages may be allowed); *Celotex Corp. v. Pickett*, 490 So.2d 35 (Fla. 1986) (successor corporation takes “bad will” along with goodwill and was liable for punitive damages for predecessor’s misconduct).

The Liggett verdict was not inconsistent. Since the three class representatives whose claims were tried during Phase II were not regular smokers of Liggett cigarettes, the jury appropriately found no fault against Liggett and Brooke as to the products liability counts, but found liability for conspiracy and fraud, consistent with its Phase I verdict (A.3b). Indeed, defense counsel for Liggett admitted during closing arguments in Phase IIA that “the fact that these three plaintiffs never purchased a Liggett product does not immediately end your inquiry on these claims” [fraud by misrepresentation, fraud by concealment and the conspiracy claims] (T.49891). While Amodeo was not a regular smoker of *Chesterfields*, he relied on many of the pre-1970 Chesterfield ads with athletes, movie stars and Arthur Godfrey: “Those ads kept me smoking.” (T.41418-31; PX 1869-73; 5426; 1021; 1014; 1036; A.42).

The punitive damages verdict is also fully supported by the evidence. The sole financial testimony presented by Liggett was that of Lebow, who controls Vector, the parent of Liggett/Brooke. Any punitive damages award would substantially reduce the value of Lebow’s eleven million shares of Vector’s stock (T.55372-78; 55380-81;

55418; 55426). Utilizing standard capitalized earnings and comparable sales methodology, the experts valued Liggett's financial resources at \$1.8 billion, substantially more than the verdict of \$790 million (T.53017-18).

The opinion contains disparaging remarks about the jury, particularly while addressing the Liggett/Brooke verdicts; yet the court relied on the wisdom of the jury's findings in holding that Amodeo's claims were barred under statutes of limitation. *Engle II* at 455, n.23. The trial court found it "inconceivable that the jury ignored or misconceived the evidence or the merits of the case." *Engle F.J.* *31. Defense counsel repeatedly acknowledged the jury's attentiveness and conscientiousness. (T.36957; 32925-27; 42826; 49686; 49725; 50022; 49689; 32929.)¹⁶ The Phase I jury deliberated over seven days, reviewed thousands of documents, exhibits and their notes. The *Engle* jurors were not "lemmings" that "ran amuck."¹⁷

¹⁶During Phase I, the juror who would later serve as the foreperson, a high school principal, asked to be excused after seven months of service because of professional and financial concerns. Defendants opposed discharging the juror, arguing that he was "an excellent, able juror", "perhaps the most fastidious note-taker", a "core juror" and that "it would almost be a tragedy" to lose this juror. "Whatever his thinking is, it has been developed as a function of very very carefully listening to the evidence in this case" (T.32925-27). The juror remained.

¹⁷Lemmings are mindless rodents that commit suicide through mass migration into the sea where they drown. "Amuck" is "possessed with a murderous or violently uncontrollable frenzy." Webster's 9th New Collegiate Dictionary.

VI. Post-judgment Narrowing of Class, and Ordering That Defense Judgments Be Entered in Favor of Defendants, Against the Three Class Representatives, Was Error.

Following the adverse verdict in Phase I on liability and entitlement to punitive damages, defendants first attacked the standing of two class representatives, Mary Farnan and Angie Della Vecchia, in an attempt to derail the trial (R.51437-58). In August, 1999, defendants argued for the first time that the cut-off date for class membership should be the date of national class certification, October 31, 1994, contradicting its earlier pronouncements that *Engle* was a Class with no time constraints. The trial court denied defendants' eleventh hour motion. Rulings as to the standing of class representatives or the scope of the class are reviewed for abuse of discretion. *Fla. Dept. of Agric. & Consumer Servs. v. City of Pompano Beach*, 829 So.2d 928, 930 (Fla. 4th DCA 2002); *Aetna Life Ins. Co. v. De Angelis*, 317 So.2d 106, 107 (Fla. 3d DCA 1975). The district court erroneously reviewed these issues *de novo*, giving no deference to the findings of the trial court. Moreover, the district court opinion exceeded what defendants requested, ordering that defense judgments be entered against Farnan and Della Vecchia. Post-judgment narrowing of the Class will have a prejudicial impact on thousands of Floridians whose claims may now be time-barred if judgments against Della Vecchia and Farnan stand.

The October 31, 1994 cut-off date for class membership is belied by

defendants' earlier inconsistent litigation positions. In *Engle I*, defendants argued that the *Engle* Class definition was vague, but never suggested a 1994 cut-off date. *Engle I* rejected defendants' challenge of the Class' definition. *Engle I* at 40-41. Defendants proposed a series of Class legal notices to be published in newspapers throughout Florida. None of the proposed notices suggested a cut-off date for class membership; instead, the notices included all Floridians during all time frames (A.48-49). Defendants obtained dismissals and abatements in individual actions where plaintiffs had lung cancers and other diseases diagnosed in 1997 or thereafter, on the basis that those individuals were *Engle* class members (A.50). Nor was there a 1994 cut-off for class membership during voir dire. Defense counsel excused potential "class member" jurors for cause if the juror or his relative was diagnosed with a tobacco related disease in 1997 or 1998, because "there are no time limitations" in the *Engle* Class (T.1375-77; A.56).

Other examples of defendants' inconsistent litigation positions include their submission before the U.S. Supreme Court, (claiming that Judge Kaye's angioplasty in 1999 made him a class member), describing the *Engle* Class as including "any smoker or former smoker who is a Florida citizen or resident and suffers from a disease claimed by Plaintiffs to be smoking-related" (A.51); their petition for a writ of certiorari in the State Medicaid action, describing *Engle* as "a Class consisting of

all Florida residents and citizens [that], encompasses all potential claimants in Florida seeking recovery for alleged smoking and addiction-related injuries” (A.11a). Defendants also stipulated during Phase I for the readmission to the Class of many Floridians who had opted out to pursue individual actions, but then requested to “opt-in” because their counsel withdrew. Many of those actions accrued after 1994. (T.31885-93; 33172-81; 35242-46; A.43).

