

IN THE SUPREME COURT OF FLORIDA

LUCILLE RUTH SOFFER, etc.

Petitioner,

v.

Case No.: SC13-139

L.T. No.: 1D11-3724

R.J. REYNOLDS TOBACCO CO.,

Respondent.

APPENDIX TO INITIAL BRIEF OF PETITIONER

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Dockets Retrieved: 5749**Filing Date:** 05/05/1994

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03/26/2014		MEMORANDUM	EFILED
03/25/2014		REQUEST FOR HEARING	
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10/30/2013		ORDER:	ON QUALIFIED PROTECTIVE ORDER
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07/24/2013		NOTICE:	TO REOPEN CASE
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07/18/2013		MOTION:	FOR COURT APPOINTED SPECIAL
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06/16/1994		MOTION TO DISMISS	RJ REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INC.
06/16/1994		MOTION TO DISMISS	PHILIP MORRIS COMPANIES, INC.
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06/14/1994		SERVICE RETURNED	BADGE # 84 P 05/06/1994 DN11
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06/06/1994		AFFIDAVIT OF:	STANLEY M. ROSENBLATT ON SERVICE OF PROCESS
06/02/1994		TEXT	LETTER FROM NORMAN A COLL TO STANLEY ROSENBLATT 5/27/94
06/01/1994		NOTICE OF APPEARANCE	ATTORNEY: 00092343 DN01
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05/31/1994		TEXT	LETTER FROM STANLEY M ROSENBLATT TO NORMAN COLL 5/27/94
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05/31/1994		NOTICE OF HEARING-	SPECIAL APPT 07/12/1994 10:00 AM
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05/27/1994		AFFIDAVIT OF:	SERVICE OF PROCESS, PHILIP MORRIS COMPANIES, 5/10/94
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05/05/1994		TEXT	MOTION FOR CLASS CERTIFICATION
05/05/1994		NOTICE OF HEARING-	SPECIAL APPT 07/07/1994 01:30 PM
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S0142977

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

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA (20)

FLA. BAR NO.: 068445

HOWARD A. ENGLE, M.D.,
ROBERT W. ANGELL, RAYMOND LACEY,
FROSENE D. STEEVENS, ARTHUR R. REEVES,
and RICHARD STARR, on behalf of themselves and
all other similarly situated,

Plaintiffs,

CLASS REPRESENTATION

v.

**AMENDED
CLASS ACTION COMPLAINT
FOR COMPENSATORY AND
PUNITIVE DAMAGES**

RJ REYNOLDS TOBACCO COMPANY,
RJR NABISCO, INC., PHILIP MORRIS INCORPORATED
("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES,
INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC.,
THE AMERICAN TOBACCO COMPANY, BROWN &
WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC.,
BROOKE GROUP, LTD., INC., DOSAL TOBACCO CORP.,
COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and
TOBACCO INSTITUTE, INC.,

Defendants.

**AMENDED CLASS ACTION COMPLAINT
FOR COMPENSATORY AND PUNITIVE DAMAGES**

The Plaintiffs, HOWARD A. ENGLE, ROBERT W. ANGELL, RAYMOND LACEY,
FROSENE D. STEEVENS, ARTHUR R. REEVES and RICHARD STARR, on behalf of
themselves and all others similarly situated, sue the defendants, RJ REYNOLDS
TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED

("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., DOSAL TOBACCO CORP., COUNCIL FOR TOBACCO RESEARCH -- U.S.A., INC. and TOBACCO INSTITUTE INC., [hereinafter collectively referred to as "TOBACCO INDUSTRY"] and allege as follows:

JURISDICTION AND IDENTIFICATION OF THE PARTIES

1. This is an action for damages in excess of Fifteen Thousand (\$15,000.00) Dollars, the minimum jurisdictional requirement of this Court, exclusive of interest and costs.

2. Plaintiff HOWARD A. ENGLE, M.D., has been practicing medicine as a pediatrician for over fifty years and is presently a physician in the Children's Medical Group in Dade County, Florida. DR. ENGLE began smoking as a freshman in medical school when he was eighteen years of age. Over the years he has smoked Chesterfield, Lark and Tareyton. DR. ENGLE has tried unsuccessfully to stop smoking over one hundred times; the longest period of time he was successful was two weeks. DR. ENGLE has unsuccessfully utilized the nicotine patch, hypnosis and acupuncture.

3. Plaintiff HOWARD A. ENGLE, M.D. suffers from bad asthma which he developed at age fifty as a result of his continuous smoking. DR. ENGLE's father who was a cattle dealer died of lung cancer at age fifty-three after smoking three packs of Camel's a day for many years. In addition to asthma, DR. ENGLE is extremely susceptible to respiratory infections and is on medication for labile hypertension. Several

of DR. ENGLE's treating physicians have documented the fact that HOWARD A. ENGLE, M.D. is addicted to nicotine.

4. Plaintiff ROBERT W. ANGELL is a resident of Dade County, Florida. MR. ANGELL began smoking when he was nineteen years of age, serving in the Air Force, in 1953. MR. ANGELL was a two-pack a day smoker over many years smoking primarily Marlboro, Raleigh, Viceroy and Kent. ROBERT ANGELL repeatedly attempted to quit smoking without any success. He continued to smoke because of his addiction even after he developed carcinoma of the oral pharynx. MR. ANGELL was hospitalized at Jackson Memorial Hospital from November 28, 1984 to December 22, 1984 and had a laryngectomy, a radical neck dissection and several other operative procedures. Due to his addiction, MR. ANGELL had a cigarette on his way to the operating room.

5. As a result of ROBERT ANGELL's cancer and operative procedures, he is disfigured in his neck and shoulder areas. MR. ANGELL was mute for three years and now utilizes a voice box. He has not had a drug free or a pain free day since his hospital admission in November, 1984.

6. RAYMOND LACEY is a resident of Ohio and Florida. MR. LACEY started smoking when he was approximately eleven years of age and has been addicted since that time. His father and mother were smokers as are his two brothers and two sisters. He was raised in a household in which tobacco smoke was present all the time. Over the years MR. LACEY smoked many brands of cigarettes, including Lucky Strike, Pall Mall and Marlboro. MR. LACEY's father had lung cancer, tuberculosis and presently has colon cancer.

7. In 1986 RAYMOND LACEY was diagnosed as having Buerger's Disease. He was advised by his physicians to stop smoking since smoking was causing him serious health problems. MR. LACEY was advised Buerger's Disease is a progressive disease and he would be severely damaged if he did not stop smoking. He wanted to stop smoking and tried to stop smoking. MR. LACEY's body screamed out for cigarette smoke and he could not stop smoking although he repeatedly attempted to quit. He temporarily stopped smoking for nineteen days while hospitalized and on large dosages of pain medication for Buerger's Disease. RAYMOND LACEY has gone through hypnosis, chewing gum treatment, aqua filters and every available program to stop smoking, except nicotine patches. MR. LACEY has been advised that if he smoked while on nicotine patches it could kill him.

8. Buerger's Disease is a progressive disease that is directly caused by cigarette smoking. As a result of cigarette smoking while he has Buerger's Disease his arteries have closed up. MR. LACEY's addiction to nicotine resulted in the loss of part of one leg; he was told to stop smoking or he could lose the entire leg. MR. LACEY devoutly wished to end the addiction which was causing the loss of his limb but he was unable to do so. As the doctors predicted, MR. LACEY lost his entire leg. He was told that if he continued to smoke his one remaining leg would be amputated as well. Will power, determination and strength of character were no match for MR. LACEY's all consuming addiction to cigarettes. The doctors tragically were correct once again; MR. LACEY continued to puff away and lost the other leg too. Thanks to the ubiquitous "Marlboro Country" propaganda, MR. LACEY is a legless man.

9. MR. LACEY has been advised that he may eventually lose his hands and arms if he doesn't stop smoking. RAYMOND LACEY is hopelessly addicted to nicotine and cigarettes, and continues to smoke in spite of warnings, admonitions and the loss of both his legs.

10. Plaintiff FROSENE D. STEEVENS is a resident of Dade County, Florida. MRS. STEEVENS has been smoking cigarettes for approximately twenty-seven years, including Kent, Benson & Hedges, True, Merit, Carltons, More and Virginia Slims. She has repeatedly attempted to stop smoking but has been unsuccessful since she is addicted to nicotine. MRS. STEEVENS has tried various methods, including Smoke Enders, nicotine patches, and she tried to stop cold turkey on innumerable occasions. These unsuccessful attempts occurred both before and after FROSENE STEEVENS had quadruple bypass heart surgery in early 1989, as a result of congestive heart failure. Her cardiologist repeatedly advised her to stop smoking but she has been unable to quit. MRS. STEEVENS has also suffered repeated bronchial problems and pneumonias as a result of her nicotine addiction.

11. Plaintiff ARTHUR R. REEVES is a resident of Dade County, Florida. MR. REEVES has been a smoker since 1961 and cannot live without cigarettes. Over the years ARTHUR REEVES has smoked just about every brand of cigarettes and considers himself a chain smoker, smoking three packs a day. ARTHUR REEVES' addiction does not permit him to stop smoking. ARTHUR REEVES has attempted to quit smoking on numerous occasions because of his respiratory problems but has been unsuccessful. He is hopelessly addicted to nicotine.

12. Plaintiff RICHARD STARR started smoking at fourteen years of age and was a regular smoker at sixteen years of age. He has smoked Salem, Winston, Merit Menthol, Newport, Marlboro Menthol, More, Benson & Hedges, Virginia Slims, Carlton, Sobraine, Pall Mall, Dunhill, Competidora and Black Russian. MR. STARR has repeatedly attempted to quit smoking and has been unable to do so because of his addiction to nicotine. He has constant upper respiratory congestion, dizziness, rapid and increased heart rate, diminished lung capacity, repeated sore throats, burned nasal passages, loss of appetite, susceptibility to colds and influenza, constant headaches and other health problems that are not characteristic of a twenty-six year old.

13. RICHARD STARR's strong desire to quit smoking cannot compete with his addiction to nicotine. He is unable to quit smoking cigarettes.

14. Venue is proper in Dade County, Florida. Plaintiffs and numerous class members purchased the Defendants' tobacco products in Dade County, Florida and were thereby damaged and are subjected to continuing harm. The Defendants are all doing business in South Florida, received substantial compensation and profits from the sale of tobacco products in South Florida and have made material omissions and misrepresentations in South Florida.

15. Defendant R. J. REYNOLDS TOBACCO COMPANY is a New Jersey corporation doing business throughout the State of Florida during all times material herein, including Dade County, Florida.

16. RJR NABISCO, INC. is a Delaware corporation doing business throughout the State of Florida during all materials times herein, including Dade County,

Florida.

17. PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A.") is a Virginia corporation, doing business in the State of Florida during all material times herein, including Dade County, Florida.

18. PHILIP MORRIS COMPANIES, INC., is a Virginia corporation, doing business throughout the State of Florida during all material times herein, including Dade County, Florida.

19. LORILLARD TOBACCO COMPANY is a Delaware corporation, doing business throughout the State of Florida during all material times herein, including Dade County, Florida.

20. LORILLARD, INC. is a New York corporation, doing business throughout the State of Florida during all times material herein, including Dade County, Florida.

21. THE AMERICAN TOBACCO COMPANY is a Delaware corporation, doing business throughout the State of Florida during all material times herein, including Dade County, Florida.

22. BROWN & WILLIAMSON TOBACCO CORP. is a Delaware corporation, doing business throughout the State of Florida during all times material herein, including Dade County, Florida.

23. LIGGETT GROUP, INC., is a Delaware corporation, doing business throughout the State of Florida during all material times herein, including Dade County, Florida.

24. BROOKE GROUP, LTD., INC., is a Delaware corporation, doing business in the State of Florida during all material times herein, and having its principal place of business in Miami, Dade County, Florida.

25. DOSAL TOBACCO CORP. is a Florida corporation, doing business throughout the State of Florida, with a principal place of business in Dade County, Florida.

26. COUNCIL FOR TOBACCO RESEARCH -- U.S.A., INC. is a New York association doing business throughout the State of Florida, including Dade County, Florida.

27. TOBACCO INSTITUTE, INC. is a New York corporation doing business throughout the State of Florida, including Dade County, Florida.

28. At all times material, COUNCIL FOR TOBACCO RESEARCH -- U.S.A., INC. and TOBACCO INSTITUTE, INC. were and are involved in promotion, lobbying, medical research, legislative and political activities or related ventures, in connection with and on behalf of the Tobacco Industry, throughout Florida and the United States.

29. At all times material Defendants RJ REYNOLDS TOBACCO COMPANY, RJ NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC. and DOSAL TOBACCO CORP. were and are manufacturers and distributors of tobacco products throughout Florida and the United States, containing the chemical nicotine; said

Defendants manipulated the level of nicotine in their tobacco products so as to make these products addictive. Said Defendants further concealed the results of testing and research conducted by or at the request of Defendants, including testing and research of the COUNCIL FOR TOBACCO RESEARCH, Special Projects Division, establishing the addictive nature of nicotine and health hazards of tobacco.

30. At all times material herein, each of the named Defendants was the agent, servant and/or employee of each other Defendant and in acting and omitting to act as alleged herein, did so within the course and scope of the agency or employment.

CLASS REPRESENTATION ALLEGATIONS

31. This action has been brought as a class suit pursuant to Rule 1.220, Florida Rules of Civil Procedure. The Plaintiffs bring this action, on behalf of themselves and all others similarly situated, as representative members of the following proposed class:

All United States citizens and residents and survivors of
United States citizens and residents, who have suffered,
presently suffer, or who have died, from diseases and medical
conditions caused by smoking cigarettes that contain nicotine.

All members of the class could not quit smoking because of
their addiction to nicotine.

32. The officers, directors and agents of the Defendants are specifically
excluded from the proposed class.

33. Class representative HOWARD A. ENGLE, M.D. has been smoking

cigarettes for over fifty years and notwithstanding over one hundred attempts, he has been unable to quit smoking due to his addiction to nicotine.

34. Class representative ROBERT W. ANGELL was smoking for over twenty years, two packs a day, and developed carcinoma of the oral pharynx. He continued to smoke after he was diagnosed with cancer and en route to the operating room. His voice box has been surgically removed; in order to speak at all MR. ANGELL must utilize a hand held appliance; the removal of bodily structures ravaged by cancer has caused severe disfigurement.

35. Class representative RAYMOND LACEY has been addicted to nicotine since he was approximately eleven years of age and smokes to this day. Although he was diagnosed with Buerger's Disease and has lost two limbs due to his smoking; he cannot stop smoking cigarettes. RAYMOND LACEY is addicted to nicotine.

36. Class representative FROSENE STEEVENS has been smoking cigarettes for approximately twenty seven years. MRS. STEEVENS has been unable to quit notwithstanding major heart surgery and pneumonia, caused by cigarettes. She is addicted to nicotine.

37. Class representative ARTHUR R. REEVES smokes three packs a day and has attempted unsuccessfully to quit smoking on numerous occasions because of respiratory ailments. He is likewise addicted to nicotine and cannot quit.

38. Class representative RICHARD STARR started smoking at fourteen years of age and has repeatedly attempted to quit smoking because of severe respiratory problems, nausea, headaches and repeated illnesses. Due to his addiction to nicotine he has been unable to quit smoking cigarettes.

39. The members of the class are so numerous that the individual joinder of all its members is impracticable under Rule 1.220, Florida Rules of Civil Procedure. The exact number and identities of class members are unknown at this time and can be ascertained through appropriate investigation and discovery. There are millions of Americans who are addicted to nicotine and have suffered diseases, illnesses and death due to their addiction.

40. The claims of the representative parties raise questions of law and fact that are common to questions of law and fact raised by the claims of each member of the class.

41. The claims of the representative parties are typical of the claims of each member of the class.

42. The representative parties can fairly and adequately protect and represent the interests of each member of the class.

43. The prosecution of separate claims by each individual member of the class would create a risk of inconsistent or varying adjudications and would not be possible due to the inability of individual claimants to successfully litigate against the Tobacco Industry.

44. The questions of law and fact common to the claims and defenses of the representative parties and the claims and defenses of each member of the class clearly predominate over any questions of law or fact affecting individual members of the class; class representation is superior to other available methods for the fair and efficient adjudication of this controversy.

45. Questions of law and fact that are common to the claims and

defenses of the representative parties and the claims and defenses of each member of the class include, but are not limited to, the following.