Defendants’ challenge of the class representatives’ standing was untimely. Farnan and Della Vecchia were substituted as class representatives prior to the Phase I trial, after full disclosure of their dates of lung cancer diagnosis (A.52-54). Defendants waited fifteen additional months, until after the Phase I verdict, before challenging their standing (R.51437-58). Prior to the Phase I verdict, the defense position had been “We want as many people as possible bound” (A.57); so that “not a single Florida . . . injured smoker in this Class can ever recover punitive damages from any of the defendants in this courtroom” (T.36004-05). This “wait-and-see” attitude has been condemned. *See e.g., Danzig v. Jack Grynberg & Associates*, 161 Cal.App. 3d 1128, 1136-37 (Cal. Ct. App. 1984).

The requisites for class membership, “like a statute of limitations, is subject to waiver, estoppel and equitable tolling.” *Zipes v. Trans. World Airlines*, 455 U.S. 385, 392 (1982). The defendants, through their conduct and inconsistent litigation

positions, waived any cut-off dates for class membership. *In accord, Birmingham Steel Corp. v. Tennessee Valley Auth.*, 353 F.3d 1131, 1341 (11th Cir. 2003) (Judicial estoppel is “an equitable doctrine that promotes the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment”); *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (“Judicial estoppel. . . prevents parties from ‘playing fast and loose.’”) Changing the rules and establishing a new cut-off date after nine years of litigation, is wrong. *See Vizcaino v. U.S. Dist. Ct. for the Western Dist. of Washington*, 173 F.3d 713, 721 (9th Cir. 1999) (court rejected Microsoft’s attempt to “substantially narrow the membership of the class” following an appellate mandate and decision on the merits.)

It was error to order that judgments be entered against class representatives Farnan and Della Vecchia because their diseases were diagnosed after the revised cut-off dates.¹⁸ *Diamond*, 397 So.2d at 672; (Article I, §21, Fla. Const. guarantees access to courts); *Southland Corp. v. Smith*, 426 So.2d 1182, 1183 (Fla. 5th DCA 1983)

¹⁸It was also error to order that judgment be entered against Amodeo. The trial court properly found that application of statutes of limitation would deprive Amodeo of a remedy without due process of law. *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So.2d 671, 672 (Fla. 1981); *Pulmosan Safety Equipment v. Barnes*, 752 So.2d 556 (Fla. 2000) (litigants cannot be deprived of their causes of action prior to actual discovery of the misconduct causing the injury). A defendant is estopped from asserting the statute of limitations to gain an advantage from his own wrongdoing. *Tanner v. Hartog*, 618 So.2d 177, 185 (Fla. 1993) (Kogan, C.J. concurring).

(denial of due process to enter defense judgment without giving litigants the right to prove his case upon remand); *Palm Shores, Inc. v. Nobles*, 5 So.2d 52 (Fla. 1941) (denial of due process to bar claims without providing Plaintiffs “an adjudication on the merits”). Under Florida law, all Floridians’ statutes of limitation are tolled. See *Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984) (following class decertification “purchasers should not be subject to the defenses of the statute of limitations or laches”).

VII. Comments of Counsel Did Not Interfere with the Jury’s Deliberations and Decisions.

This Court has recognized “the superior vantage point of the trial judge” who was on the scene and is in the best position to determine the impact, if any, of argument of counsel on the jury and has ordered the abuse of discretion standard to be applied because the “trial judge is in the best position to determine the propriety and potential impact of allegedly improper closing argument.” *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010, 1031 n. 25 (Fla. 2000). The trial judge here was crystal clear:

The Court has carefully considered the Motion 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.

Engle F.J. at *7. The trial court further found that the jury “did not evince any prejudice, passion or corruption in rendering its verdict.” *Engle F.J.* *31. The district court failed to provide the proper deference to the trial court’s findings, applying an improper *de novo* standard of review rather than the requisite abuse of discretion standard. Defendants’ trial strategy, was to defend the case by convincing the jury that tobacco manufacturers should not be liable for selling a legal product with congressionally mandated warnings (“Can a plaintiff in 1999 seriously come into this courtroom and suggest that manufacturing a legal product is beyond all bounds of decency, atrocious and utterly intolerable?” “Manufacturing, advertising, and marketing a product that our society has told us is a legal product. . . cannot be behavior which goes and fits into [the verdict form]” “The Attorneys General wanted to be certain that the tobacco companies would actually be able to stay in business to sell a legal product”) (T.37523; 37390; 51101).¹⁹

¹⁹But legality was never an issue since the legality of an act does not insulate it from tort liability. See *McCarthy v. Olin Corp.*, 119 F.3d 148, 163 n. 14 (2d Cir.

Counsel properly used Civil Rights examples as an analogy of where "legality" of the product - cigarettes - was not dispositive of the issue; being legal did not make defendants' conduct "right." There is wide latitude in closing arguments and the analogies were appropriate. *See Street v. State*, 636 So.2d 1297, 1303 (Fla. 1994) (counsel's argument may include references to and quotes from the Bible); *Paramore v. State*, 229 So.2d 855, 860-61 (Fla. 1969) ("Counsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men as may be appropriate to the case.")

Class Counsel did not pander; the defendants did, calling an African American employee (Gertrude Bourgeois) as a damage control witness, a woman who had never testified or given a deposition in a tobacco case, and who offered this response to a question about difficulty in marketing to local stores: "[O]n several occasions, in the small little areas that I would service, I was greeted at the front door and I was told,

1997). Nor did Congress intend for tobacco companies to be immune from liability for selling "a legal product." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The Class filed a motion in limine to prohibit this argument because it was misleading. (A.44-45); (T.37467; 37452; 37449). Defendants "legality defense" is apparently standard trial strategy, judging from a recent opinion affirming a punitive damages award after remand from the U.S. Supreme Court, in *Williams v. Philip Morris*, 2004 WL 1259675 (Or. Ct. App. 2004): "Defendant argued that Oregon cannot punish it. . . for selling a lawful product. . . . [T]he punitive damages award was based not simply on defendant's sale of cigarettes but on its using fraudulent and deceptive means in order to do so." (A.58 *27).