(a) Whether the Tobacco Industry has conducted medical research in (1), the Defendants' Research and Development laboratories; (2), through selected grants; and (3), through the Special Projects Division of the COUNCIL FOR TOBACCO RESEARCH -- U.S.A., that the Defendants have suppressed and kept secret from the United States Government and the American public?;

(b) Whether the Special Projects Division of the COUNCIL FOR TOBACCO RESEARCH -- U.S.A. was fraudulently established to hide medical research that linked tobacco and disease and established that nicotine was addictive?;

(c) Whether nicotine is addictive?;

(d) Whether the Tobacco Industry has manipulated the levels of nicotine in their tobacco products?;

(e) Whether the Tobacco industry has conducted research or has caused research to have been done that affirmatively proves the addictive nature of nicotine?;

(f) Whether the Tobacco Industry has hidden from the public and the United States Government, research that proves nicotine is addictive?;

(g) Whether the Tobacco Industry has intentionally caused the level of nicotine to rise in low tar cigarettes so as to keep smokers of low tar cigarettes addicted to nicotine?;

(h) Whether the Tobacco Industry has intentionally caused smokers throughout the United States to become addicted to cigarettes through the

manipulation of nicotine levels?;

(i) Whether the Chief Executive Officers, Directors of Research and Development and other spokespersons for the Tobacco Industry have repeatedly misrepresented the truth by stating that smoking cigarettes does not cause lung disease, heart disease, cancer and other diseases?;

(j) Whether the Tobacco Industry knows that tobacco causes lung cancer, heart disease, emphysema and other diseases through its independent research and research conducted through the Special Projects Division of the Defendant, COUNCIL FOR TOBACCO RESEARCH -- U.S.A., and has intentionally concealed and distorted the results of research from the American public and the United States Government?;

(k) Whether the Tobacco Industry has been aware for decades that there are safer alternative designs for cigarettes that would not be addictive and the Tobacco Industry has intentionally disregarded the safer alternatives, to maximize the sale of a defective, addictive product?;

(l) Whether cigarettes contain an addictive substance, nicotine, that does in fact addict members of the consuming public so as to constitute a defective and dangerous product?;

(m) Whether the Tobacco Industry has conspired to defraud the United States Government and the smoking public by manipulating levels of nicotine in cigarettes and concealing any adverse testing or research that would establish the addictive nature of nicotine and the adverse health consequences of smoking?;

(n) Whether the Tobacco Industry has required silence from its

scientists and researchers, so as to suppress and conceal from the American public at large and the United States Government information about the addictive nature of nicotine and the dangerous nature of the Defendants' tobacco products?;

(o) Whether Plaintiffs and members of the class could not quit smoking because of their addiction to nicotine?;

(p) Whether the COUNCIL FOR TOBACCO RESEARCH -- U.S.A. is nothing more than a sham -- a Tobacco Industry puppet that funds medical research unrelated to issues of tobacco and health, with the exception of the research conducted through the Special Projects Division that is concealed from the American public and the United States Government?;

(q) Whether the Tobacco Industry, through the COUNCIL FOR TOBACCO RESEARCH -- U.S.A, and specifically, the Special Projects Division, fraudulently utilized the attorney-client privilege to suppress medical research linking disease to cigarette smoke?;

(r) Whether the Tobacco Industry is the King of concealment and disinformation -- as stated in the Opinion of New Jersey United States Federal Court Judge H. Lee Sarokin?;

(s) Whether the COUNCIL FOR TOBACCO RESEARCH -- U.S.A. INC. and TOBACCO INSTITUTE, INC. have misrepresented to the public at large that there is still a legitimate controversy as to whether smoking cigarettes causes any diseases, with full knowledge that the opposite is true?;

(t) Whether the chief executive officers of the tobacco companies, and the spokespersons for the Defendants TOBACCO INSTITUTE, INC. and COUNCIL

FOR TOBACCO RESEARCH -- U.S.A., INC. have misrepresented to the public at large that (i), smoking cigarettes does not cause lung cancer; (ii), smoking cigarettes does not cause any cancers; (iii), smoking cigarettes does not cause heart disease; (iv), smoking cigarettes does not cause emphysema; (v), nicotine is not addictive; (vi) and it is not known whether any person has ever died from smoking cigarettes?;

(u) Whether the Tobacco Industry, and each of these Defendants, has targeted teenagers, women and minorities through its merchandise advertising, including, but not limited to the "Joe Camel" campaign, including T-shirts, mugs, back packs, cigarette lighters, jackets, beach towels, posters, books, jewelry, playing cards, compacts, athletic equipment, duffel bags, writing utensils, dishes, cutlery, caps, blankets, gear bags, watches, clothing, wallets, thermoses, musical instruments, sports equipment and numerous other attractive products -- none of which contain any warnings as to the health hazards of smoking or addictiveness of nicotine?;

(v) Whether the Tobacco Industry utilizes those portions of the tobacco leaves that contain the most nicotine so as to maximize the level of nicotine and addiction in low tar cigarettes?;

(w) Whether all of the Defendants have acted in concert to defraud, misrepresent and deceive the American public?;

(x) Whether the Tobacco Industry is presently focusing on Third World countries (whose inhabitants are not members of the instant class suit) so as to create and maintain a globe of smokers who are hopelessly addicted to nicotine, with the resulting health costs, suffering and death?;

(y) Whether nicotine is an addictive drug and cigarettes are as

addictive as heroin or cocaine?;

(z) Whether spokespersons of the Tobacco Industry lied to members of Congress on March 25, 1994 and April 14, 1994 in stating under oath that tobacco containing nicotine is not addictive and that smoking cigarettes does not cause disease and death?;

(aa) Whether the Federal Cigarette Labeling and Advertising Act preempts one or more of the claims Plaintiffs and members of the class are asserting in this litigation?;

(bb) Whether the Tobacco Industry's conduct, as set forth in Plaintiffs' Class Action Complaint, constitutes fraud and misrepresentation?;

(cc) Whether the Tobacco Industry has breached implied warranties to the Plaintiffs and members of the class?;

(dd) Whether the Tobacco Industry has produced a defective product (cigarettes) for which they are strictly liable?;

(ee) Whether cigarettes have been defectively designed by the Tobacco Industry in that a safer alternative design was and is available and has not been utilized?;

(ff) Whether the Tobacco Industry has intentionally inflicted emotional distress upon the Plaintiffs and members of the class by their outrageous misconduct?;

(gg) Whether there has been a conspiracy to defraud the American public and the United States Government by the Tobacco Industry?;

(hh) Whether smoking cigarettes causes lung cancer, emphysema,

heart disease and other serious illnesses?;

(ii) Whether over 434,000 persons die each year in the United States as a result of smoking cigarettes and approximately 53,000 additional persons die in the United States each year from exposure to secondary smoke?;

(jj) Whether the Tobacco Industry should be accountable for the damages, suffering and deaths its product has caused?;

(kk) Whether the Tobacco Industry is spending billions of dollars to solely target smokers to switch brands through advertising on billboards, sports events, magazines, newspapers and through merchandise programming?;

(ll) Whether the Tobacco Industry spends billions of dollars on advertising to entice new smokers, particularly teenagers, women and minorities?;

(mm) Whether the Tobacco Industry has concealed medical research establishing that smoking cigarettes over a period of time suppresses the immune system, making individuals more susceptible to disease;

(nn) Whether the Tobacco Industry intentionally targets the most susceptible and vulnerable victims for addiction to cigarettes, including, but not limited to, members of our armed forces during times of combat?;

(oo) Whether the Tobacco Industry prior to January 1, 1965, failed to warn the smoking public of the dangers of smoking cigarettes, notwithstanding evidence of same, that was concealed by the Tobacco Industry from the public?;

(pp) Whether the Tobacco Industry intentionally miscalculates and inaccurately measures the levels of tar and nicotine in cigarettes so as to understate same and deceive the consuming public and the United States Government?;

(qq) Whether the Tobacco Industry intentionally designed a filter with tiny, nearly invisible holes, so that less tar and nicotine would be measured through conventional measuring mechanisms utilized by the Tobacco Industry -- far less tar and nicotine than actually is received in the lungs of the smoker?;

(rr) Whether more nicotine is inhaled by the smoker in low tar cigarettes, due to the intentional manipulation of the level of nicotine and the design of the cigarette and filter by the Tobacco Industry?;

(ss) Whether the Tobacco Industry has intentionally utilized inaccurate measurements for tar and nicotine, knowing that far less tar and nicotine is measured and reported than actually gets to the smoker?;

(tt) Whether the Tobacco Industry has misrepresented the amount of tar and nicotine on cigarette packages, knowing that the true yield of nicotine and tar is far greater than that disclosed?;

(uu) Whether the Tobacco Industry has encouraged smokers to switch to low tar cigarettes since smokers will consume more low tar cigarettes to obtain the nicotine they crave?;

(vv) Whether approximately 434,000 people die each year in the United States as a result of smoking cigarettes?;

(ww) Whether smoking costs the American public approximately 52 billion dollars annually in healthcare and other costs?;

(xx) Whether cigarette smoking is the single most preventable cause of premature death and disability in the United States?;

(yy) Whether a burning cigarette is a chemical factory that fills the

air with more than 4,000 chemicals, including carbon monoxide, a colorless odorless poison?;

(zz) Whether ninety-one percent of six year old children are able to identify Joe Camel with cigarettes?;

(aaa) Whether cigarettes are the major cause of cancer in the United States and are also the single greatest cause of chronic obstruction lung disease?;

(bbb) Whether the Tobacco Industry has spent billions of dollars to hide, cover up and obscure the true facts about smoking?; and

(ccc) Whether the Tobacco Industry has distorted the clear medical and scientific data for their own selfish pecuniary gain and for decades have played a statistical and semantic shell game with the lives and health of the American public?;

46. The defenses asserted by the Tobacco Industry will be very similar if not identical as to all named representatives and members of the class; it would be impractical to assert the claims and defenses in separate lawsuits.

47. Proof on the issue of causation, both as to the linkage between smoking and disease and the addictive nature of nicotine, will be the same as to all named representatives and members of the class.

48. The named class representatives will fairly and adequately protect and represent the interests of each member of the class; each of the named class representatives is highly intelligent and has been or is addicted to nicotine.

49. The claims of the class representatives are typical of the claims of members of the class. The class representatives and members of the class have been and are addicted to cigarettes because of the level of nicotine contained within cigarettes.

There is no conflict between any individual class representative and other members of the class with respect to this action, or with respect to the claims for relief herein set forth.

50. The named class representatives are able to and will fairly and adequately protect the interests of the class.

51. Counsel for the class representatives and members of the class are experienced and capable in class action litigation, and more specifically, litigation against the Tobacco Industry. Stanley M. Rosenblatt, Susan Rosenblatt and their law firm are representing thirty non-smoking flight attendants who filed a class action in 1991 in Dade County Circuit Court against the Tobacco Industry for damages sustained from continued exposure to second hand smoke in airline cabins. Mr. Rosenblatt has deposed Chief Executive Officers and other high ranking officials in the Tobacco Industry, including officers of the COUNCIL FOR TOBACCO RESEARCH -- U.S.A. and the TOBACCO INSTITUTE [*Norma R. Broin, etc. et al. v. Philip Morris Companies, Inc., etc. et al.*, Case No. 91-49738 CA (22)]. As a result of the Broin litigation the Third District Court of Appeal in a per curiam decision published an outstanding Opinion authorizing class action treatment of litigation against the Tobacco Industry. Legal scholars throughout the country have cited with approval the Opinion of the Third District Court of Appeal in *Broin v. Philip Morris*, Case No. 92-1405, that was filed March 15, 1994 (motion for rehearing pending). Mr. Rosenblatt who has handled all discovery in the Broin tobacco litigation will actively conduct and be responsible for the Plaintiffs' case herein and will be trial counsel for the Plaintiffs.

52. The class action is superior to other available methods for the fair and efficient adjudication of this litigation, since individual joinder of all members of the

class is impracticable. Even if any class members could afford individual litigation, which is unlikely and improbable in view of the adversary, it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties in the court system in resolving the controversies engendered by the Tobacco Industry's product. By contrast, the class action device presents far and fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single court. Concentrating this litigation in one forum would aid judicial economy and efficiency, as well as judicial consistency. The conduct of this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each class member. Notice of the pendency and of any resolution of this action can be easily provided to class members by publication.

53. Class representation is superior to other available means for the fair and efficient adjudication of the controversy in view of the financial and political strength of the Tobacco Industry versus individual claimants. No individual action has ever been successful against the Tobacco Industry, including the Cipollone litigation where, after ten years of litigation and twelve reported Opinions, including a United States Supreme Court decision, the Plaintiff's survivors and Plaintiff's counsel gave up, and ultimately received no compensation. The class action device is extremely pliable and designed to fill gaps. There is an enormous gap here. The Tobacco Industry has produced a product with absolutely no redeeming value that seriously injures and kills the consuming public. The class action rule is particularly appropriate to provide the class representatives and members of the class with a remedy.

54. This action is properly maintained as a class action inasmuch as the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FACTS GIVING RISE TO THE CAUSE OF ACTION

55. The named class representatives and members of the class have been addicted and are addicted to nicotine in cigarettes and continue to smoke cigarettes because of their addiction. Plaintiffs and members of the class were unable to quit smoking until after they were afflicted with diseases. Even then, class representatives and members of the class have proceeded to risk their very lives by continuing to smoke because of their addiction.

56. The Tobacco Industry has repeatedly and publically denied that nicotine is addictive, as recently as March 25, 1994, and April 14, 1994, where top tobacco officials, including chief executive officers of the tobacco companies, testified under oath that nicotine is not addictive. The Tobacco Industry continues to take the position that tobacco is not addictive, with full knowledge that nicotine is an addictive poison and cigarettes have caused death and terrible disease to millions of Americans and people throughout the world. The Tobacco Industry has known for over a quarter of a century that nicotine is addictive and has also known of the deleterious health consequences of cigarette smoking.

57. The Tobacco Industry has intentionally suppressed scientific and medical evidence that nicotine is addictive. In January, 1972 a meeting of twenty-five

scientists, sponsored by Defendant COUNCIL FOR TOBACCO RESEARCH -- U.S.A., including a scientist from Defendant PHILIP MORRIS, Dr. William L. Dunn, Jr. and the Scientific Director of Defendant LORILLARD, Alexander Spears, III, Ph.D., met in St. Martin, to determine the answer to the question "Why do people smoke cigarettes?" The group of scientists concluded that nicotine is why people smoke cigarettes; without nicotine people would not smoke. A confidential 1972 PHILIP MORRIS memorandum by Dr. Dunn states in part:

The majority of the conferees . . . accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine. . . there would be no smoking. Some strong evidence can be martialed to support this argument:

- (1) No one has ever become a cigarette smoker by smoking cigarettes without nicotine.
- (2) Most of the psychological responses to inhaled smoke have been shown to be nicotine -- related.

* * *

Why then is there not a market for nicotine per se, to be eaten, sucked, drunk, injected, inserted or inhaled as a pure aerosol? The answer, and I feel quite strongly about this is that the cigarette is in fact among the most awe-inspiring examples of the ingenuity of man. Let me explain my conviction.

The cigarettes should be conceived not as a product but as a package. The product is nicotine. The cigarette is but one of many package layers. There is the carton, which contains the pack, which contains the cigarette, which contains the smoke. The smoke is the final package. The smoker must strip off all these package layers to get to that which he seeks.

But consider for a moment what 200 years of trial and error designing has brought in the way of nicotine packaging:

Think of the cigarette pack as a storage container for a day's supply of nicotine.

- (1) It is unobtrusively portable.
- (2) Its contents are instantly accessible.

Think of the cigarette as a dispenser for a dose unit of nicotine:

- (1) It is readily prepped for dispensing nicotine.
- (2) Its rate of combustion meters the dispensing rate, setting an upper safe limit for a substance that can be toxic in large doses.
- (3) Dispensing is unobtrusive to most ongoing behavior.

Think of a puff of smoke as the vehicle of nicotine:

- (1) A convenient 35 cc. mouthful contains approximately the right amount of nicotine.
- (2) The smoker has wide latitude in further calibration: puff volume, puff interval, depth and duration of inhalation.

* * *

Smoke is beyond question the most optimized vehicle of nicotine and the cigarette the most optimized dispenser of smoke.

58. Dr. William Dunn, Jr. published his findings and that of other scientists in "Smoking Behavior: Motives and Incentives" published by John Wiley & Sons in 1973. Significantly, the introductory remarks and chapter 7, authored by Dr. Dunn, presents not a word about the consensus at the St. Martin meeting and the authors strong conviction that the cigarette pack is a storage container for a days supply of nicotine and the cigarette is a dispenser for a dose unit of nicotine. Nicotine is hardly mentioned by Mr. Dunn; instead, the many virtues and psychological benefits of tobacco are stressed throughout this publication, funded by the Defendant COUNCIL FOR TOBACCO RESEARCH -- U.S.A.

59. The FDA Commissioner David A. Kessler presented to the Congressional Sub Committee on Health and the Environment, on March 25, 1994, evidence that the Tobacco Industry has intentionally sold cigarettes containing an addictive level of nicotine. The Defendants intentionally manipulated the levels of nicotine in cigarettes so as to addict the consuming public. The class representatives and members of Plaintiffs' class were unaware of the Tobacco Industry's knowing manipulation of nicotine levels in tobacco products until such allegations surfaced after FDA investigations in March, 1994.

60. On March 25, 1994, Dr. Alexander W. Spears, the Vice Chairman and Chief Operating Officer of Defendant LORILLARD TOBACCO COMPANY, testified before Congress that the Tobacco Industry does not set nicotine levels for particular brands of cigarettes and that nicotine levels follow the tar level. Dr. Spears and other Tobacco Industry spokespersons testified before the House Sub Committee on Health and the Environment that the Tobacco Industry does not manipulate nicotine levels in cigarettes. Mr. Spears testified on March 25, 1994:

We do not set nicotine levels for particular brands of cigarettes. Nicotine levels follow the tar level. The easy proof that no nicotine manipulation has occurred may be found in the temporal tar and nicotine data from the 1950's to the 1990's. . . [B]oth tar and nicotine on a sales weighted basis have decreased in parallel fashion and by the same amount. . . . The correlation. . . is essentially perfect correlation between tar and nicotine and shows that there is no manipulation of nicotine.

61. On March 25, 1994, Charles O. Whitley, representing the Defendant TOBACCO INSTITUTE similarly testified:

Nicotine levels are a function of tar levels. When tar levels

are set, nicotine levels follow. As manufacturers have reduced tar levels and yields over the years to satisfy changing consumer taste, nicotine levels in yields have fallen correspondingly.

62. Brennan Dawson, the Vice President of the Defendant TOBACCO INSTITUTE, stated on the CBS News Program "Face The Nation" on March 27, 1994:

Some of the Industry testimony that Mr. Waxman did not tell you about included statements from all six cigarette manufacturers that not only do they not add nicotine, but they do not manipulate nicotine. So Congress has been told formally by every cigarette manufacturer in the United States that this claim is without foundation.

63. The Vice Chairman and Chief Operating Officer at Defendant LORILLARD TOBACCO COMPANY wrote an article in 1981 entitled "Chemical and Physical Criteria for Tobacco Leaf of Modern Day Cigarettes" for the 35th Tobacco Chemist's Research Conference. Dr. Spears made several comments in his article about the tobacco companies intentional manipulation of the level of nicotine so as to increase nicotine in low tar cigarettes. Dr. Spears stated:

The 0-6 mg. "tar" segment has grown from a 3.8% share of total market to a 10.6% share over the last five years, and the number of individual cigarette packings has increased from 5 to 30-3. Based on these trends, one would conclude that the lowest "tar" segment is composed of cigarettes utilizing a tobacco blend which is significantly higher in nicotine. Although one cannot conclude that this has been achieved solely by the selection of tobacco, it does indicate a trend toward the use of tobacco with higher nicotine levels. . . .

In order to have some additional insight into the possible tobacco type trends that may result from the 0-6 mg. "tar" category, we can examine the ways in which the higher nicotine levels can be achieved. . . Higher nicotine levels can be achieved by decreasing Oriental and the stem and tobacco sheet and increasing the Burley and upper stalk positions of both the Flue-cured and the Burley tobacco. It may be

concluded, therefore, that continuation of the trend in the 0-6 mg. "tar" segment will lead to increased usage of Burley and upper stalk position tobaccos and a possible decrease in usage of Oriental and tobacco stem and sheet.

In Dr. Spears "Summary" he states in part:

In summary, the physical and chemical characteristics of the tobacco in today's cigarettes are undergoing some change. Nicotine will increase if the very low "tar" brands continue to expand in market share.

64. Each of the named representatives and members of the class would not have continued smoking cigarettes, and tried repeatedly to quit smoking but were unable to do so, due to their addiction to nicotine. The Tobacco Industry suppressed and concealed information about the addictive nature of nicotine, all the while knowing that the Tobacco Industry was intentionally manipulating the level of nicotine so as to keep American smokers addicted. The Tobacco Industry stresses "free choice" in its campaign for "smokers' rights"; yet it eliminated any free choice for Plaintiffs and members of the class. Plaintiffs and members of the class were unable to quit because of their addiction.

65. During the last forty years, the Tobacco Industry misrepresented to the American consuming public that cigarettes were good for smokers. One example is the late Arthur Godfrey who promoted Chesterfields for years and ultimately died of lung cancer (a smoker). On his popular radio show he told consumers that he had evidence to make them feel better about the health issues and that "scientific studies" demonstrated bodily organs were not adversely affected by smoking. Arthur Godfrey stated:

That ought to make you feel better if you had any worries at

all about it. I never did. I smoked two or three packs of these things every day. I feel pretty good. I don't know, I never did believe that they did you any harm and now, we have got the proof -- Chesterfields are the cigarette for you to smoke, be they regular size or kingsize.

* * * *

I have a client here, the Chesterfield people, Liggett and Myers are their names. The firm is an honorable one, a trustworthy one. The years and years and years that they have been advertising, you never heard them make an unsubstantiated claim -- ever! Certainly not during the time that I have been with them. They came out, not so long ago, with a report by an eminent physician -- it's a good report -- I suppose there are those who wonder about it.

If you believe in me, and over the twenty-three years I have been on the radio, you know that I have never yet misled you with advertising. Nobody has been able to buy me enough to do that. If you believe in me, then you take my word that I know this -- that the Liggett and Myers people don't make statements that they can't substantiate. And when they say that after this test that they made with the doctor, that after he made it, he came up and says, "it is my opinion that the ears, nose, throat and accessory organs of all participating subjects examined by me, were not adversely affected in the six month period by smoking the cigarettes provided".

And they meant what they say -- that specialists said it. Liggett and Myers have substantiated it. Remember that when you're wondering about cigarettes. Smoke Chesterfields -- they are good [for you] [see *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990)].

66. Chesterfield advertisements in the 1950's spoke of studies by competent medical specialists of the affects of smoking Chesterfield cigarettes on a group of men and women who "continually smoked ten to forty cigarettes" per day for "one to thirty years". None of the smokers had any problems. The Tobacco Industry boasted through Arthur Godfrey that "Godfrey could not remember ever seeing a gravestone

stating that the buried individual had 'smoked too much". Advertisements from the Tobacco Industry said "play safe and smoke Chesterfield". L & M advertised that "cigarettes were just what the doctor ordered" [see *Cipollone* Opinion in Third Circuit]. The R. J. REYNOLDS TOBACCO COMPANY similarly advertised -- "More doctors smoke Camels than any other cigarette".

67. After presiding over the *Cipollone* litigation for ten years and another action against the Tobacco Industry, *Haines v. Liggett Group, Inc.*, U.S. District Court Judge H. Lee Sarokin stated that "The Tobacco Industry may be the king of concealment and disinformation". Judge Sarokin further stated in his published Opinion:

. . . . All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!

Judge Sarokin found that the Tobacco Industry manipulated the COUNCIL FOR TOBACCO RESEARCH -- U.S.A.; any negative findings or information that would have an adverse impact on the Tobacco Industry were placed in a Special Projects Division where it could be protected through the assertion of the attorney/client privilege. This was yet another tobacco fraud on the American public and the United States Government.

68. Cigarettes are not merely defective products with the potential to cause harm. Cigarettes are a product that when used as directed will inevitably cause death and disease to a large percentage of its users, the percentage increasing with the

duration and volume of use. Cigarettes have absolutely no redeeming value.

69. The Tobacco Industry has lied to the American public through a multi-million dollar advertising campaign pretending that the COUNCIL FOR TOBACCO RESEARCH -- U.S.A. was and is an independent, objective, scientific body created for the purpose of disseminating factual information about the relationship between smoking and health. In 1984 Defendant R. J. REYNOLDS advertised in the New York Times, stating "Studies which conclude that smoking causes disease have regularly ignored scientific evidence to the contrary. These scientific findings come from research completely independent of the Tobacco Industry". The truth is and was that at all times material the COUNCIL FOR TOBACCO RESEARCH -- U.S.A. was an arm and agent of the Tobacco Industry whose true purpose was to conceal or assail any data that linked cigarette smoking to disease and death.

70. For over forty years the Tobacco Industry has been using the same sad, dishonest and scientifically discredited argument. The orchestra members have changed over the years, even some of the instruments -- but the conductor and his message remain constant. Distort, belittle, lie and bottom line -- at all cost -- keep selling cigarettes!

71. The vehicle and mechanism to continue selling cigarettes, notwithstanding evidence of adverse health consequences, and notwithstanding the mandatory warnings on all cigarettes packages, was and is nicotine. The class representatives and members of the class do not possess the ability to stop smoking cigarettes because they are addicted to nicotine, through the intentional acts of the Tobacco Industry. Smokers find it easier to change jobs, divorce spouses and move to

new cities, than to stop smoking. Smoking is not a habit, it is an addiction.

72. The class representatives and members of the class are addicted to a substance that is slowly killing them. Were cigarette smoke removed from the equation, suffering, deaths and healthcare costs would be drastically reduced and society would prosper. Healthcare would be affordable and there would be no medical crisis. The named class representatives and members of the class cannot legislate and ban cigarettes; they can and are seeking redress for the injuries they have sustained.

73. Adolescents and young adults start smoking through the lure of massive advertising campaigns of the Tobacco Industry, including merchandise campaigns such as "Joe Camel" and "Marlboro Country Store" "Save the Miles, Get the Gear" "Gear for the Great Wide Open" and "Bandanna Cowboy". Young people believe that they will smoke until they finish high school; smoke for one summer; smoke until they complete college; smoke until they marry or until they have their first child. Unfortunately, cigarettes are like heroin; once the new smokers become addicted to nicotine, there is no way out. By manipulating the levels of nicotine, new smokers start and cannot stop - the Tobacco Industry is assured a new wave of smokers with the resulting health costs, suffering and death.

74. Presidents have smoked, U.S. Supreme Court Justices smoke, highly respected physicians smoke cigarettes -- all because they are addicted. The class representatives and members of the class are not on a mission to cause themselves great suffering and death -- they are addicted and have no choice in the matter.

75. In addition to causing 434,000 deaths each year, smoking accounts for approximately 85% of all lung cancer deaths, 80% of chronic obstructive pulmonary

disease deaths and 30% of all heart disease deaths; smoking costs America approximately \$52 billion dollars annually in healthcare and other costs. The evidence establishing cigarette smoking as the single largest preventable cause of premature death and disability in the United States is overwhelming -- totalling more than 50,000 studies from dozens of cultures.

76. In addition to deliberately creating millions of nicotine addicts, the tobacco manufacturers and tobacco lobbying associations successfully brainwashed generations of Americans into believing that smoking was glamorous, attractive, adventurous, cool, hip, macho and sexy -- the key to personal and career success. There were very few movies made in the 30's, 40's or 50's which showed a leading man and a leading lady talking without also smoking. The classic movie "Casablanca" was made in 1942 and Humphry Bogart smoked in virtually every scene as did nearly everyone else.

77. Bogart, Carey Grant, Jimmy Cagney, Frank Sinatra, Bette Davis, John Wayne, Yul Brynner (the list is endless) -- nearly every idol of the entertainment and sports world was a proud and satisfied smoker. The highest rated programs on radio and television were sponsored by tobacco companies. A teenager would have to be made of steel to say -- "cigarettes are not for me, they're unhealthy". Over eighty percent of life long smokers became addicted as teenagers or even younger. Once they started, there was no stopping.

78. The named representatives and members of the class have been victimized by the multi-million dollar advertising campaigns of the Tobacco Hucksters. Once addicted, Plaintiffs and members of the class have been unable to quit smoking, notwithstanding their repeated desires to do so. Amongst the addicted, are children, third

world populations and the uneducated and underprivileged in our society -- easy targets for the Tobacco Industry.

79. In 1988 R. J. REYNOLDS TOBACCO COMPANY launched its "Smooth Character" advertising campaign featuring the most loveable of cartoon characters -- Joe Camel. Joe Camel has the flashiest and jauntiest of wardrobes and head gear; he is always seen with dark glasses and a cigarette dangling from the corner of his mouth; he is the quintessence of cool! He can be seen in varied manifestations -- with his sleeves rolled up as he is banging on bongo drums or playing a trombone or guitar -- he is a great pool player and loves his motorcycle -- he is usually surrounded by adoring women. Joe Camel can be seen at millions of bus stops, billboards, phone booths and magazine pages. He offers Camel buyers coupons that can be redeemed for T-shirts and baseball caps.

80. Defendant R. J. REYNOLDS TOBACCO COMPANY who spends over \$40 million dollars annually on the Joe Camel advertising campaign denies that it is targeting children. According to R. J. REYNOLDS it merely wants to get adults smokers to switch from another brand to Camels. A very informative study was done by physicians from the Department of Family Medicine at the Medical College of Georgia and the University of North Carolina on the subject of brand logo recognition by children age three to six years. Approximately thirty percent of three year old children correctly matched Joe Camel with a picture of a cigarette. By the age of six, ninety-one percent of the children were able to match up old Joe. The study proved that by the age of six years Joe Camel is as well recognized as Mickey Mouse. R. J. REYNOLDS TOBACCO COMPANY is as effective as the Disney Channel in reaching six year old children.

81. Cigarettes are the major cause of cancer in the United States. They are most strongly associated with cancers of the lung and respiratory tract; cigarettes are also the single greatest cause of chronic obstructive lung disease. Cigarettes cause cancers at numerous other sites throughout the body and endanger fetal and neonatal health; they contribute to perinatal mortality, low birth weight, and complications during pregnancy. In short, cigarettes are an unmitigated disaster possessing no redeeming social value whatsoever.

82. The Tobacco Industry knows and has known for many years that cigarettes guarantee death, cancer, heart disease, pain, agony, anguish, grief and enormous medical costs to millions of Americans. The Tobacco Industry also knows and has known for many years that nicotine is addictive. The Tobacco Industry has intentionally manipulated the level of nicotine in cigarettes so that the smoking public including the class representatives and members of the class will be and are addicted to nicotine. No one knows this better than the Tobacco Industry who has demonstrated beyond doubt that it simply does not care. The Tobacco Industry has spent billions of dollars to hide, cover up and obscure the simple facts. The Tobacco Industry has engaged in deception on a grand scale and all of this has been done for money and nothing else -- the lives and health of the American public be damned. The Tobacco Industry has ignored, manipulated and distorted clear medical and scientific data for their selfish pecuniary gain. For years the Tobacco Industry pretended that yet more research was needed to conclusively demonstrate the causal link between tobacco products and cancer as well as numerous other diseases. For decades these Defendants have played a shameful, statistical and semantic shell game with the lives and health of the American

public.

83. The Tobacco Industry has deliberately embarked upon a course of conduct to undermine and obfuscate its obligation to advise the public that nicotine is addictive. The Tobacco Industry has systematically engaged in the fraudulent contention that cigarettes with less tar and nicotine and with new and improved scientific or recessed filters were healthy for the user and removed any serious potential health risks. In March, 1994 it was learned that cigarettes with less tar actually have higher levels of nicotine and that the true levels of nicotine have not been disclosed by the Tobacco Industry.

84. The Tobacco Industry never warned consumers of the tremendous addictive powers of tobacco -- an addiction as strong as the addiction to heroin. The Tobacco Industry spokespersons repeatedly assert that the American public is overwhelmingly informed about the health risks associated with smoking and has all the information they need to make intelligent adult choices. Addicted individuals have no freedom of choice; nor do those who have been bombarded since early childhood with attractive images, connecting smoking with glamour, success, power, money and sex. Approximately ninety percent of all smokers began smoking and became addicted to nicotine when they were teenagers. Otherwise thoughtful individuals with a social conscience and a desire to live a healthy and long life, would willingly and anxiously give up the "pleasures" of smoking; but they are unable to help themselves -- they are addicts.

COUNT I

CLAIM FOR STRICT LIABILITY IN TORT AGAINST
ALL DEFENDANTS EXCEPT DEFENDANTS COUNCIL
FOR TOBACCO RESEARCH -- U.S.A. AND TOBACCO INSTITUTE, INC.