"Nigger, you cannot service this store." (T. 56206). Defense counsel gratuitously asked the employee if she worked in Los Angeles during "the Rodney King time" (T. 56210). She was also used as a *raison d'être* to announcing that Garth Reeves "was the recipient" of the "Kool Achiever Award." (T. 56213). At a sidebar conference, the trial judge reacted, stating "This courtroom is incensed and it should never have happened" (T. 56213-14). Defendants also attempted (unsuccessfully) to call a series of African American witnesses who had no relevant testimony i.e., the Mayor of Macon, Georgia (where one juror was born and raised), Garth Reeves, the publisher of The Miami Times and Mattie Mack, a small tobacco farmer (T. 61995-98).

The majority of the comments of counsel that are referred to by the district court occurred during Phase I, *over a year before the jurors deliberated in Phase IIB* and determined their punitive damages award.²⁰ The district court's view that counsel "personally vouched to the jury that the defendants would not go bankrupt" and was "urging the jury to assume any award would be payable in installments over decades

²⁰Multiple personal insults were hurled by defendants at Class Counsel, who were accused, in the presence of the jury, of conducting a "heresy trial" (T. 36880-81; 36955); distorting and misrepresenting documents (T. 36808); having no interest in "truth or justice or in exposing massive wrongdoing" "This case is about money" (T. 37161; 37246; 37348; 36786); everything the Class did was in an effort to "win a larger pot of money" (T. 36960); "Mr. Rosenblatt does not seek truth, he does not seek fairness and he does not seek justice. He only seeks money" (T. 57186-87).

into the future,” is out of context.²¹ Counsel’s argument to the jury that “under the instructions you get and based on the evidence and testimony you have heard in this case, I represent to you. . .”, was not counsel’s personal voucher but rather a figure of speech such as “I think” or “I believe”. See *Murphy*, 766 So.2d at 1029, approving *Forman v. Wallshein*, 671 So.2d 872 (Fla. 3d DCA 1996).

It was defendants who injected the MSA and FSA into *Engle*, and the concept of a payout (T.51050; 51088-90). Commencing with opening statements and continuing thereafter, Tobacco argued that in contrast to the MSA, where Tobacco’s payments spanned 25 years, defendants must pay a punitive damages verdict in *Engle* “immediately” “in a single lump sum amount” (T.51101-03; 53183; 54803-04). The trial court’s reaction was that it was unfair to mislead the jury by defendants’ false assertions:

The Court: We are not telling the jury a lot of stuff. We are not telling the jury, for example, if they come up with an award, no matter what it is, the only money that the defense has to come up with is \$100 million for an appeal. . . . I think to mislead [the jury] and say 30 days from the time of the verdict is wrong. If you want me to explain to them the techniques of what is going on, you know, I’ll do that. T.53063-64.

²¹The opinion fails to consider any of Class Counsel’s comments in context. See *State v. Jones*, 867 So.2d 398, 400 (Fla. 2004). The opinion is filled with “partisan rhetoric” derived from its almost verbatim adoption of defendants’ *Engle II* briefs (A.7; 5 at 7-21). This Court has condemned a similar practice by trial judges. See *Perlow v. Berg-Perlow*, 2004 WL 583130 *15-16 (Fla. 2004) (Lewis, J. specially concurring).

Tobacco declined the trial court's offer. Defendants received a curative instruction and a special instruction at the conclusion of the evidence, advising the jury that it was only the "current financial condition and resources" of each defendant that the jury was to consider and "current ability to pay a punitive damages award" and specifically "not whether a defendant can pay using a payout or an installment plan." (T.57789). The district court disregarded settled Florida law that a jury is presumed to follow the instructions given to them. *See Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932, 942 (Fla. 2001). The punitive damages instructions, as a whole, were fair and complete. *Holiday*, 753 So.2d at 1269. Defendants cannot complain of alleged error that was clearly invited. *See Barwick v. State*, 660 So.2d 685, 694 (Fla. 1995); *Dufour v. State*, 495 So.2d 154, 160-61 (Fla. 1986); *State v. Mathis*, 278 So.2d 280, 281 (Fla. 1973); *Rodriguez v. State*, 2004 WL 93942 *8 (Fla. 3d DCA 2004).

In the context of two years of litigation, with over 57,000 transcript pages, 23 days of opening and closing statements during three phases, where defense objections were sustained and curative instructions were given, and where the evidence of defendants' guilt was overwhelming, any alleged error contained within a handful of comments, is harmless and invited. *See Murphy*, 766 So.2d at 1013 n.2; *State v. Compo*, 651 So.2d 127, 130 (Fla. 2d DCA 1995); §59.041, Fla. Stat. (2001).

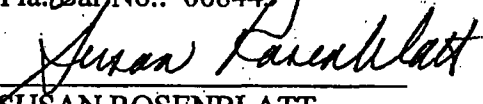
CONCLUSION

The Florida *Engle* Class most respectfully requests that this Court quash the decision of the district court and reinstate class certification, the three jury verdicts and the final judgment. If this Court determines that the punitive damages verdict is excessive, then the Class requests that this Court enter a remittitur, pursuant to the criteria in *Ballard*, *Gore* and *State Farm*.

Respectfully submitted,

STANLEY M. ROSENBLATT, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
(305) 374-6131

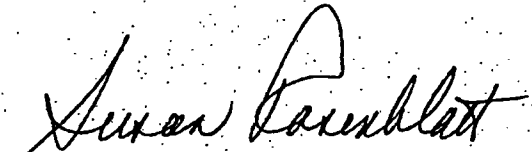
By: 
STANLEY M. ROSENBLATT
Fla. Bar No.: 068445

By: 
SUSAN ROSENBLATT
Fla. Bar No.: 142163

CERTIFICATE OF SERVICE

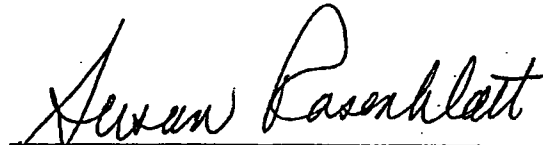
I HEREBY CERTIFY that a true and correct copy of the Petitioners'

Brief on the Merits was hand delivered to Norman Coll, Esquire, Shook Hardy & Bacon, LLP, Miami Center, Suite 2400, 201 South Biscayne Boulevard, Miami, FL 33131-2312 this 14th day of June, 2004 and delivered by Federal Express to all other counsel on the attached Service List.