Plaintiffs, on behalf of themselves and all others similarly situated readopt and reallege all of the allegations contained in paragraphs 55 through 84, under "Facts Giving Rise to the Cause of Action", and further allege:

85. Defendants R. J. REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC. and DOSAL TOBACCO CORP., are strictly liable to the representative Plaintiffs and members of the class by virtue of the following:

(a) Said Defendants manufactured, sold and distributed dangerous and defective products -- cigarettes containing nicotine. The cigarettes manufactured, distributed and sold by Defendants were unreasonably dangerous at the time they left said Defendants' possession.

(b) Said Defendants manufactured their defective tobacco products by manipulating the levels of nicotine so as to addict the consuming public. These tobacco products containing nicotine were sold to retailers, who sold said Defendants' tobacco products to Plaintiffs and class members.

(c) The cigarettes containing manipulated levels of nicotine were

manufactured by these Defendants and were expected to and did reach the ultimate user/ consumer without any changes in the product as manufactured, manipulated and sold by said Defendants.

(d) The cigarettes were manufactured by said Defendants in a unreasonably dangerous condition in that the cigarettes slowly poisoned the user and caused the user to be addicted to the nicotine contained within the cigarettes.

(e) Class representatives and members of the class consumed the tobacco products in the manner in which the tobacco products were intended to be used -- for personal consumption -- causing the class representatives and members of the class to become addicted to nicotine.

(f) The cigarettes were manufactured, distributed and sold by said Defendants in a defective and unreasonably dangerous condition due to all of the following:

(i) Defendants failed to design, manufacture, distribute and sell a safer alternative cigarette that would not addict smokers -- although a safer alternative design for cigarettes was available at all times material;

(ii) Said Defendants failed to warn the class representatives and members of the class that use of their product would cause addiction and the inability to stop smoking cigarettes;

(iii) Said Defendants failed to warn the class representatives and members of the class that the levels of nicotine were manipulated by said Defendants so as to insure the consumers' addiction to cigarettes.

86. The class representatives and members of the class were not aware of and could not in the exercise of reasonable care have discovered, the true addictive nature of tobacco products, said Defendants' manipulation of the nicotine levels of these tobacco products, and said Defendants' intent to addict Plaintiffs and class members.

87. Said Defendants' tobacco products, containing manipulated levels of nicotine, as intentionally manipulated by these Defendants, which caused Plaintiffs and members of the class to become addicted to nicotine upon personal consumption, constitute products that are unreasonably dangerous and defective.

88. As a direct and proximate result of said Defendants design, manufacture and sale of the defective tobacco products, Plaintiffs and members of the class have suffered addiction, serious diseases, great pain, suffering and mental anguish, and other injuries.

COUNT II

CLAIM AGAINST ALL DEFENDANTS FOR FRAUD AND MISREPRESENTATION

Plaintiffs, on behalf of themselves and all others similarly situated, reallege and readopt the allegations contained in paragraphs 55 through 84, as set forth under "Facts Giving Rise to the Cause of Action", and further allege:

89. The Tobacco Industry through brilliant deception and artifice convinced the legal system, the American public, members of the class and the class representatives herein, that smokers smoked because they chose to do so. According to the Tobacco Industry, smoking is an adult choice that is made because of the pleasures associated with smoking cigarettes. The scientific truth, as conclusively

revealed in the March and April, 1994 Congressional hearings, is that regular smokers are drug/chemical addicts who are unable to stop smoking on their own. The representative Plaintiffs and members of the class are smokers who are addicted to nicotine.

90. Although each of the Defendants possess the specific scientific data establishing nicotine is addictive, and linking cigarette smoking with cancer and other serious illnesses, these Defendants intentionally and fraudulently suppressed material facts from the public, including the representative Plaintiffs and members of the class.

91. At all times material during the course of dealings between the Defendants and representative Plaintiffs and members of the class, through advertising in the mass media and other communications, the Defendants repeatedly misrepresented that nicotine is not addictive. Defendants did so as recently as April 14, 1994, where chief executive officers of these Defendants so testified before Congress. Said Defendants also testified under oath that the Tobacco Industry does not manipulate nicotine levels in its tobacco products so as to addict consumers.

92. In their representations to class representatives and members of the class, each of the Defendants omitted the following material information: (1) that nicotine is addictive; and (2) that the Tobacco Industry manipulates nicotine levels in their tobacco products so as to addict the consuming smokers.

93. The Defendants' representations made to the public, including the class representatives and members of the class, in advertisements, announcements of tobacco spokespersons and in testimony before Congress, were highly misleading and

false in that smokers were led to believe that cigarettes are not addictive and that smokers are not exposed to any risks of harm from smoking cigarettes; in fact, class representatives and members of the class are addicted to cigarettes and have been subjected to serious health risks and injury because of their addiction.

94. Each of the Defendants was under a duty to disclose to Plaintiffs and members of the class the addictive nature of nicotine, Defendants' manipulation of nicotine levels in tobacco products, and Defendants' intent to addict the class representatives and members of the class. The Tobacco Industry had sole access to material facts concerning (1), the addictive nature of nicotine; (2), the manipulation of nicotine levels in its cigarette products; and (3), its intent to addict Plaintiffs and members of Plaintiffs' class. The Tobacco Industry knew that prior to Plaintiffs' addiction to nicotine, Plaintiffs and members of the class could not reasonably have discovered (1), the addictive nature of nicotine; (2), the manipulation of nicotine levels; and (3), Defendants' intent to addict Plaintiffs and members of Plaintiffs' class. The Tobacco Industry actively concealed the addictive nature of nicotine, its manipulation of nicotine levels and its intent to addict Plaintiffs and members of the class.

95. As part of its program to distort the true facts about smoking and addiction, the Tobacco Industry has done the following:

(a) Intentionally miscalculated and inaccurately measured the level of tar and nicotine in cigarettes so as to understate same and deceive the consuming/smoking public and the United States Government;

(b) Intentionally designed a filter with tiny, nearly invisible holes,

so that far less tar and nicotine would be measured through conventional measuring mechanisms utilized by the Tobacco Industry than actually is received in the lungs of the smoker;

(c) Intentionally manipulated the level of nicotine so that far more nicotine is inhaled by the smoker of low tar cigarettes;

(d) Misrepresented the amount of tar and nicotine on cigarette packages, knowing that the true yield of nicotine and tar is far greater than that disclosed.

96. In furtherance of the fraud and misrepresentation, Defendant COUNCIL FOR TOBACCO RESEARCH -- U.S.A. and the Defendant TOBACCO INSTITUTE held themselves out as objective entities that compiled data regarding cigarettes. In fact, Defendant COUNCIL FOR TOBACCO RESEARCH -- U.S.A. and Defendant TOBACCO INSTITUTE, INC. distorted the truth about the dangers of smoking and the addictive nature of tobacco.

97. Defendant COUNCIL FOR TOBACCO RESEARCH -- U.S.A. intentionally misrepresented research data relating to the danger of death and serious injury from cigarettes and the addictive nature of nicotine.

98. Defendant COUNCIL FOR TOBACCO RESEARCH -- U.S.A., through its Special Projects Division, has suppressed medical testing and research establishing the addictive nature of nicotine and the health consequences of smoking.

99. Each of the Defendants knew at all times material that nicotine was addictive and that the manufacturing Defendants were manipulating the level of nicotine in cigarettes so as to addict class representatives and members of the class.

100. The Defendants' representations were false when made and each of the Defendants knew these representations were false. The misrepresentations and omissions were made deliberately, wilfully and maliciously to mislead the class representatives and members of the class into reliance and action thereon, causing the Plaintiffs to purchase cigarettes and become addicted to nicotine. These misrepresentations were made in an effort to promote the sale of cigarettes and produce a society of addicted smokers.

101. By reason of their reliance on each of the Defendants misrepresentations and omissions, Plaintiffs and members of Plaintiffs' class are addicted to cigarettes and have been damaged as a result of their addiction and the serious illnesses they have sustained.

102. Each of the Defendants knew that nicotine was addictive and that their products were unreasonably dangerous and caused serious health problems. Notwithstanding those facts, each of the Defendants manipulated the amount of nicotine levels in cigarettes with the intention of causing the class representatives and members of the class to be addicted. Each of the Defendants refrained from disclosing the true facts to the Plaintiffs for the purpose of inducing them to purchase cigarettes, thus causing them to become addicted with resulting serious illnesses, pain, suffering, disfigurement and economic damages.

103. The conduct alleged above constitutes malice, oppression and fraud and warrants the imposition of punitive damages, against each of the Defendants. Defendants are liable for punitive damages for their reckless, wanton and willful disregard

for the public's safety in the manufacture, design and manipulation of nicotine, a toxic and hazardous substance, in their tobacco products and for the development of an inherently defective and dangerous product that knowingly causes serious injuries and death.

COUNT III

CLAIM AGAINST ALL DEFENDANTS FOR CONSPIRACY TO MISREPRESENT AND COMMIT FRAUD

Plaintiffs, on behalf of themselves and all others similarly situated, readopt and reallege the allegations contained in paragraphs 55 through 84, as contained within the "Facts Giving Rise to the Cause of Action", and further allege:

104. Each of the Defendants conspired to deprive the public of medical and scientific data reflecting the dangers associated with smoking cigarettes, including the addictive nature of nicotine.

105. These Defendants have worked in collusion to utilize misleading words, half truths and visual imagery in a hugely successful advertising campaign to confuse children and teenagers who are contemplating smoking, about the reality, nature and extent of the dangers of cigarette smoking, and the addictive nature of nicotine.

106. These Defendants have conspired to develop a public relations strategy aimed at combatting the mounting adverse scientific reports regarding the dangers of smoking. There has been a conspiracy to refute, undermine and neutralize information coming from the scientific and medical community and to confuse and mislead the consuming public in an effort to encourage new persons to commence smoking and to encourage existing smokers to believe that they have made an "adult choice" to continue smoking.

107. There has been a conspiracy to completely hide all scientific data proving that nicotine is addictive and that smoking cigarettes causes serious illnesses, including lung cancer, emphysema and heart disease.

108. These Defendants have conspired to manipulate the level of nicotine in cigarettes so as to keep a nation of smokers, addicted and smoking. The nicotine levels have been intentionally raised in low tar cigarettes, to insure that smokers of low tar cigarettes remain addicted.

109. There has been a conspiracy of these Defendants to deny the validity of statistics establishing that 434,000 persons die each year in the United States as a result of smoking cigarettes; there has been a conspiracy to suppress and hide medical testing and research through the Special Projects Division of the COUNCIL FOR TOBACCO RESEARCH -- U.S.A.

110. There has been a conspiracy to spend billions of dollars each year to entice new smokers, targeting youngsters, women and minorities, to make up for the smokers who are dying or who have finally been able to quit, following serious debilitating illnesses caused by tobacco.

111. These Defendants have conspired to intentionally miscalculate and inaccurately measure the levels of tar and nicotine in cigarettes so as to grossly understate those measurements and deceive the consuming public and the United States Government.

112. These Defendants have conspired to design filters with tiny holes that would enable the Tobacco Industry to measure less tar and nicotine through conventional measuring mechanisms, than is actually received in the lungs of the smoker.

113. These Defendants have conspired to manipulate the level of nicotine in low tar cigarettes so that the smokers of low tar cigarettes remain addicted.

114. These Defendants have conspired to misrepresent the true measurement of tar and nicotine on cigarette packages -- knowing that the true yield of nicotine and tar is far greater than that disclosed.

115. These Defendants have conspired to misrepresent to the public at large that there is still a legitimate controversy as to whether smoking cigarettes causes any diseases, with full knowledge that the opposite is true.

116. These Defendants have conspired to utilize those portions of the tobacco leaves containing the most nicotine so as to maximize the level of nicotine and addiction in low tar cigarettes.

117. These Defendants conspired to misrepresent to the public at large and members of Congress on March 25, 1994 and April 14, 1994, by stating under oath that nicotine is not addictive and cigarettes do not cause disease or death.

118. These Defendants have conspired to avoid presenting to the American public a safer cigarette without nicotine, since a safer design would not produce a society of addicted smokers.

119. There has been a conspiracy by these Defendants to misrepresent to the United States Government and the American public that the Tobacco Industry advertises only to entice smokers to switch brands.

120. These Defendants have conspired to establish the Special Projects Division of the COUNCIL FOR TOBACCO RESEARCH -- U.S.A.; a division that was fraudulently established to hide medical research linking tobacco and disease and

conceal evidence establishing that nicotine was and is addictive. These Defendants further conspired to utilize the "attorney/client privilege" as a means of hiding and suppressing medical research and testing performed by the Special Projects Division.

121. There has been a conspiracy to completely hide all scientific data proving that cigarettes cause serious illnesses, including lung cancer, and that nicotine is addictive.

122. The misconduct of these Defendants through their conspiracy has been outrageous and in total disregard of the health and well being of members of the American public, including the class representatives and members of the class. There has been a concerted effort to increase profits, notwithstanding the suffering and premature death of millions of Americans.

123. All of the Defendants have entered into a conspiracy to misrepresent and falsify data so as to convince the public at large that there is no danger from smoking cigarettes and that nicotine is not addictive. Defendants COUNCIL FOR TOBACCO RESEARCH -- U.S.A., INC. and the TOBACCO INSTITUTE, INC. have been instrumental in this conspiracy to misrepresent and commit fraud. Through this conspiracy, Defendants have successfully kept from the public and the Plaintiffs herein the fact that smokers are addicted to nicotine and that smoking is responsible for millions of preventable deaths and debilitating diseases.

124. The class representatives and members of the class have relied to their detriment on the fraud and misrepresentations of these Defendants who have conspired herein, by purchasing and smoking cigarettes and becoming addicted to same.

125. As a direct and proximate result of Defendants' conspiracy to

misrepresent and commit fraud, the class representatives and members of the class have sustained serious and permanent injuries and demand punitive and compensatory damages.

COUNT IV

**CLAIM FOR BREACH OF IMPLIED WARRANTY
OF MERCHANTABILITY AND FITNESS AGAINST ALL
DEFENDANTS EXCEPT DEFENDANTS COUNCIL FOR
TOBACCO RESEARCH -- U.S.A. AND TOBACCO INSTITUTE, INC.**

Plaintiffs, on behalf of themselves and all others similarly situated, readopt and reallege all of the allegations contained in paragraphs numbered 55 through 84, above, under "Facts Giving Rise to the Cause of Action", and further allege:

126. The Defendants, R. J. REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., and DOSAL TOBACCO CORP., impliedly warranted that their tobacco products which were designed, manufactured and sold to the representative Plaintiffs and members of the class, were merchantable and fit and safe for their ordinary use, and that said Defendants had not manipulated the nicotine levels of cigarettes so as to make their cigarette products addictive to consumers.

127. Said Defendants' tobacco products purchased and consumed by the representative Plaintiffs and members of Plaintiffs class were addictive, unmerchantable, and unfit for use when sold, subjecting the class representatives and members of the class to addiction and an unreasonable risk of serious injury.

128. The cigarette products were defective when they were transferred from said Defendants to class representatives and members of the class.

129. Said Defendants breached the implied warranty of merchantability and fitness at the time said Defendants' tobacco products were sold to class representatives and members of the class in that the Defendants' cigarette products were not fit for their ordinary purposes and caused smokers to become addicted when using the product in a reasonable and foreseeable manner.

130. As a direct and proximate result of said Defendants' breach of the implied warranty of merchantability and fitness, the class representatives and members of the class are addicted to cigarettes, have suffered serious diseases and illnesses and demand compensatory damages and all other damages recoverable under Florida law.

COUNT V

CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS

Plaintiffs, on behalf of themselves and all others similarly situated, readopt and reallege the allegations contained in paragraphs numbered 55 through 84, as contained within the "Facts Giving Rise to the Cause of Action", and further allege:

131. Each of the Defendants acted in an extreme and outrageous fashion towards the class representatives, members of the class, the American public and the United States Government, by adamantly denying that nicotine is addictive while at the same time said Defendants were manipulating the levels of nicotine in their tobacco products so as to addict Plaintiffs and members of the class to cigarettes. Each of the Defendants acted with the intention of causing severe emotional distress to the class

representatives and members of the class.

132. As set forth above, the conduct of each of these Defendants, both singularly and in concert, was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency; said Defendants' conduct is intolerable in a civilized society and was calculated to cause the class representatives and members of the class to become addicted to cigarettes with resulting illnesses, disease, suffering and eventual death.

133. Each of the Defendants both singularly, and in concert, deliberately, maliciously and overtly engaged in outrageous conduct with complete indifference to Defendants' legal and civil obligations.

134. As a direct, foreseeable and proximate result of the Defendants' outrageous conduct, the class representatives and members of the class have suffered and continue to suffer from addiction, serious injuries and severe emotional distress and anguish.

135. The extreme and outrageous misconduct of these Defendants entitles the class representatives and members of the class to compensatory and punitive damages.

COUNT VI

CLAIM FOR NEGLIGENCE AGAINST ALL DEFENDANTS EXCEPT DEFENDANTS COUNCIL FOR TOBACCO RESEARCH -- U.S.A., INC. AND TOBACCO INSTITUTE, INC.

Plaintiffs, on behalf of themselves and all others similarly situated, readopt and reallege the allegations contained in paragraphs 55 through 84, above, as contained within the "Facts Giving Rise to the Cause of Action", and further allege:

136. At all times material herein Defendants R. J. REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC., and DOSAL TOBACCO CORP., knew or should have known that nicotine was addictive and that by increasing the levels of nicotine in cigarettes the American smoking public became and remained addicted to cigarettes.

137. Said Defendants had a duty to the class representatives and members of the class to provide a reasonably safe cigarette in design and manufacture and to warn of the addictive nature of nicotine in cigarettes.

138. At all times material herein said Defendants knew or should have known that Defendants' cigarettes were inherently defective, unreasonably dangerous, deleterious, poisonous, addictive and otherwise harmful to smokers.

139. At all times material herein the class representatives and members of the class did not know, and could not have known that the Defendants were intentionally increasing the levels of nicotine so as to cause Plaintiffs and members of the class to be hopelessly addicted to cigarettes.

140. Said Defendants further breached their duty of reasonable care to the class representatives and members of the class by the following acts and omissions:

(a) failure to design and manufacture products that were not addictive;

(b) failure to design and manufacture tobacco products that did

not contain an unreasonable level of nicotine;

(c) failure to warn the smoking consumers of the addictive nature of nicotine when said Defendants knew or should have known of nicotine's addictive nature;

(d) failure to take any reasonable precautions or exercise reasonable care to adequately or sufficiently reduce or remove the level of nicotine in cigarettes so that smokers would have the ability to quit;

(e) failure to utilize a safer design that was readily available to Defendants, so that smokers could purchase a nicotine free cigarette;

(f) failure to utilize accurate measurements as to levels of true nicotine yield and tar in "low tar" cigarettes;

(g) failure to provide the smoking public with information known solely by the Defendants as to the health risks involved in smoking cigarettes and the addictive nature of nicotine;

(h) failure to remove and recall tobacco products from their marketplace upon learning that cigarettes were addictive and poisonous and caused serious illnesses and death to smokers and those in the vicinity of cigarette smoke.

141. As a direct and proximate result of the negligence and carelessness of said Defendants, the class representatives and members of the class have suffered foreseeable damages including physical damages, economic injury and severe emotional distress, and all other damages recoverable under Florida law.

COUNT VII

CLAIM AGAINST ALL DEFENDANTS FOR EQUITABLE RELIEF

Plaintiffs, on behalf of themselves and all others similarly situated, readopt and reallege the allegations contained in paragraphs numbered 55 through 84, above, as contained within the "Facts Giving Rise to the Cause of Action", and further allege:

142. The class representatives and members of the class have no adequate remedy at law to recover future medical costs for diseases that are reasonably certain to occur because of class members' exposure to carcinogens contained within tobacco smoke.

143. Unfortunately, many members of the class who are presently addicted to nicotine in cigarettes, and who have chronic respiratory illnesses and other diseases, will develop serious debilitating diseases including, but not limited to, lung cancer, heart disease, emphysema and other well-established smoking related ailments. Members of the class who are addicted to cigarettes need a special medical fund to cover future care and treatment and to monitor the health of the class representatives and members of the class.

144. The Tobacco Industry should be declared responsible by this Court for establishing and financing a medical fund to monitor the health of all class representatives and members of the class and to pay for all medical treatment required and caused by the Tobacco Industry' misconduct and wrongdoing.

145. The billions of dollars expended annually by the American public and the United States Government to pay for medical care required by smokers of cigarettes

should be borne by the responsible party, the Tobacco Industry. The need for such future medical care is certain and the burden should be shifted to the responsible party.

COUNT VIII

CLAIM AGAINST ALL DEFENDANTS FOR BREACH OF EXPRESS WARRANTY EXCEPT DEFENDANTS COUNCIL FOR TOBACCO RESEARCH -- U.S.A., INC. AND TOBACCO INSTITUTE, INC.

146. Plaintiffs, on behalf of themselves and all others similarly situated, readopt and reallege all of the allegations contained in paragraphs 55 through 84, above, under "Facts Giving Rise to the Cause of Action", and further allege:

147. Defendants R. J. REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC., PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., LORILLARD TOBACCO COMPANY, LORILLARD, INC., THE AMERICAN TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., LIGGETT GROUP, INC., BROOKE GROUP, LTD., INC. and DOSAL TOBACCO CORP. designed, manufactured, distributed, packaged, merchandised, promoted, advertised, and supplied tobacco products containing nicotine that were sold to the class representatives and members of the class.

148. Said Defendants expressly warranted to the Plaintiffs and members of the class that Defendants' cigarettes were not addictive; that Defendants did not manipulate the nicotine levels in Defendants' cigarettes; and that Defendants did not intend to addict Plaintiffs and members of the class.

149. Said Defendants further warranted in their advertising, promotion and packaging of cigarette products, that cigarettes contained specified levels of tar and

nicotine. Defendants utilized inaccurate measuring devices to calculate the levels of tar and nicotine and understated same to the smoking public, including Plaintiffs and members of the class.

150. Said Defendants breached their express warranties by offering for sale and selling as non-addictive, cigarettes that were in fact addictive and contained elevated levels of nicotine manipulated by said Defendants with the intention to cause Plaintiffs and members of the class to become addicted to cigarettes.

151. The above mentioned express warranties by said Defendants were false and untrue at the time they were made. The Defendants knew that the nicotine in cigarettes was addictive to Plaintiffs and members of the class and that the nicotine levels disclosed on cigarette packages and in cigarette advertising was inaccurate.

152. Said Defendants' breach of their express warranties caused Plaintiffs and members of the class to become addicted to nicotine. Plaintiffs and members of the class relied on the skill, judgment and express warranties and representations of said Defendants in purchasing cigarettes.

153. Defendants' breach of express warranties entitles Plaintiffs and members of the class to compensatory damages and all other damages awardable under Florida law.

CLAIMS OF CLASS REPRESENTATIVES AND MEMBERS OF THE CLASS

154. As a direct and proximate result of the conduct of these Defendants, under theories of strict liability in tort, fraud and misrepresentation, conspiracy to misrepresent and commit fraud, breach of implied warranty of merchantability and fitness,

intentional infliction of emotional distress, negligence, and the claim for equitable relief, the named class representatives and members of the class pray for Judgment against all Defendants, jointly and severally, as follows:

(a) An Order certifying the Plaintiff class and any appropriate subclasses thereof under the appropriate provisions of Rule 1.220, Florida Rules of Civil Procedure, and appointing Plaintiffs' counsel to represent the class;

(b) Compensatory damages in excess of One Hundred Billion (\$100,000,000,000) Dollars for bodily injury, pain and suffering, disability, disfigurement, loss of capacity for the enjoyment of life, medical care and expenses, loss of wage earning capacity and mental anguish;

(c) Punitive damages in excess of One Hundred Billion (\$100,000,000,000) Dollars against the Defendants for fraud, misrepresentation, conspiracy to commit misrepresentation and fraud, and the intentional infliction of emotional distress;

(d) Equitable relief, including, but not limited to, a medical fund for future healthcare costs;

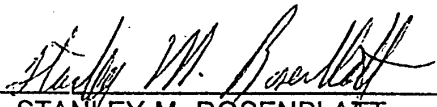
(e) Attorneys fees recoverable by law;

(f) All court costs recoverable by law.

WHEREFORE, Plaintiffs, class representatives and members of the class demand Judgment against the Defendants named herein for all damages recoverable under Florida law, as set forth above, and demand trial by jury of all issues triable as of right by a jury.

Respectfully submitted,

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By: 
STANLEY M. ROSENBLATT

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

27370

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 249

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
Friday, March 12, 1999, at 9:34 a.m.

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

W02811427

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On behalf of Defendants Liggett Group
and Brooke Group

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1 with strict liability in tort, you know, we constantly
2 hear throughout this trial, and I believe during the
3 argument, the concept that the applicable test is
4 consumer expectations, what consumers knew, what they
5 expected, and that also is not true.

6 There's a risk utility test that's applied in
7 strict liability in tort, and there are many cases that
8 address it. There are even cases decided, tobacco
9 cases, outside of Florida that apply the risk utility
10 standard.

11 And one of them was the Horton case versus
12 American Tobacco, which was 667 So.2d 1289. That's
13 Mississippi Supreme Court in 1996. The trial court
14 instructed the jury in accordance with consumer
15 expectation test, rather than risk utility standard.

16 Now, in that case, since the jury found
17 liability against the tobacco company, it was harmless
18 error, but then I guess the comparative negligence
19 became almost a hundred percent, so the whole case
20 became academic; but the principle still stands that
21 it's the risk utility, which common sense is, you know,
22 well, what is the benefit of tobacco versus its risk?
23 That of course is not the type of test the defendants
24 want here, but that is what should be applied.

25 And jumping to another point for a minute,

1 but it has to do with strict liability, Florida has
2 recognized that punitive damages can also be awarded
3 under strict liability in tort, and I know the
4 defendants have said that's only fraud and conspiracy
5 to commit fraud and misrepresentation and infliction of
6 emotional distress.

7 But in Johns-Manville versus Jenson, 463
8 So.2d 242, at Page 251, it's the First District, 1984,
9 review denied. 467 So.2d 999, punitive damages in a
10 products liability case, strict liability -- in a
11 products liability case were awarded, and also for
12 gross negligence, punitive damages can be awarded.

13 Okay. A final point I want to address
14 relates to the scope of fraud and misrepresentations as
15 it relates to preemption, and defendants acknowledge
16 and they have to acknowledge that misrepresentations
17 and falsehoods are never preempted.

18 They then argue that basically half truths
19 are okay. And they can put whatever they want in
20 public statements and omit what they want, and that's
21 where there's a total difference in our positions.

22 I believe under Florida law where a party
23 discloses facts, they've got to tell the whole truth.
24 They've got to be honest and do so in a nonfraudulent
25 fashion.

1 point, there's nothing to put on that verdict form on
2 either of these counts, the fraud or the conspiracy.

3 Now, moving to the punitive damage issue,
4 they didn't really respond at all to the standard in
5 Florida except to say that you can have punitive
6 damages on a showing of gross negligence, and that's
7 just not right. That's just totally inappropriate.

8 You must have willful action that rises to
9 the level of criminal manslaughter. You don't convict
10 somebody of manslaughter for being grossly negligent.
11 So they did say that.

12 Secondly, on the punitive damage issue,
13 counsel said: Well, you can get punitive damages for
14 strict liability. Maybe fraud is one thing, but you
15 can get it for strict liability.

16 Well, you can if you plead it; but if you
17 look at this complaint, you'll find there is no
18 allegation in this complaint for punitive damages on
19 any of the counts except the fraud and the conspiracy
20 and then that intentional infliction of mental
21 distress, which somebody else is going to deal with.
22 They don't ask for punitive damages on product
23 liability claims in this case. So when counsel says
24 you can get punitives on product liability, you can if
25 you pled it, and in this case, they haven't.

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

27480

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 250

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
Friday, March 12, 1999, at 1:50 p.m.

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

W02811537

APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs

DECHERT PRICE & RHOADS
ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE
RICHARD M. KIRBY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

(APPEARANCES - Continued)

GREENBERG TRAUIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard

MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

1 THE COURT: Mr. Moodhe said as far as CTR was
2 concerned, you hadn't pled it against them.

3 MS. ROSENBLATT: I think Mr. Reid said there
4 was no reference to The Frank Statement. Also, he
5 mentioned The Frank Statement and he mentioned today --
6 and to my knowledge, there was no objection on that
7 basis at the time of trial. We went through and it was
8 tried.

9 THE COURT: I don't remember that. I will
10 have to look it up.

11 MS. ROSENBLATT: And also, the issue of
12 punitive damages under strict liability and tort. We
13 asked for punitive damages for fraud, conspiracy to
14 commit fraud, and also for infliction of emotional
15 distress.

16 If, in fact, I didn't include it in, it was
17 tried. Punitive damages are claimed on every count
18 that we would like to amend, any count that they're
19 recoverable under Florida law. And as I said, under
20 Rule 1.190, even after judgment, it's appropriate to
21 amend the pleadings to conform to the evidence.

22 So we would ask that there would be reference
23 to the voluntary undertaking of a duty through The
24 Frank Statement and a punitive damage claim for strict
25 liability and tort pursuant to Rule 1.190 (b), in the

1 event there is a deficiency in the complaint at the
2 close of our case.

3 MR. REID: Your Honor, with regard to that
4 rule, we need to know precisely what she intends to do,
5 because we do object to any amendment. And as the rule
6 points out, we have to make certain showings and they
7 have to make certain showings.

8 Let me make a couple of points that are
9 clear.

10 The issue about this special duty that
11 they're alleging, that is a negligence concept, and in
12 the negligence count it is only based on negligent
13 manufacture. So they're trying to create a whole new
14 idea about fraud. That's the problem. And clearly,
15 punitive damages weren't asked for --

16 THE COURT: You can't amend to establish a
17 new cause of action.

18 MR. REID: That's what they're trying to do.

19 MS. ROSENBLATT: No, we're not.

20 MR. REID: We would respond to it and say for
21 the record we object to all attempts to amend.

22 THE COURT: Let's see what you're talking
23 about.

24 MS. ROSENBLATT: We tried The Frank Statement
25 and the voluntarily undertaking and went through that

1 without objection in terms of any deficiency.

2 THE COURT: Put it on paper so we can read
3 it.

4 MS. ROSENBLATT: I wanted to preserve it for
5 purposes of the record.

6 MR. REID: I will say it wasn't tried without
7 objection. So it's clear. Counsel just said we tried
8 The Frank Statement without objection. I wanted to say
9 we didn't.

10 THE COURT: You did object.

11 MR. REID: We objected, yes.

12 THE COURT: You objected to everything,
13 almost.

14 MR. REID: Not everything.

15 MS. ROSENBLATT: Not in terms of the
16 pleadings, Your Honor. I'm talking specifically, and
17 if there was an objection, even after judgment, to
18 conform to what was tried before the jury, under the
19 rule --

20 THE COURT: It's discretionary with the
21 Court; I understand that. We'll have to review the
22 evidence and the circumstances under which you want to
23 change the complaint. But I don't know that yet until
24 I see it.

25 MS. ROSENBLATT: Okay. So that's basically

1 it.

2 THE COURT: What else? Is that it?

3 MR. ROSENBLATT: Yes.

4 THE COURT: You want to go home; I can tell
5 that.

6 MS. ROSENBLATT: Have some chicken soup.

7 THE COURT: All right. Enjoy your weekend.

8 MR. MOSS: Monday, 9:30, sir?

9 THE COURT: Yes, 9:30.

10 Mr. Heim, you sent that opinion, the
11 magistrate. I think I have it upstairs.

12 MR. HEIM: Why don't I give you the one I
13 have?

14 THE COURT: If you would.

15 MS. ROSENBLATT: Could you send one of those
16 over to me, because I don't have that.

17 (Court was adjourned at 3:45 p.m.)

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21

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24

25

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

37532

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W.
ANGELL, RAYMOND LACEY, FROSENE D.
STEEVENS, FRANK AMODEO, MARY
FARNAN, LOREN E. LOWERY, ANGIE
DELLA VECCHIA and MICHAEL MATYI,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."), LORILLARD
TOBACCO COMPANY, LORILLARD, INC.,
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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 351

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
Monday, June 28, 1999 at 9:30 a.m.

Miami, Florida

Taylor, Jonovic, White & Gendron

(305) 358-9047

W03229393

APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
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CLIFFORD DOUGLAS, ESQ.
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DECHERT PRICE & RHOADS
ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT
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On behalf of Defendant Philip Morris

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CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
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DOUGLAS CHUMBLEY, ESQ.
On behalf of Defendant R.J. Reynolds

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RICHARD M. KIRBY, ESQ.
DIANE PULLEY, ESQ.
On behalf of Defendant R.J. Reynolds

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On behalf of Defendants Liggett Group
and Brooke Group

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On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

APPEARANCES (Continued)

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ANNE COHEN, ESQ.