SUSAN ROSENBLATT

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.


SUSAN ROSENBLATT
Fla. Bar No.: 142163


STANLEY M. ROSENBLATT
Fla. Bar No.: 068445

ENGLE FLORIDA CLASS SUPREME COURT SERVICE LIST
LOWER TRIBUNAL CASE NO.: 3D00-3400

Stanley M. Rosenblatt, Esquire
Susan Rosenblatt, Esquire
Stanley M. Rosenblatt, P.A.
66 West Flagler Street
12th Floor, Concord Building
Miami, Florida 33130
Tel: (305) 374-6131
Fax: (305) 381-8818
Class Counsel for the Engle Class

Dan K. Webb, Esquire
Stuart Altschuler, Esquire
Winston & Strawn
35 West Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax (312) 558-5700
(Co-Counsel for Philip Morris, Inc.)

Norman A. Coll, Esquire
Kenneth J. Reilly, Esquire
Shook Hardy & Bacon, LLP
Miami Center, Suite 2400
201 South Biscayne Boulevard
Miami, FL 33131-2312
Tel: (305) 358-5171
Fax (305) 358-7470
(Co-Counsel for Philip Morris Inc.)
(Co-Counsel for Lorillard, Inc., Lorillard
Tobacco Company)

Robert C. Heim, Esquire
Joseph P. Archie, Esquire
Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
Tel: (215) 994-4000
Fax (215) 994-3143
(Co-counsel for Philip Morris, Inc.)

Melvin S. Spaeth, Esquire
David Eggert, Esquire
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
Tel: (202) 942-5000
Fax (202) 942-5999
(Co-counsel for Philip Morris, Inc.)

Stephen N. Zack, Esquire
Zack Kosnitzky
100 S.E. Second Street, Suite 2800
Miami, Florida 33131-2144
Tel: (305) 539-8400
Fax (305) 539-0499
(Co-Counsel for Philip Morris, Inc.)

James T. Newsom, Esquire
Shook, Hardy & Bacon, LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105
Tel: (816) 474-6550
Fax: (816) 421-2708/421-5547
(Co-Counsel for Lorillard, Inc.
Lorillard Tobacco Company)

ENGLE FLORIDA CLASS SUPREME COURT SERVICE LIST
LOWER TRIBUNAL CASE NO.: 3D00-3400

Arthur J. England, Jr., Esquire
David L. Ross, Esquire
Elliot H. Scherker, Esquire
Greenberg, Traurig
1221 Brickell Avenue
Miami, FL 33131
Tel: (305) 579-0500
Fax (305) 789-5373
(Co-Counsel for Lorillard, Inc. and
Lorillard Tobacco Company)

James R. Johnson, Esquire
Diane G. Pulley, Esquire
Jones Day Reavis & Pogue
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, GA 30308-3242
Tel: (404) 521-3939
Fax: (404) 581-8330
(Co-Counsel for RJ Reynolds Tob. Co.)

R. Benjamine Reid, Esquire
Wendy F. Lumish, Esquire
Carlton Fields
100 S.E. 2nd Street, Suite 4100
Miami, Florida 33131-9101
Tel: (305) 530-0050
Fax (305) 530-0055
(Co-Counsel for RJ Reynolds Tob. Co.)

Robert H. Klonoff, Esquire
Jones Day Reavis & Pogue
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax (202) 626-1700
(Co-Counsel for RJ Reynolds Tob. Co.)

Gordon Smith, Esquire
Richard A. Schneider, Esquire
Barry Goheen, Esquire
King & Spalding
191 Peachtree Street
Atlanta, GA 30303-1763
Tel: (404) 572-4600
Fax: (404) 572-5125
(Co-Counsel for Brown & Williamson
Tobacco Corporation/The American
Tobacco Company)

Anthony J. Upshaw, Esquire
Adorno & Yoss
2601 South Bayshore Drive, Ste. 1600
Miami, FL 33133
Tel: (305) 860-7052
Fax (305) 250-7110
(Co-Counsel for Brown & Williamson
Tobacco Corporation/The American
Tobacco Company)

James A. Goold, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Tel: (202) 662-6000
Fax: (202) 778-5507/662-6291
(Co-Counsel for Tobacco Institute)

Gutierrez & Associates
Suite 510, Courvoisier Centre II
601 Brickell Key Drive
Miami, FL 33131-2651
Tel: (305) 577-4500
Fax (305) 577-8690
(Co-Counsel for Tobacco Institute and
Council for Tobacco Research)

ENGLE FLORIDA CLASS SUPREME COURT SERVICE LIST
LOWER TRIBUNAL CASE NO.: 3D00-3400

Joseph P. Moodhe, Esquire
Debevoise & Plimpton
919 Third Avenue
New York, N.Y. 10022
Tel: (212) 909-6000
Fax: (212) 909-6836
(Co-Counsel for Council for Tobacco Research)

Michael Fay, Esquire
Aaron Marks, Esquire
Kassowitz Benson Torres & Friedman
1633 Broadway, 22nd Floor
New York, N.Y. 10019-6799
Tel: (212) 506-1700
Fax: (212) 506-1800
(Co-Counsel for Liggett Group, Inc.,
Brooke Group Holding, Inc.)

Kelly A. Luther, Esquire
Clarke, Siverglate, Campbell, Williams &
Montgomery
799 Brickell Plaza, 9th Floor
Miami, FL 33131
Tel: (305) 377-0700
Fax: (305) 377-3001
(Co-Counsel for Liggett Group, Inc.
Brooke Group Holding, Inc.)

Alvin B. Davis, P.A.
Steel Hector & Davis, LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398
Tel: (305) 577-2835
Fax: (305) 577-7001
(Co-Counsel for Liggett Group, Inc.
Brooke Group Holding, Inc.)

Brian Wolfman, Esquire
Alan Morrison, Esquire
Public Citizen Litigation Group
1600 Twentieth Street, N.W.
Washington, D.C. 20009-1001
Amicus for Public Citizen,
National Center for Tobacco Free Kids,
The American Cancer Society, The
American Heart Association, The
American Lung Association, The Allergy
and Asthma Network Mothers of
Asthmatics, The National Latino Counsel
on Alcohol and Tobacco Prevention

Christopher J. Lynch, Esquire
Angones, Hunger, McClure, Lynch,
Williams & Garcia, P.A.
66 West Flagler Street
9th Floor, Concord Building
Miami, FL 33130
Tel: (305) 371-5000
Fax: (305) 371-3948
Amicus on Behalf of
National Center for Tobacco Free Kids,
The American Cancer Society, The
American Heart Association, The
American Lung Association, The Allergy
and Asthma Network Mothers of
Asthmatics, The National Latino Counsel
on Alcohol and Tobacco Prevention

Norwood S. Wilner, Esquire
Greg Maxwell, Esquire
Spohrer, Wilner, Maxwell
& Matthews, P.A.
701 West Adams Street, Suite 2
Jacksonville, FL 32204
Tel: (904) 354-8310
Amicus for Tobacco Trial Lawyers Assoc.

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (22)

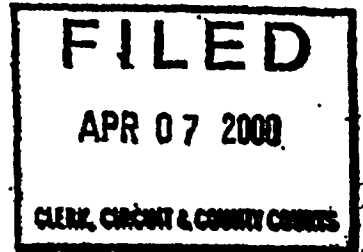
HOWARD A. ENGLE, M.D., et al.,

Plaintiffs,

v.

RJ REYNOLDS TOBACCO COMPANY, et al.,

Defendants.



VERDICT FORM FOR PHASE II

We, the Jury, return the following Verdict:

Question No. 1

[Legal Causation]

In your verdict of July 7, 1999, you found that smoking cigarettes causes some diseases including lung cancer and laryngeal (throat) cancer.

Was smoking cigarettes a legal cause of Mary Faman's lung cancer?

Yes ✓

No _____

Was smoking cigarettes a legal cause of Frank Amodeo's laryngeal (throat) cancer?

Yes ✓

No _____

Was smoking cigarettes a legal cause of Angie Della Vecchia's lung cancer and death?

Yes ✓

No _____

If your answer as to one or more of the Class Representatives, above, is "No", your verdict is for the Defendants as to that Class Representative and you should not answer any further questions as to that Class Representative. If you answered "No" to Question No. 1 for all three Class Representatives, you do not need to answer any further questions. Please sign and date the last page. If you answered "Yes" as to one or more of the Class Representatives, please answer the following questions as to that or those Class Representatives.

Question No.2

[Strict Liability]

You found in your Verdict of July 7, 1999 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 (except for Brooke whose liability is limited to after July 1, 1974).

Were defective and unreasonably dangerous cigarettes placed on the market by one or more of the Defendant tobacco companies a legal cause of damage to Class Representatives Mary Farnan, and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as to each Class Representative below.

a. Mary Farnan

Phillip Morris, Incorporated	Yes ☒	No ☐
RJ Reynolds Tobacco Company	Yes ☒	No ☐
Brown & Williamson Tobacco Corporation, Individually and as successor by merger to the American Tobacco Company	Yes ☒	No ☐
Lorillard Tobacco Company/Lorillard, Inc.	Yes ☒	No ☐
Liggett Group Inc.	Yes ☒	No ☐
Brooke Group Holding Inc.	Yes ☒	No ☐

b. Frank Amodeo

Philip Morris, Incorporated	Yes ☒	No ☐
RJ Reynolds Tobacco Company	Yes ☒	No ☐
Brown & Williamson Tobacco Corporation, Individually and as successor by merger to the American Tobacco Company	Yes ☒	No ☐
Lorillard Tobacco Company/Lorillard, Inc.	Yes ☒	No ☐
Liggett Group Inc.	Yes ☒	No ☐
Brooke Group Holding Inc.	Yes ☒	No ☐

c. Estate of Angie Della Vecchia, deceased

Phillip Morris, Incorporated

Yes ☒ No ☐

RJ Reynolds Tobacco Company

Yes ☒ No ☐

**Brown & Williamson Tobacco Corporation,
Individually and as successor by merger
to the American Tobacco Company**

Yes ☒ No ☐

Lorillard Tobacco Company/Lorillard, Inc.

Yes ☒ No ☐

Liggett Group Inc.

Yes ☒ No ☐

Brooke Group Holding Inc.

Yes ☒ No ☐

Question No. 3

[Fraud and Misrepresentation]

In your July 7, 1999 Verdict you found that each of the Defendants made 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, both before and after May 5, 1982 (except for Brooke, whose liability is limited to after May 5, 1982).

Did Class Representatives Mary Farnan, Frank Amodeo and/or Angie Della Vecchia, deceased rely on a false statement(s) of material fact that was a legal cause of damage or death to that Class Representative?

Please answer "Yes" or "No" as indicated below.