JOSEPH R. MOODHE, ESQ.

On behalf of Defendant The Council for Tobacco Research

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL

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On behalf of Defendant Lorillard

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On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

KASOWITZ BENSON TORRES & FRIEDMAN

AARON MARKS, ESQ.

NANCY STRAUB, ESQ.

On behalf of Defendants Liggett Group
and Brooke Group

1 In fairness, it just requires that.

2 THE COURT: Yes. Bring the jury in.

3 THE BAILIFF: Bringing in the jury. Jurors
4 entering the courtroom.

5 (The jurors entered the courtroom.)

6 THE COURT: Have a seat, folks, please.

7 We're about to get into the reading of the
8 instructions to the jury, and usually standard
9 procedure is that once we start, nobody comes in or out
10 of the courtroom. So if any of you folks feel the need
11 now that you'd like to leave, do so now because the
12 doors will be locked.

13 Good morning, folks. Everybody have a nice
14 weekend, I hope?

15 Did you come in contact with any information
16 regarding this case or any other case in any manner,
17 shape or form?

18 JURORS: No, sir.

19 THE COURT: Now, I've got some instructions
20 that I'm going to read to you. You don't have to take
21 notes on these instructions because I'm going to give
22 you a copy of them. And I want you to listen to what I
23 say, and then we'll give you a copy of this for your
24 review.

25 Now, this case is unlike most other lawsuits

1 that have come to trial, and before instructing you on
2 the law, I want to discuss with you your role as jurors
3 in this case.

4 In a typical lawsuit, the jury hears
5 testimony from the litigants, including the plaintiffs,
6 the parties bringing the lawsuit. Ordinarily, the
7 plaintiffs would testify about their claims and
8 describe their medical conditions and their damages.
9 However, this case is not typical, because it is not
10 brought on behalf of one or two individuals, but rather
11 on behalf of a group or a class of individuals.

12 The Florida class is a state-wide class
13 consisting of all Florida citizens and residents and
14 their survivors who have suffered, presently suffer or
15 who have died from diseases and medical conditions
16 caused by their addiction to cigarettes that contain
17 nicotine.

18 Because the size of the Florida class and the
19 complexity of the issues, the Court has determined that
20 all common liability issues would be tried before a
21 jury in a single trial. This common issue trial has
22 addressed the conduct of the tobacco industry. This
23 trial did not address issues as to the conduct or
24 damages of individual members of the Florida class.
25 Those issues are not relevant during this trial.

1 The Court has determined that the conduct of
2 class members is not relevant to the issues presented
3 in this common liability trial, and therefore, you did
4 not hear testimony from any members of the Florida
5 class who are plaintiffs bringing the action. You
6 should not hold it against any of the class
7 representatives or class members that they did not
8 testify before you or provide you with their medical
9 records or other information, because that was the
10 decision of this Court.

11 You will not determine any issues regarding
12 the conduct of individual class members of the Florida
13 class, including any issues as to compensatory damages
14 for individual class members. You will, however,
15 consider the issue of entitlement to punitive damages,
16 since punitive damages address only the conduct of the
17 defendants.

18 Members of the jury, I shall now instruct you
19 on the law that you must follow in reaching your
20 verdict. It is your duty as jurors to decide the
21 issues, and only the issues that I submit for
22 determination by your verdict. And in reaching your
23 verdict, you should consider and weigh the evidence,
24 decide the disputed issues of fact, and apply the law
25 on which I shall instruct you, to the facts as you find

1 them from the evidence.

2 The evidence in this case consists of the
3 sworn testimony of all the witnesses, all of the
4 exhibits received in evidence, and all facts that may
5 be admitted or agreed to by the parties.

6 In determining the facts, you may draw
7 reasonable inferences from the evidence. You may make
8 deductions and reach conclusions which reason and
9 common sense lead you to draw from the facts shown by
10 the evidence in this case. But you should not
11 speculate on any matters outside of the evidence.

12 Now, there are some general considerations
13 you have to take into consideration here. One is, in
14 determining the believability of any witness and the
15 weight to be given the testimony of any witness, you
16 may properly consider the demeanor of the witness while
17 testifying; the frankness or the lack of frankness of
18 the witness; the intelligence of the witness; any
19 interest the witness may have in the outcome of the
20 case; the means and the opportunity the witness had to
21 know the facts about which the witness testified; the
22 ability of the witnesses to remember the matters about
23 which the witness testified; and the reasonableness of
24 the testimony of the witness, considered in light of
25 all of the evidence in the case and in light of your

1 own experience and common sense.

2 You've heard opinion testimony on certain
3 technical subjects from persons referred to as an
4 expert witness. Some of that testimony before you is
5 in the form of opinions about certain technical
6 subjects.

7 Now, you may accept such opinion testimony or
8 you may reject it, or you may give it the weight that
9 you think it deserves, considering the knowledge, the
10 skill, the experience, the training or education of the
11 witness, the reasons given by the witness for the
12 opinion expressed, and all of the other evidence in the
13 case.

14 In your deliberations, you are to consider
15 several distinct claims. There are individual claims
16 for strict liability, fraud and misrepresentation,
17 conspiracy, implied warranty, express warranty,
18 negligence, and intentional infliction of emotional
19 distress.

20 Although these claims have all been tried
21 together, each is separate from the other, and each
22 party is entitled to have you separately consider each
23 claim as it affects that party. Therefore, in your
24 deliberations, you should consider the evidence as it
25 relates to each claim separately, as you would had each

1 claim been tried before you separately.

2 Now, the first question that you will
3 consider on the verdict form is whether cigarette
4 smoking is a cause of certain diseases. The burden of
5 proof of the class is to establish cause by the greater
6 weight of the evidence. The greater weight of the
7 evidence means the more persuasive and convincing force
8 and effect of the entire evidence in the case.

9 You've heard conflicting evidence as to
10 scientific requirements of cause, but you are to follow
11 only the legal definition of cause that I have given
12 you, even if it conflicts with what you consider to be
13 the scientific definition or requirements of cause.

14 The second issue for your consideration is
15 whether cigarettes that contain nicotine are addictive.

16 Additional issues for your consideration on
17 the claims of plaintiffs are as follows: On the claim
18 of strict liability, the issues are whether one or more
19 of the defendants designed, manufactured and marketed
20 cigarettes which were defective and unreasonably
21 dangerous to smokers.

22 On the claim of fraud and misrepresentation,
23 the issues are whether one or more of the defendants
24 made numerous fraudulent misrepresentations of material
25 facts regarding their cigarette product and engaged in

1 a public relations campaign that was designed to
2 manipulate public opinion and create a false
3 controversy so that smokers would have doubt about the
4 adverse health effects of smoking and would continue to
5 smoke.

6 The plaintiff class members also allege that
7 each of the defendant tobacco companies previously
8 concealed from the public the internal tobacco
9 documents proving that nicotine is addictive, and have
10 kept the levels of nicotine at sufficiently elevated
11 levels to keep smokers dependent upon cigarettes and
12 smoking.

13 The plaintiff class members claim these
14 misrepresentations and concealments were made by all of
15 the defendant tobacco companies. The Tobacco Industry
16 Research Council, that later became the Council for
17 Tobacco Research and the Tobacco Institute, were acting
18 on behalf of and at the direction of the members of
19 defendant tobacco companies. That's according to the
20 claim of the plaintiffs.

21 On the claim of civil conspiracy to commit
22 fraud and misrepresentation, the issues are whether the
23 defendants agreed together, with and through the
24 Tobacco Institute and the Council for Tobacco Research,
25 and its predecessor, the Tobacco Institute Research

1 Committee, to create a false controversy regarding
2 cigarettes and disease, and to create doubt in the
3 minds of smokers as to whether smoking is hazardous to
4 health and whether smoking is addictive.

5 Plaintiff class members further allege that
6 there's been a conspiracy to entice new smokers,
7 consisting of underage smokers, women and minorities to
8 make up for the smokers who are dying or who have been
9 able to quit.

10 On the claim of negligence, the issues are
11 whether one or more of the defendants were negligent in
12 manufacturing, designing, marketing, selling and
13 distributing cigarettes which defendants knew or should
14 have known would cause serious and fatal diseases,
15 including lung cancer, or dependence-producing
16 substances; in negligently not testing tobacco and
17 commercial cigarettes to confirm that smoking causes
18 human disease; in failing to design and produce a
19 reasonably safe cigarette with lower nicotine levels;
20 in negligently measuring and understanding -- excuse
21 me -- understating nicotine and tar levels in low-tar
22 cigarettes; and in failing to warn smokers of the
23 dangers of smoking and the addictiveness or
24 dependence-producing effects of cigarettes prior to
25 July 1 of 1969.

1 On the claim for intentional infliction of
2 emotional distress, the issues are whether one or more
3 of the defendants engaged in extreme and outrageous
4 conduct with the intent to cause severe emotional
5 distress to smokers or with reckless disregard of the
6 high probability of causing severe emotional distress
7 to smokers.

8 On the claim of breach of express and implied
9 warranties, the issues are whether one or more of the
10 defendants, with the exception of Liggett, expressly
11 and voluntarily undertook certain responsibilities and
12 duties pursuant to The Frank Statement to Cigarette
13 Smokers that was published throughout the United States
14 in 1954.

15 Another issue for your consideration is
16 whether cigarettes manufactured or supplied by
17 defendants do not conform to representations of fact
18 made by the defendant tobacco companies orally or in
19 writing, and whether cigarettes are not reasonably fit
20 for the uses intended or reasonably foreseeable by the
21 defendant tobacco companies.

22 The final issue is whether the plaintiff
23 class is entitled to punitive damages.

24 Now, this Court has determined that this
25 class action will be tried in phases. During this

1 phase of the case, any alleged fault or negligence on
2 the part of the class members and their decedents are
3 not relevant, and therefore, not an issue in this case.
4 You should not consider whether any smoker or smokers
5 are or were at fault, nor should you compare any
6 alleged fault of any smoker or class member to the
7 alleged fault of one or more of the defendants.

8 The comparative fault or negligence, if any,
9 of individual class members will be determined at
10 subsequent individual trials of class members,
11 therefore, the comparative fault or negligence of class
12 members is not at issue and is irrelevant during this
13 Phase I trial.

14 The Court has determined and now instructs
15 you, that as a matter of law, that defendants are
16 responsible for any negligence or other conduct of
17 their officers, agents and employees while said
18 individuals are performing services they were employed
19 to perform, or while the individual is acting at least
20 in part because of a desire to serve his employer and
21 is doing something that is reasonably incident to his
22 employment, or is doing something, the doing of which
23 was reasonably foreseeable and reasonably to be
24 expected of persons similarly employed. The defendants
25 are not responsible for the acts of an independent

1 contractor.

2 The defendants are corporations and can act
3 only through their officers, agents and employees. The
4 conduct of an officer, agent or employee acting within
5 the scope of their authority or employment is the
6 conduct of the corporation.

7 You are instructed that the American Tobacco
8 Company has merged with the defendant, Brown &
9 Williamson Tobacco Company or Corporation, and that as
10 a result of the merger, Brown & Williamson Tobacco
11 Corporation has succeeded to the liabilities of the
12 American Tobacco Company, as successor to the American
13 Tobacco Company.

14 Now, you have heard evidence regarding the
15 destruction of certain documents. If you find that the
16 plaintiffs have shown that a defendant or defendants
17 destroyed documents and have failed to provide a
18 satisfactory explanation for doing so, you are
19 permitted to infer that the evidence, if produced,
20 would have been unfavorable to that party.

21 In determining whether a party's explanation
22 regarding the destruction of evidence is satisfactory,
23 you may consider all of the facts and circumstances,
24 including whether the documents were destroyed in bad
25 faith. Bad faith includes both deliberate destruction

1 or concealment, as well as destruction or concealment
2 with reckless disregard for the relevance of the
3 evidence.

4 Bad faith is not required, however; it is
5 sufficient if the party knew or should have known of
6 the importance of preserving the evidence.

7 During the trial you have heard references to
8 defendants' appearances before Congress and various
9 regulatory agencies. Under the law, the defendants
10 have the right to petition, provide information, and
11 express their views to the government on the issues of
12 policy and regulation concerning smoking and health.
13 These and similar communications with the government,
14 advocacy efforts, and government submissions are
15 protected under the First Amendment to the United
16 States Constitution, as well as Florida law. However,
17 false, misleading or deceitful statements and
18 representations are not protected under the First
19 Amendment.

20 During the trial you have been given the
21 option of taking notes of the testimony and evidence
22 presented by the parties as an aid to your memory.
23 Your notes are not evidence. In the event that your
24 recollection of the testimony or evidence differs from
25 what is recorded in your notes or the notes of another

1 juror, you should rely on your own recollection. The
2 fact that some jurors may have taken more notes than
3 others is in no way or in no way gives those jurors
4 more authority over jurors who have taken fewer or no
5 notes.

6 Throughout the trial, you have occasionally
7 heard the Court or the lawyers mention the word
8 "preemption." Preemption is a doctrine of federal law
9 that limits the claims the plaintiffs can make in this
10 case. You need to understand this limitation in order
11 to perform your duty as jurors.

12 The doctrine of preemption arises from the
13 federal law enacted by the United States Congress on
14 July 1st of 1969, in which Congress mandated that every
15 pack of cigarettes bear a specific warning label
16 written by Congress itself. Later, Congress required
17 that those same warnings appear on each cigarette brand
18 advertisement.

19 Therefore, pursuant to federal law, you may
20 not base any finding of liability on a determination
21 that after July 1 of 1969, one or more of these
22 defendants should have included additional or more
23 clearly stated warnings on their cigarette packages or
24 in their advertisements. However, federal law does not
25 limit the liability of any defendant against claims

1 based on negligence, strict liability, express
2 warranty, fraud, misrepresentation, or conspiracy.

3 Finally, the federal law does not limit the
4 liability of any defendant against any claim of failure
5 to warn prior to July 1 of 1969.

6 Now, I will be reviewing with you shortly the
7 verdict form. You will be asked questions in the
8 verdict form addressing the conduct of defendants
9 before and after particular dates. You should answer
10 these questions factually, without any consideration of
11 the legal significance, if any, of the dates. The
12 legal significance of the dates is a matter which will
13 be considered solely by the Court.

14 Now, on the claim of strict liability of the
15 Florida class against the defendant tobacco companies,
16 the issue for your consideration is whether cigarettes
17 sold by these tobacco companies were defective when
18 they left the possession of the companies.

19 A product is defective if it is in a
20 condition unreasonably dangerous to the user and the
21 product as expected to and does reach the user without
22 substantial change affecting that condition.

23 A product is defective if by reason of its
24 design the product is in the condition unreasonably
25 dangerous to the user and the product is expected to

1 and does reach the user without substantial change
2 affecting that condition.

3 A product is unreasonably dangerous because
4 of its design if the product fails to perform as safely
5 as an ordinary consumer would expect when used as
6 intended or in a manner reasonably foreseeable by the
7 manufacturer, or the risk of danger in the design
8 outweighs the benefits.

9 If you find against one or more of the
10 defendants, you are also to consider whether the
11 defendants' conduct occurred before or after July 1,
12 1974.

13 On the Florida class claim for fraud and
14 misrepresentation, the issues for your determination
15 are:

16 1, whether one or more of the defendants made
17 a false statement concerning a material fact;

18 2, whether one or more of the defendants knew
19 the statement was false when it was made, or made the
20 statement knowing that said defendants were without
21 knowledge of its truth or falsity;

22 3, whether in making a false statement, or in
23 concealing material facts, one or more of the
24 defendants intended that another rely on the false
25 statement or misrepresentation;

1 If you find against one or more of the
2 defendants, you are to consider whether the defendants'
3 conduct occurred before or after May 5, 1982.

4 On the plaintiffs' claim for fraud by
5 concealment, the issues for your determination are:

6 1, whether one or more of the defendants
7 omitted or concealed material facts that would be
8 necessary to make statements by said defendants not
9 misleading;

10 2, whether one or more of the defendants knew
11 the statement was false when it was made, or made the
12 statement without knowing -- excuse me -- or made the
13 statement knowing that said defendant was without
14 knowledge as to its truth or falsity, or knew of the
15 existence of material facts that were not disclosed;
16 and

17 3, whether in making the false statement, or
18 in concealing material facts, one or more of the
19 defendants intended that another rely on the omission
20 or concealment.