Mary Farnan

Phillip Morris, Incorporated

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

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,
Individually and as successor by merger to
the American Tobacco Company**

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.
before May 5, 1982
after May 5, 1982
Both before and after May 5, 1982

Yes _____ No _____
Yes _____ No _____
Yes ✓ No _____

Liggett Group Inc.
before May 5, 1982
after May 5, 1982
Both before and after May 5, 1982

Yes _____ No _____
Yes _____ No _____
Yes ✓ No _____

Brooke Group Holding Inc.
after May 5, 1982

Yes ✓ No _____

Council for Tobacco Research
before May 5, 1982
after May 5, 1982
Both before and after May 5, 1982

Yes _____ No _____
Yes _____ No _____
Yes ✓ No _____

Tobacco Institute
before May 5, 1982
after May 5, 1982
Both before and after May 5, 1982

Yes _____ No _____
Yes _____ No _____
Yes ✓ No _____

Frank Amodeo

Phillip Morris, Incorporated
before May 5, 1982
after May 5, 1982
Both before and after May 5, 1982

Yes _____ No _____
Yes _____ No _____
Yes ✓ No _____

RJ Reynolds Tobacco Company
before May 5, 1982
after May 5, 1982
Both before and after May 5, 1982

Yes _____ No _____
Yes _____ No _____
Yes ✓ No _____

**Brown & Williamson Tobacco Corporation,
individually and as successor by merger
to the American Tobacco Company**
before May 5, 1982
after May 5, 1982
Both before and after May 5, 1982

Yes _____ No _____
Yes _____ No _____
Yes ✓ No _____

Lorillard Tobacco Company/Lorillard, Inc.
before May 5, 1982
after May 5, 1982
Both before and after May 5, 1982

Yes _____ No _____
Yes _____ No _____
Yes ✓ No _____

Liggett Group Inc.

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Brooke Group Holding Inc.

after May 5, 1982

Yes ☒ No ☐

Council for Tobacco Research

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Tobacco Institute

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Angie Della Vecchia, deceased

Phillip Morris, Incorporated

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

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,
individually and as successor by merger
to the American Tobacco Company**

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.

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Liggett Group Inc.

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Brooke Group Holding Inc.

after May 5, 1982

Yes ☒ No ☐

Council for Tobacco Research

before May 5, 1982

Yes ☐

No ☐

after May 5, 1982

Yes ☐

No ☐

Both before and after May 5, 1982

Yes ☒

No ☐

Tobacco Institute

before May 5, 1982

Yes ☐

No ☐

after May 5, 1982

Yes ☐

No ☐

Both before and after May 5, 1982

Yes ☒

No ☐

Question No. 4.

[Fraud by Concealment]

In your Verdict of July 7, 1999 you found that each of the Defendants concealed or omitted 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, both before and after May 5, 1982 (except for Brooke, whose liability is limited to after May 5, 1982).

As to each of the Defendants, was that Defendant's concealment or omission a legal cause of injury to Class Representatives Mary Farnan, and/or Frank Amodeo and/or Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as indicated below.

Mary Farnan

Philip Morris, Incorporated

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

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,
Individually and as successor by merger
to the American Tobacco Company**

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.

before May 5, 1982

Yes ☐

No ☐

after May 5, 1982

Yes ☐

No ☐

Both before and after May 5, 1982

Yes ☒

No ☐

Liggett Group Inc.

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Brooke Group Holding Inc.

after May 5, 1982

Yes ☒ No ☐

Council for Tobacco Research

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Tobacco Institute

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Frank Amodeo

Philip Morris, Incorporated

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

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,
Individually and as successor by merger
to the American Tobacco Company**

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.

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Liggett Group Inc.

before May 5, 1982

Yes ☐ No ☐

after May 5, 1982

Yes ☐ No ☐

Both before and after May 5, 1982

Yes ☒ No ☐

Brooke Group Holding Inc.

after May 5, 1982

Yes ☒ No ☐

Council for Tobacco Research

before May 5, 1982

after May 5, 1982

Both before and after May 5, 1982

Yes ☐

No ☐

Yes ☐

No ☐

Yes ☒

No ☐

Tobacco Institute

before May 5, 1982

after May 5, 1982

Both before and after May 5, 1982

Yes ☐

No ☐

Yes ☐

No ☐

Yes ☒

No ☐

Angie Della Vecchia, deceased

Phillip Morris, Incorporated

before May 5, 1982

after May 5, 1982

Both before and after May 5, 1982

Yes ☐

No ☐

Yes ☐

No ☐

Yes ☒

No ☐

RJ Reynolds Tobacco Company

before May 5, 1982

after May 5, 1982

Both before and after May 5, 1982

Yes ☐

No ☐

Yes ☐

No ☐

Yes ☒

No ☐

**Brown & Williamson Tobacco Corporation,
Individually and as successor by merger
to the American Tobacco Company**

before May 5, 1982

after May 5, 1982

Both before and after May 5, 1982

Yes ☐

No ☐

Yes ☐

No ☐

Yes ☒

No ☐

Lorillard Tobacco Company/Lorillard, Inc.

before May 5, 1982

after May 5, 1982

Both before and after May 5, 1982

Yes ☐

No ☐

Yes ☐

No ☐

Yes ☒

No ☐

Liggett Group Inc.

before May 5, 1982

after May 5, 1982

Both before and after May 5, 1982

Yes ☐

No ☐

Yes ☐

No ☐

Yes ☒

No ☐

Brooke Group Holding Inc.

after May 5, 1982

Yes ☒

No ☐

Council for Tobacco Research

before May 5, 1982

after May 5, 1982

Both before and after May 5, 1982

Yes ☐

No ☐

Yes ☐

No ☐

Yes ☒

No ☐

Tobacco Institute

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]

In your Verdict of July 7, 1999 you found that all 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.

As to each of the Class Representatives below, was his or her injury legally caused by acts done in furtherance of an agreement among two or more defendants to commit an act of fraud or misrepresentation, as found in Phase One? Please answer "Yes" or "No" with reference to the periods of time before and after May 5, 1982.

Mary Farnan

Before May 5, 1982

Yes _____

No _____

After May 5, 1982

Yes _____

No _____

Both before and after May 5, 1982

Yes ☒

No _____

Frank Amodeo

Before May 5, 1982

Yes _____

No _____

After May 5, 1982

Yes _____

No _____

Both before and after May 5, 1982

Yes ☒

No _____

Angie Della Vecchia, deceased

Before May 5, 1982

Yes _____

No _____

After May 5, 1982

Yes _____

No _____

Both before and after May 5, 1982

Yes ☒

No _____

Question No. 6.

[Civil Conspiracy-Concealment]

In your Verdict of July 7, 1999 you found that all 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.

As to each of the Class Representatives below, was his or her injury legally caused by acts done before or after May 5, 1982 in furtherance of an agreement among two or more of the defendants to commit an act of omission or concealment? Please answer "Yes" or "No" with reference to the periods of time before and after May 5, 1982.