21 Intentional concealment exists where a party
22 knows of defects in a product and intentionally
23 conceals them, or, while under no duty to speak,
24 nevertheless voluntarily does so, but does not speak
25 honestly or makes misleading statements or suppresses

1 facts.

2 If you find against the defendants, you are
3 also to consider whether the defendants' conduct
4 occurred before or after May 5, 1982.

5 A material fact is one that is of such
6 importance that a reasonably careful -- excuse me --
7 that a reasonable person would consider same
8 significant in their decision-making process.

9 Now, a civil conspiracy is a combination or
10 an agreement of two or more persons or entities, having
11 a common purpose to accomplish an unlawful act, or
12 accomplish a lawful act by unlawful means.

13 The claim here is that two or more defendants
14 agreed to commit wrongful acts, namely, a fraudulent
15 statement, misrepresentation, concealment, or omission
16 of material information regarding the health effects of
17 cigarette smoking.

18 Plaintiffs must establish that a conspiracy
19 existed and that the defendants knowingly became
20 members of that conspiracy with the intent to advance
21 or further some object or purpose of the conspiracy.
22 "Knowingly" means voluntarily and intentionally, and
23 not because of a mistake or accident or other innocent
24 reasons.

25 A conspiracy does not have to be established

1 by direct proof, and no formal or written agreement is
2 necessary. The agreement itself may have been entirely
3 unspoken. Its existence may be proven by
4 circumstantial evidence. You may infer the existence
5 of an agreement or mutual understanding, from what you
6 find the alleged members actually did. Mere similarity
7 of conduct among various persons, however, or the fact
8 that they may have associated with one another and may
9 have never assembled together and discussed common aims
10 and interests, does not necessarily establish the
11 existence of a conspiracy.

12 If they acted similarly, but independently of
13 one another without any agreement or mutual
14 understanding among them, then there would be no
15 conspiracy.

16 A conspiracy may be formed without all
17 parties coming to the agreement at the same time. The
18 unlawful agreement may be shown if the proof
19 establishes that the parties knowingly worked together
20 to accomplish a common purpose. It is not essential
21 that all persons acted exactly alike. A person who
22 knowingly joins an existing conspiracy or who
23 participates in only part of a conspiracy, with
24 knowledge of the overall conspiracy, is just as
25 responsible as if it had been one of those performed or

1 began the conspiracy and participated in every part of
2 it.

3 A party may become a member of a conspiracy
4 without full knowledge of all the details of the
5 conspiracy, the identity of all of its members, or the
6 parts they played. Knowledge of the essential nature
7 of the plan is enough.

8 On the other hand, a person who has no
9 knowledge of the conspiracy, but happened to act in a
10 way which furthered some object or purpose of the
11 conspiracy, does not, thereby, become a conspirator.
12 Once a conspiracy has been established, the acts, the
13 statements and conduct of each of the conspirators in
14 execution of furtherance of the common purpose may be
15 considered as evidence against the others, regardless
16 of their presence or their absence.

17 The "in furtherance" requirement is broadly
18 construed and is satisfied if the acts, statements or
19 conduct promotes the common good of the conspirators.
20 For example, statements describing past events are in
21 furtherance of the conspiracy if they are made to plan
22 future activities or to keep conspirators abreast of
23 current developments and problems facing the group.

24 The issues for your determination on the
25 claim of the plaintiffs against the defendant tobacco

1 companies under express and implied warranties are
2 whether cigarettes sold or supplied by the tobacco
3 companies were defective when they left the possession
4 of one or more of the defendants and, if so, whether
5 such defect was a legal cause of loss, injury or damage
6 sustained by class members.

7 A product is defective if it does not conform
8 to representations of fact made by one or more of these
9 defendants, orally or in writing, in connection with
10 the sale or transaction, or if it is not reasonably fit
11 for the uses intended or reasonably foreseeable by the
12 tobacco companies, or if it is not reasonably fit for
13 the specific purpose for which the tobacco companies
14 knowingly sold the product.

15 If you find against the defendants on the
16 issue of express warranty, you are also to consider
17 whether defendants' conduct occurred before or after
18 July 1 of 1974. If you find against the defendants on
19 the issue of implied warranty, you are also to consider
20 whether the defendants' conduct occurred before or
21 after July 1, 1969, and before or after July 1, 1974.

22 The issues for your determination on the
23 claim of the plaintiffs against all of the defendants
24 for the intentional infliction of severe emotional
25 distress are:

1 A, whether one or more of the defendants
2 engaged in extreme and outrageous conduct;

3 B, whether one or more defendants acted with
4 the intent to cause severe emotional distress or with
5 reckless disregard of the high probability of causing
6 severe emotional distress.

7 Extreme and outrageous conduct is behavior
8 which, under the circumstances, goes beyond all
9 possible bounds of decency and is regarded as shocking,
10 atrocious and utterly intolerable in a civilized
11 community.

12 Emotional distress is severe when it is of
13 such intensity or duration that no ordinary person
14 should be expected to endure it.

15 The issue for determination on the negligence
16 claims of the plaintiffs against each of the tobacco
17 companies is whether one or more of the tobacco
18 companies were negligent in designing, manufacturing,
19 testing, or marketing of cigarettes. Another issue for
20 your determination is whether one or more of the
21 defendant tobacco companies were negligent prior to
22 July 1, 1969 in failing to warn smokers of the health
23 risks of smoking or the addictiveness of smoking.

24 Negligence is the failure to use reasonable
25 care. Reasonable care is that degree of care which a

1 reasonably careful person would use under like
2 circumstances. Negligence may consist either in doing
3 something that a reasonably careful person would not do
4 under like circumstances, or in failing to do something
5 that a reasonably careful person would do under like
6 circumstances.

7 A manufacturer's conduct is unreasonable if
8 it fails to warn of a danger which a reasonably prudent
9 manufacturer would have known and warned about under
10 the circumstances. There's no duty on the part of a
11 manufacturer to warn of a risk or danger that should be
12 obvious to, or generally known by, foreseeable product
13 users, or a danger of which the plaintiffs are already
14 aware.

15 When a risk is obvious or generally known,
16 the consumer will or should know of its existence. A
17 manufacturer, in deciding whether to warn, can
18 reasonably take into account whether ordinary consumers
19 are already aware of the risk.

20 If the greater weight of the evidence does
21 not support the claims of the Florida class against one
22 or more of the defendant tobacco companies, then your
23 verdict on that claim should be for one or more of the
24 defendants.

25 However, if the greater weight of the

1 evidence does support the claims of the Florida class
2 against one or more of the defendants, then your
3 verdict should be in favor of the Florida class and
4 against one or more of the defendants.

5 "Greater weight of the evidence" means the
6 more persuasive and convincing force and effect of the
7 entire evidence in the case.

8 Now, if you find for the plaintiffs and
9 against one or more of the defendants, then you should
10 consider whether punitive damages are warranted in the
11 circumstances of this case as punishment and as a
12 deterrent to others.

13 You will decide whether the conduct of any
14 and all the defendants is such that punitive damages
15 are warranted.

16 Punitive damages are warranted if you find by
17 the greater weight of the evidence that:

18 1, the conduct causing the loss, injury or
19 damage to the plaintiff was so gross and flagrant as to
20 show a reckless disregard of human life or of the
21 safety of persons exposed to the effects of such
22 conduct; or

23 2, the conduct showed such an entire lack of
24 care that the defendant must have been consciously
25 indifferent to its consequences; or

1 3, the conduct showed such an entire lack of
2 care that the defendant must have wantonly or
3 recklessly disregarded the safety and welfare of the
4 public; or

5 4, the conduct showed such reckless
6 indifference to the rights of others as to be
7 equivalent to an intentional violation of those rights.

8 You may determine that punitive damages are
9 warranted against one defendant and not the others, or
10 against more than one defendant.

11 Your verdicts must be based on the evidence
12 that has been received and on the law in which I've
13 instructed you. In reaching your verdicts, you are not
14 to be swayed from the performance of your duty by any
15 prejudice or sympathy or any other sentiment for or
16 against any party.

17 When you retire to the jury room, you should
18 select one of your number to act as a foreperson to
19 preside over your deliberations and to sign your
20 verdicts. Your verdicts must be unanimous, that is,
21 your verdicts must be agreed to by each of you.

22 You will be given a blank form on the
23 verdict, which I shall now read to you:

24 When you've agreed on your verdicts, the
25 foreperson acting for the jury should date and sign the

1 appropriate forms of the verdict and knock on the door
2 and let us know you have a verdict.

3 Now, this verdict form may appear to be
4 somewhat confusing because of the nature of the form
5 itself. But I'll try to explain it to you so that you
6 really will understand it. And overall, it's really
7 not that confusing, despite the number of yeses and
8 nos.

9 It reads, excluding the formal heading
10 thereof: Verdict Form for Phase I. We, the jury,
11 return the following verdict:

12 Question 1, on generic causation: Does
13 smoking cigarettes cause one or more of the following
14 diseases or medical conditions?

15 And there's a list of these diseases. Next
16 to each of the diseases is a place for you to check off
17 yes or no. I'm going to read these diseases to you,
18 hopefully being able to pronounce all the words, but
19 I'll do it.

20 It starts off with:

21 Aortic aneurism, yes or no.

22 Asthmatic bronchitis as related to COPD, yes
23 or no.

24 Bladder cancer, yes or no.

25 Cerebrovascular disease, including stroke,

1 yes or no.

2 Cervical cancer, yes or no.

3 Chronic obstructive pulmonary disease or
4 COPD, including emphysema, yes or no.

5 Coronary heart disease, including
6 cardiovascular disease, hardening of the arteries,
7 atherosclerosis, coronary artery disease, and
8 arteriosclerosis, angina, abnormal blood clotting,
9 blood vessel damage, myocardial infarction or heart
10 attack, answer yes or no.

11 Esophageal or throat cancer, yes or no.

12 Infertility, yes or no.

13 Kidney disease, yes or no.

14 Laryngeal or throat or voice box cancer, yes
15 or no.

16 Lung cancer, yes or no. And subheadings of
17 lung cancer: Adenocarcinoma, yes or no.

18 Bronchoalveolar carcinoma, yes or no.

19 Large cell carcinoma, yes or no.

20 Small cell carcinoma, yes or no.

21 And squamous cell carcinoma, yes or no.

22 Complications of pregnancy or miscarriage,
23 yes or no.

24 Oral cavity or tongue cancer, yes or no.

25 Pancreatic cancer, yes or no.

1 Peripheral vascular disease, including
2 Buerger's disease, yes or no.

3 Pharyngeal cancer, yes or no.

4 And stomach cancer, yes or no.

5 Now, if your answer to all of the diseases
6 above is no, then your verdict is for the defendants
7 and you should not proceed any further except to date
8 and sign the verdict form and return to the courtroom.

9 If you answer yes to any of the above
10 questions, then please answer the following questions:

11 Question Number 2 involves addicted or
12 dependence, and reads:

13 Are cigarettes that contain nicotine
14 addictive or dependence-producing? And you check off
15 either yes or no.

16 Question Number 3 relates to strict
17 liability. It reads:

18 Did one or more of the defendant tobacco
19 companies place cigarettes on the market that were
20 defective and unreasonably dangerous? Place yes or no
21 as to each defendant, because they're listed. If you
22 answer yes to any of the defendants, then please answer
23 whether the conduct occurred during one of the
24 following time periods:

25 Philip Morris, Incorporated, you answer yes

1 or no, then there's a time period that you check off,
2 either before July 1 of 1974, yes or no, or after July
3 1, 1974. Then on the top of the next page, both before
4 and after July 1, 1974.

5 So of those three choices of dates, you check
6 off one which is applicable.

7 RJ Reynolds Tobacco Company, either yes or
8 no, and again, the three choices: Before July 1 of
9 1974, yes or no; after July 1, 1974; or both, before
10 and after July 1 of 1974.

11 Brown & Williamson Tobacco Corporation with
12 the same three choices, yes or no.

13 The Brown & Williamson Tobacco Corporation,
14 as successor to American Tobacco Company, the same
15 three choices for dates, yes or no.

16 The Lorillard Tobacco Company, yes or no, and
17 the same three date choices.

18 The Liggett Group Inc., yes or no. Again,
19 the same three choices, 1974.

20 And the Brooke Group, Limited, yes or no, and
21 the same three choices for July 1, 1974.

22 You proceed to Question Number 4, which is
23 the fraud and misrepresentation questions. This one
24 reads:

25 Did one or more of the defendants make a

1 false statement of a material fact, either knowing the
2 statement was false or misleading, or being without
3 knowledge as to its truth or falsity, with the
4 intention of misleading smokers?

5 Please answer yes or no as to each defendant
6 below. If you answer yes as to any defendant, then
7 please answer whether that conduct occurred during one
8 of the following time periods:

9 Philip Morris, Inc., yes or no, and the time
10 period would be before May 5, 1982, or after May 5,
11 1982, or both before and after May 5, 1982. Check off
12 one of those dates if you feel that's the appropriate
13 answer.

14 Same would apply to RJ Reynolds Tobacco
15 Company, yes or no, and the same three dates.

16 Brown & Williamson Tobacco Corporation, yes
17 or no, and the same three dates.

18 Brown & Williamson Tobacco Corporation, as
19 successor to American Tobacco Company, yes or no, the
20 same three dates.

21 Lorillard Tobacco Company/Lorillard Inc., yes
22 or no, the same three dates.

23 Liggett Group, Inc., yes or no, before or
24 after the same three dates. The third date on that
25 question is on the top of Page 5.

1 The Brooke Group, Limited, yes or no, before
2 or after or both before and after, the same three
3 dates.

4 Council for Tobacco Research USA, yes or no,
5 same three dates.

6 And Tobacco Institute, yes or no, same three
7 dates.

8 Question 4A, this is called fraud by
9 concealment:

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

16 Again, please answer yes or no as to each
17 defendant below. And if you answer yes to any
18 defendant, please answer whether the conduct occurred
19 during one of the following time periods:

20 Philip Morris, Incorporated, yes or no. The
21 dates before May 5, 1982, after May 5, 1982, or both
22 before and after May 5, 1982.

23 RJ Reynolds Tobacco Company, yes or no, same
24 three dates.

25 Brown & Williamson Tobacco Company, yes or

1 no, same three dates.

2 Brown & Williamson Tobacco Corporation, as
3 successor to American Tobacco Company, yes or no, same
4 three dates.

5 Lorillard Tobacco Company/Lorillard, Inc.,
6 yes or no, same three dates.

7 Liggett Group, Inc., yes or no, same three
8 dates.

9 Brooke Group, Limited, Inc., yes or no, same
10 three dates.

11 Council for Tobacco Research USA, yes or no,
12 same three dates.

13 And Tobacco Institute, yes or no, same three
14 dates.

15 Question Number 5 relates to civil conspiracy
16 or misrepresentation:

17 Did two or more of the defendants enter into
18 an agreement to misrepresent information relating to
19 the health effects of cigarette smoking, or the
20 addictive nature of cigarette smoking, with the
21 intention that smokers and members of the public rely
22 to their detriment?

23 Please answer yes or no as to each defendant
24 below. No dates involved in this one.

25 Philip Morris, Incorporated, yes or no.

1 RJ Reynolds Tobacco, yes or no.

2 Brown & Williamson Tobacco Corporation, yes
3 or no.

4 Brown & Williamson Tobacco Corporation, as
5 successor to American Tobacco Company, yes or no.

6 Lorillard Tobacco Company/Lorillard, Inc.,
7 yes or no.

8 Liggett Group, Inc., yes or no.

9 Brooke Group, Limited, Inc., yes or no.

10 Council for Tobacco Research USA, yes or no.

11 And Tobacco Institute, yes or no.

12 I'm reading them all because I have to. I'm
13 sure you understand that they're all listed, but I have
14 to read it.

15 Question Number 5A relates to civil
16 conspiracy-concealment:

17 Did two or more of the defendants enter into
18 an agreement to conceal or omit information regarding
19 the health effects of cigarette smoking, or the
20 addictive nature of smoking cigarettes, with the
21 intention that smokers and members of the public relied
22 to their detriment?