Mary Farnan

Before May 5, 1982

After May 5, 1982

Both before and after May 5, 1982

Yes ☐ No ☐
Yes ☐ No ☐
Yes ☒ No ☐

Frank Amodeo

Before May 5, 1982

After May 5, 1982

Both before and after May 5, 1982

Yes ☐ No ☐
Yes ☐ No ☐
Yes ☒ No ☐

Angie Della Vecchia, deceased

Before May 5, 1982

After May 5, 1982

Both before and after May 5, 1982

Yes ☐ No ☐
Yes ☐ No ☐
Yes ☒ No ☐

Question No. 7.

[Breach of Implied Warranty]

In your Verdict of July 7, 1999, you found that each of the Defendant Tobacco Companies sold or supplied cigarettes that were defective in that they were not reasonably fit for the uses intended, both before and after July 1, 1974 (except for Brooke whose liability is limited to after July 1, 1974).

As to each of the Defendants, below, please state whether the sale or supply of defective cigarettes was a legal cause of damage to Class Representatives Mary Farnan and/or Frank Amodeo and/or was a legal cause of death to Angie Della Vecchia, deceased.

Please answer "Yes" or "No" as to each Defendant, below:

Phillip Morris, Incorporated

Mary Farnan

Frank Amodeo

Angie Della Vecchia, deceased

Yes ☒ No ☐
Yes ☒ No ☐
Yes ☒ No ☐

RJ Reynolds Tobacco Company

Mary Farnan

Frank Amodeo

Angie Della Vecchia, deceased

Yes ☒ No ☐
Yes ☒ No ☐
Yes ☒ No ☐

**Brown & Williamson Tobacco Corporation,
individually and as successor by merger
to the American Tobacco Company**

Mary Farnan

Frank Amodeo

Angie Della Vecchia, deceased

Yes ☒ No ☐
Yes ☒ No ☐
Yes ☒ No ☐

Lorillard Tobacco Company/Lorillard, Inc.

Mary Farnan
Frank Amodeo
Angie Della Vecchia, deceased

Yes	☒	No	☐
Yes	☒	No	☐
Yes	☒	No	☐

Liggett Group Inc.

Mary Farnan
Frank Amodeo
Angie Della Vecchia, deceased

Yes	☒	No	☐
Yes	☒	No	☐
Yes	☒	No	☐

Brooke Group Holding Inc.

Mary Farnan
Frank Amodeo
Angie Della Vecchia, deceased

Yes	☒	No	☐
Yes	☒	No	☐
Yes	☒	No	☐

Question No. 8.

[Breach of Express Warranty]

In your Verdict of July 7, 1999, you found that each of the Defendant tobacco companies sold or supplied 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, both before and after July 1, 1974 (except for Brooke whose liability is limited to after July 1, 1974).

As to each of the Defendants, below, was that Defendant's breach of express warranty a legal cause of damage to Class Representatives Mary Farnan and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased?

Please answer "Yes" or "No" as to each Defendant, below:

Phillip Morris, Incorporated

Mary Farnan
Frank Amodeo
Angie Della Vecchia, deceased

Yes	☒	No	☐
Yes	☒	No	☐
Yes	☒	No	☐

RJ Reynolds Tobacco Company

Mary Farnan
Frank Amodeo
Angie Della Vecchia, deceased

Yes	☒	No	☐
Yes	☒	No	☐
Yes	☒	No	☐

**Brown & Williamson Tobacco Corporation,
individually and as successor by merger
to the American Tobacco Company**

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No ☐
Yes ☒ No ☐
Yes ☒ No ☐

Lorillard Tobacco Company/Lorillard, Inc.

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No ☐
Yes ☒ No ☐
Yes ☒ No ☐

Liggett Group Inc.

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No ☐
Yes ☒ No ☐
Yes ☒ No ☐

Brooke Group Holding Inc.

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No ☐
Yes ☒ No ☐
Yes ☒ No ☐

Question No. 9.

[Negligence]

In your Verdict of July 7, 1999, you found that all of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances, both before and after July 1, 1969 (except for Brooke whose liability is limited to after July 1, 1969).

As to each of the Defendants, below, please state whether that Defendant's negligence was a legal cause of damage to Class Representatives Mary Faman and/or Frank Amodeo and/or a legal cause of death to Angie Della Vecchia, deceased.

Please answer "Yes" or "No" as to each Defendant, below:

Philip Morris, Incorporated

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No ☐
Yes ☒ No ☐
Yes ☒ No ☐

RJ Reynolds Tobacco Company

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No _____
Yes ☒ No _____
Yes ☒ No _____

**Brown & Williamson Tobacco Corporation,
Individually and as successor by merger
to the American Tobacco Company**

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No _____
Yes ☒ No _____
Yes ☒ No _____

Lorillard Tobacco Company/Lorillard, Inc.

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No _____
Yes ☒ No _____
Yes ☒ No _____

Liggett Group Inc.

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No _____
Yes ☒ No _____
Yes ☒ No _____

Brooke Group Holding Inc.

Mary Faman
Frank Amodeo
Angie Della Vecchia, deceased

Yes ☒ No _____
Yes ☒ No _____
Yes ☒ No _____

Question No. 10

[Intentional Infliction of Emotional Distress]

In your Verdict of July 7, 1999, you found that the Plaintiffs had proven that all 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.

As to each of the Defendants below, please state whether that Defendant's extreme and outrageous conduct was a legal cause of injury to Class Representatives Mary Faman and/or Frank Amodeo.

Please answer "Yes" or "No" as to each Defendant, below:

Phillip Morris, Incorporated

Mary Faman
Frank Amodeo

Yes ☒ No ☐
Yes ☒ No ☐

RJ Reynolds Tobacco Company

Mary Faman
Frank Amodeo

Yes ☒ No ☐
Yes ☒ No ☐

**Brown & Williamson Tobacco Corporation,
individually and as successor by merger
to the American Tobacco Company**

Mary Faman
Frank Amodeo

Yes ☒ No ☐
Yes ☒ No ☐

Lorillard Tobacco Company/Lorillard, Inc.

Mary Faman
Frank Amodeo

Yes ☒ No ☐
Yes ☒ No ☐

Liggett Group Inc.

Mary Faman
Frank Amodeo

Yes ☒ No ☐
Yes ☒ No ☐

Brooke Group Holding Inc.

Mary Faman
Frank Amodeo

Yes ☒ No ☐
Yes ☒ No ☐

Question No. 11

[Statute of Limitations]

- a. Did Frank Amodeo know, or should he have known, on or before May 5, 1990, in the exercise of reasonable care that he was addicted to smoking?

Yes ☒

No ☐

- b. Did Frank Amodeo know, or should he have known, on or before May 5, 1990, in the exercise of reasonable care that he had cancer and that there was a reasonable possibility that his cancer was caused by cigarette smoking?

Yes ☒

No ☐

Question No. 12

[Comparative Fault]

If your answer to Question Nos. 2, 7, 8 and/or 9 as to one or more of the Class Representatives was "Yes" as to any Defendant, please answer the following questions relating to that Class Representative.

- a. Was there fault on the part of one or more of the Class Representatives that was a legal cause of his or her damage?

Please answer "Yes" or "No" as to each Class Representative, below:

Mary Farnan

Yes ☒

No ☐

Frank Amodeo

Yes ☒

No ☐

Angie Della Vecchia, Deceased

Yes ☒

No ☐

- b. State the percentage of any fault which was a legal cause of damage to Class Representative Mary Farnan, that you charge to:

Phillip Morris, Incorporated

5 %

RJ Reynolds Tobacco Company

50 %

Brown & Williamson Tobacco Corporation,
Individually and as successor by merger
to the American Tobacco Company

20 %

Lorillard Tobacco Company/Lorillard, Inc.

5 %

Liggett Group Inc.

0 %

Brooke Group Holding Inc.

0 %

Mary Farnan

20 %

TOTAL MUST BE 100%

- c. State the percentage of any fault which was a legal cause of damage to Class Representative Frank Amodeo that you charge to:

Phillip Morris, Incorporated

20 %

RJ Reynolds Tobacco Company

5 %

Brown & Williamson Tobacco Corporation,
Individually and as successor by merger
to the American Tobacco Company

50 %

Lorillard Tobacco Company/Lorillard, Inc.	<u>0</u> %
Liggett Group Inc.	<u>0</u> %
Brooke Group Holding Inc.	<u>0</u> %
Frank Amodeo	<u>25</u> %
TOTAL MUST BE	100%

d. State the percentage of any fault which was a legal cause of damage to **Angie Della Vecchia, Deceased** that you charge to:

Phillip Morris, Incorporated	<u>0</u> %
RJ Reynolds Tobacco Company	<u>50</u> %
Brown & Williamson Tobacco Corporation, Individually and as successor by merger to the American Tobacco Company	<u>35</u> %
Lorillard Tobacco Company/Lorillard, Inc.	<u>0</u> %
Liggett Group Inc.	<u>0</u> %
Brooke Group Holding Inc.	<u>0</u> %
Angie Della Vecchia, Deceased	<u>15</u> %
TOTAL MUST BE	100%

Your answers to Question 12(b)(c) and (d) must each total 100%, and should include a zero for any Defendant or Class Representative you found not at fault.

If you answered "No" as to all Class Representatives and all Defendants in Questions 2 through 10, then your verdict is for the Defendants and you should not continue any further except to sign and date the Verdict Form. If you answered "Yes" as to any Class Representative against any Defendant, in any of Questions 2 through 10, please answer Question Nos. 13 and 14 as it pertains to that or those Class Representatives.

Question No. 13

[Damages]

a. What is the total amount of damages sustained by Class Representative Mary Farnan?

1. **ECONOMIC DAMAGES** [including medical expense, hospitalization, medical care in the past or to be obtained in the future; lost earnings and lost ability to earn money in the future; loss of ability to earn money in the past and in the future; and loss of household services]

a.\$ 1,250,000

2. **INTANGIBLE DAMAGES** [damages incurred in the past or that will be experienced in the future, including bodily injuries, pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience and loss of capacity of the enjoyment of life]

b.\$ 1,600,000

Total damages of Class Representative Mary Farnan

TOTAL (add lines a & b) \$ 2,850,000

b. What is the total amount of damages sustained by Class Representative Frank Amodeo?

1. **ECONOMIC DAMAGES** [including medical expense, hospitalization, medical and nursing care in the past or to be obtained in the future; lost earnings and lost ability to earn money in the future; loss of ability to earn money in the past and in the future; and loss of household services]

a.\$ 2,081,000

2. **INTANGIBLE DAMAGES** [damages incurred in the past or that will be experienced in the future, including bodily injuries, pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience and loss of capacity of the enjoyment of life]

b.\$ 3,750,000

Total damages of Class Representative Frank Amodeo:

TOTAL (add lines a & b) \$ 5,831,000

Question No. 14

What is the total amount of damages sustained by the Estate of Angie Della Vecchia, deceased, and the statutory survivors, her husband Ralph Della Vecchia and her minor son James?

RALPH DELLA VECCHIA [loss of companionship, loss of protection, and mental pain and suffering, in the past and in the future]

a.\$ 1,500,000

JAMES DELLA VECCHIA [loss of parental companionship, instruction, guidance and mental pain and suffering, in the past and in the future]

b.\$ 2,000,000

THE ESTATE OF ANGIE DELLA VECCHIA [funeral expenses, medical and hospital expenses and loss of household services]

c.\$ 523,000

TOTAL (add lines a ,b & c)

\$ 4,023,000

In determining the total amount of damages, do not make any reduction because of the comparative fault, if any, of Class Representatives Mary Farnan, Frank Amodeo and/or Angie Della Vecchia, deceased. If you found one or more of the Class Representatives at fault to any degree, the Court in entering Judgment will reduce that Class Representative's total amount of damages (100%) by the percentage of fault which you found as chargeable to the Class Representative or decedent.

SO SAY WE ALL, this 7th day of APRIL, 2000.