23 Please answer yes or no as to each defendant
24 below:

25 Philip Morris, yes or no.

1 RJ Reynolds, yes or no.

2 Brown & Williamson Tobacco Corporation, yes
3 or no.

4 Brown & Williamson Tobacco Corporation, as
5 successor to American Tobacco Company, yes or no.

6 Lorillard Tobacco Company/Lorillard, Inc.,
7 yes or no.

8 Liggett Group, Inc., yes or no.

9 Brooke Group Limited, yes or no.

10 Council for Tobacco Research, yes or no.

11 And Tobacco Institute, yes or no.

12 Question 6, breach of implied warranty:

13 Did one or more of the defendant tobacco
14 companies sell or supply cigarettes that were defective
15 in that they were not reasonably fit for the uses
16 intended?

17 Again, please answer yes or no as to each
18 defendant below, and if you answer yes to any
19 defendant, please answer whether the conduct occurred
20 during any of the following time periods:

21 Philip Morris, Incorporated, yes or no. We
22 have a little bit different dates here, so I have to
23 explain to you. The first date would be before July 1,
24 1969, yes or no. The second date to consider is July
25 1, 1969 through July 1, 1974; and after July 1, 1974.

1 Now, it's possible that you could check off
2 all of those or only one or only two. So you'll have
3 to consider each of those dates separately.

4 RJ Reynolds Tobacco Company, yes or no, and
5 the same three dates.

6 Brown & Williamson Tobacco, Corporation, yes
7 or no, and the same three dates.

8 Brown & Williamson Tobacco Corporation, as
9 successor to American Tobacco Company, yes or no, the
10 same three dates.

11 Lorillard Tobacco Company/Lorillard, Inc.,
12 yes or no, same three dates.

13 Liggett Group, Inc., yes or no, same three
14 dates.

15 And the Brooke Group, Limited, Inc., yes or
16 no, same three dates.

17 Question 7, the breach of express warranty:

18 Did one or more of the defendant tobacco
19 companies sell or supply cigarettes that, at the time
20 of sale or supply, did not conform to representations
21 of fact made by said plaintiffs, either orally or in
22 writing?

23 If you answer yes to any defendant, please
24 answer whether the conduct occurred during one of the
25 following time periods:

1 Philip Morris, Incorporated, yes or no --
2 now, these dates are all the same, so you answer one of
3 the three as you had previously done: Before July 1 of
4 '74, after July 1 of '74, or both.

5 RJ Reynolds Tobacco Company, yes or no, same
6 three dates.

7 Brown & Williamson Tobacco Corporation, yes
8 or no, same three dates.

9 Brown & Williamson Tobacco Corporation, as
10 successor of American Tobacco Corporation, yes or no,
11 same three dates.

12 Lorillard Tobacco Company/Lorillard, Inc.,
13 same three dates.

14 Liggett Group, Inc., yes or no, same three
15 dates.

16 And Brooke Group, Limited, yes or no, same
17 three dates.

18 Question Number 8 relates to negligence:

19 Have the plaintiffs proven that one or more
20 of the defendant tobacco companies failed to exercise
21 the degree of care which a reasonable careful --
22 getting myself mixed up -- which a reasonable cigarette
23 manufacturer would exercise under like circumstances?

24 Please answer yes or no as to each defendant,
25 and if you answer yes to any defendant, please answer

1 whether the conduct occurred during one of the
2 following time periods:

3 Philip Morris, Incorporated, yes or no. And
4 the choices here as dates are before July 1, 1969,
5 either yes or no, or after July 1, '69, either yes or
6 no, or both before and after July 1, 1969.

7 RJ Reynolds Tobacco Company, yes or no, same
8 three dates.

9 Brown & Williamson Tobacco Corporation, yes
10 or no, same three dates.

11 Brown & Williamson Tobacco Corporation, as
12 successor to American Tobacco Company, yes or no, same
13 three dates.

14 Lorillard Tobacco Company/Lorillard, Inc.,
15 yes or no, same three dates.

16 Liggett Group, Inc., yes or no, same three
17 dates.

18 And Brooke Limited, or Brooke Group, Limited,
19 Inc., yes or no, same three dates.

20 Question Number 9 deals with intentional
21 infliction of emotional distress:

22 Have plaintiffs proven that one or more of
23 the defendant tobacco companies engaged in extreme and
24 outrageous conduct or with reckless disregard relating
25 to cigarettes sold or supplied to Florida smokers with

1 the intent to inflict severe emotional distress?

2 You answer yes or no as to each defendant
3 below. There's no dates involved.

4 Philip Morris, Incorporated, yes or no.

5 RJ Reynolds Tobacco Company, yes or no.

6 Brown & Williamson Tobacco Corporation, yes
7 or no.

8 Brown & Williamson Tobacco Corporation, as
9 successor to American Tobacco Company, yes or no.

10 Lorillard Tobacco Company/Lorillard, Inc.,
11 yes or no.

12 Liggett Group, Inc., yes or no.

13 Brooke Group, Limited, yes or no.

14 And that ends that question.

15 Question 10, entitlement to punitive damages:

16 Under the circumstances of this case, state
17 below whether the conduct of any defendant rose to a
18 level that would permit a potential award or
19 entitlement to punitive damages.

20 Please answer yes or no as to each defendant
21 below. No dates involved.

22 Philip Morris, Incorporated, yes or no.

23 RJ Reynolds Tobacco Company, yes or no.

24 Brown & Williamson Tobacco Corporation, yes
25 or no.

1 Brown & Williamson Tobacco Corporation, as
2 successor to American Tobacco Company, yes or no.

3 Lorillard Tobacco Company/Lorillard, Inc.,
4 yes or no.

5 Liggett Group, Inc., yes or no.

6 Brooke Group, Limited, Inc., yes or no.

7 Council for Tobacco Research USA, yes or no.

8 And Tobacco Institute, yes or no.

9 Then there's a place that says: So say we
10 all, this blank day of blank, 1999, which you'll insert
11 the date and the place for your foreperson, whoever he
12 or she may be, to sign the verdict form.

13 Whoever becomes the foreperson not only signs
14 the verdict form, but please print your name underneath
15 it so that we know whose signature it is. Sometimes
16 you can't understand the signature.

17 Now, we've told you before that lunch will be
18 provided for you. We will have the clerk marshall all
19 of the evidence. I understand there are boxes.

20 THE CLERK: Yes, sir.

21 THE COURT: And the boxes will be given to
22 you in there for your use. You can go through them at
23 your leisure.

24 There's no time limit required of you. Take
25 as much time as you need to reach a verdict in this

1 case. That verdict, again, I remind you, must be
2 unanimous by you all.

3 Now, because of the nature of this case, the
4 following jurors will go into the jury room to decide
5 this issue: Juror Numbers 580, 577, 614, 459, 331 and
6 788.

7 You may now go to the jury room to decide
8 this issue and reach a verdict. Go ahead, folks, if
9 your number was called. You can take your notes with
10 you. Take your notes.

11 (The above jurors exited the courtroom.)

12 THE COURT: The rest of you folks please have
13 a seat.

14 Now, this may have come as a surprise to the
15 rest of you: 684, 729, 798, 805, 822, 831 and 907. I
16 guess that's right.

17 In this case, you were alternate jurors. You
18 do not have to decide this issue at this time. That
19 may be a blessing in disguise; it may not. I don't
20 know how you feel.

21 But we didn't, and I don't normally tell
22 jurors who are the alternates, so that you all pay
23 attention. Because if you're an alternate, you may not
24 pay attention.

25 Now, this has been an extraordinarily long

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

09 JUL -7 PM 5:13
CLERK'S

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 ☒

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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
GENERAL JURISDICTION DIVISION

56489

HOWARD A. ENGLE, M.D., ROBERT W.
ANGELL, RAYMOND LACEY, FROSENE D.
STEEVENS, FRANK AMODEO, MARY
FARNAN, LOREN E. LOWERY, ANGIE
DELLA VECCHIA and MICHAEL MATYI, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
PHILIP MORRIS INCORPORATED, ("PHILIP
MORRIS U.S.A."), 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.

ORIGINAL.

CASE NO. 94-08273 CA22

TRIAL

Phase II-B

Volume 569

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, July 6, 2000, at 9:35 a.m.

Miami, Florida **TAYLOR JONOVIC WHITE & GENDRON** (305) 358-9047

MO5731678

APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs

WINSTON & STRAWN
DAN WEBB, ESQ.
BRADLEY LERMAN, ESQ.
On behalf of Defendant Philip Morris

DECHERT PRICE & RHOADS
WILLIAM DODDS, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
DOUGLAS J. CHUMBLEY, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE
JAMES JOHNSON, ESQ.
JAMES YOUNG, ESQ.
DIANE G. PULLEY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
GORDON SMITH, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

TAYLOR, JONOVIC, WHITE & GENDRON
Miami, Florida 305-358-9047

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APPEARANCES (Continued)

SHOOK HARDY & BACON

KENNETH J. REILLY, ESQ.

WILLIAM P. GERAGHTY, ESQ.

JAMES T. NEWSOM, ESQ.

On behalf of Defendant Lorillard

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL

DAVID L. ROSS, ESQ.

On behalf of Defendant Lorillard

MARTINEZ & GUTIERREZ

JOSE MARTINEZ, ESQ.

On behalf of Defendant The Tobacco Institute.
and Tobacco Institute

ADORNO & ZEDER

ANTHONY UPSHAW, ESQ.

On behalf of Defendant Brown & Williamson

DEBEVOISE & PLIMPTON

JOSEPH P. MOODHE, ESQ.

On behalf of Defendant Council for Tobacco Research

TAYLOR, JONOVIC, WHITE & GENDRON

Miami, Florida 305-358-9047

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1 Honor, only conduct that was so gross and flagrant so
2 as to show a reckless disregard for human life and
3 safety qualifies as punitive damage misconduct, that's
4 how you instructed the jury and gave them the jury
5 instructions in the Phase I trial.

6 It's only that punitive damage misconduct
7 that can be considered in determining amount. That's
8 the purpose of the last two sentences of the
9 instruction. That's all I have to say about this
10 instruction.

11 MS. ROSENBLATT: Your Honor indicated you
12 wished to have that instruction given so that we will
13 rephrase it.

14 We do not agree with the phraseology of the
15 instruction, and I think it should be said as an
16 affirmative as opposed to a negative as to "under the
17 counts that you found in your Phase I verdict punitive
18 damages," you know, "under those counts you are
19 considering the issue here."

20 THE COURT: That's very wordy. It should be
21 very simple and, I like simplicity when it comes to
22 jury instruction. We lawyers talk about a lot of
23 stuff, and most people don't understand what we're
24 talking about anyway.

25 If the jury is told, under the law, punitive

1 damages only applies to certain counts, they are 1, 2,
2 3 and 4, you cannot award punitive damages in counts
3 such as in this case -- I'm not saying that's exactly
4 how you do it, strict liability and all that. So they
5 can make that break and distinction real quick. So
6 they know they're only concerned with the fraud, the
7 conspiracy, the misrepresentation and emotional
8 distress counts, the rest of it they're not concerned
9 with.

10 MS. ROSENBLATT: However, we don't agree, and
11 I know this has come up at prior hearings, under the
12 Johns Mansville case, that the defense had cited to
13 you, from the Fourth District, that the defense talked
14 about changed circumstances, that resulted in an award
15 of punitive damages.

16 I know I did not say, in our complaint, and
17 at the beginning of Phase I, we said we want to proceed
18 under strict liability as well. Basically, we talked
19 about amending to conform to the evidence, and that was
20 sort of up in the air, and there was never a
21 disposition of that.

22 And I don't, I, just for the record, and Your
23 Honor may sustain their objection, but for the record,
24 we feel that, certainly under the Johns Mansville case
25 and under Florida law, we have proven, under strict

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Miami, Florida 305-358-9047

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1 liability and tort, an entitlement to punitive damages
2 as well.

3 So I don't really agree with that. And I
4 would rather that be sorted out, if it's even relevant
5 at all in the appellate court, down the road. But I
6 wouldn't want to agree to an instruction that I don't
7 feel is a correct instruction of the law.

8 The John Mansville case, in a series of
9 cases, punitive damages for gross misconduct is
10 awardable under strict liability and tort. Not implied
11 warranty or express warranty, but it is under strict
12 liability.

13 MR. WEBB: Your Honor, this issue came up
14 earlier and we argued in front of Your Honor. They did
15 not amend the complaint. The complaint is exactly as
16 I've said here. It has not been changed at all.
17 Clearly we're not going to change it at this stage of
18 the game.

19 By the way, the way I phrased the first two
20 sentences is exactly how you just described. I tell
21 them which count it applies to and which it doesn't.
22 So I think those first two sentences say it as clearly
23 and as straightforward as you possibly can, as to what
24 counts punitive damages apply to and which counts they
25 don't. It's said very simply, very straightforward.

1 MS. ROSENBLATT: Also, Your Honor, the
2 liability is incorporated within fraud and it's within
3 conspiracy.

4 THE COURT: Sale of defective product is
5 basically strict liability.

6 MR. WEBB: That's correct.

7 MS. ROSENBLATT: But it also comes into the
8 way --

9 THE COURT: Did you call it strict liability
10 in your complaint? Yes.

11 MS. ROSENBLATT: We have a count. We don't
12 call it sale of a defective product.

13 THE COURT: No, you call it strict liability,
14 and that's what it should be counted as.

15 MS. ROSENBLATT: But not as sale --

16 THE COURT: I agree with you.

17 MS. ROSENBLATT: The last sentence we
18 disagree because the jury found what they found. Now
19 the question is, is it appropriate for punitive damages
20 not to talk about the misconduct? What that comes down
21 to is the argument: Well, did you base it on the Frank
22 Statement?

23 THE COURT: I'm not going to second-guess
24 that. So I disagree with the defense on the "moreover"
25 statement.

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

57776

GENERAL JURISDICTION DIVISION

HOWARD A. ENGLE, M.D., ROBERT W.
ANGELL, RAYMOND LACEY, FROSENE D.
STEEVENS, FRANK AMODEO, MARY
FARNAN, LOREN E. LOWERY, ANGIE
DELLA VECCHIA and MICHAEL MATYI,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."), 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.

ORIGINAL

CASE NO. 94-08273 CA22

TRIAL
Phase II - B
Volume 581

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
Friday, July 14, 2000 at 9:35 a.m.

Miami, Florida

Taylor, Jonovic, White & Gendron

(305) 358-9047

W05767073

APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs

WINSTON & STRAWN
DAN WEBB, ESQ.
BRADLEY LERMAN, ESQ.
On behalf of Defendant Philip Morris

DECHERT PRICE & RHOADS
WILLIAM DODDS, ESQ.
On behalf of Defendant Philip Morris

COLL DAVIDSON SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

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STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris

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DOUGLAS J. CHUMBLEY, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE
JAMES JOHNSON, ESQ.
JAMES YOUNG, ESQ.
DIANE G. PULLEY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
GORDON SMITH, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

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APPEARANCES (Continued)

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KENNETH J. REILLY, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

GREENBERG TRAUERIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard

MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

ADORNO & ZEDER
ANTHONY UPSHAW, ESQ.
On behalf of Defendant Brown & Williamson

DEBEVOISE & PLIMPTON
JOSEPH P. MOODHE, ESQ.
On behalf of Defendant Council for Tobacco Research

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Miami, Florida 305-358-9047
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1 (Whereupon, the following proceedings were had:)

2 THE COURT: All right. Have a seat, folks.

3 Okay. What's the problem?

4 MS. ROSENBLATT: We have one issue sidebar we
5 wanted to take up.

6 (The following proceedings were had at
7 sidebar:)

8 MS. ROSENBLATT: We believe that one of the
9 instructions is very misleading. And it came out
10 during rebuttal yesterday when there were repeated
11 objections, when Stan made the obvious argument that
12 you could also look to the resources, available
13 resources, to borrow from the parent or sister
14 corporations, that the defense lawyers were taking the
15 position that Your Honor's jury instructions somehow
16 prohibited that. And Your Honor overruled it, and I'm
17 afraid the jury could misinterpret that.

18 Your Honor, what I've done -- and I just
19 wanted to explain why this is so important -- and also,
20 Your Honor, during closing argument, Mr. Webb stated
21 that -- and this is at Page 57394: The fate and future
22 of my client, Philip Morris, its employees and
23 stockholders rests in your hands.

24 And he also stated: We have already been
25 punished by \$80 billion, which was the diminution of

1 stock value, which was the parent.

2 So they're coming in and arguing the parent
3 and talking the parent, and then they're asking Your
4 Honor -- the instruction, as is it reads right now,
5 could absolutely be misread.

6 What we're suggesting is adding one sentence.
7 The sentence would be: However -- (Handing) you may
8 consider --

9 You can see it.

10 MR. WEBB: Your Honor, you can't change an
11 instruction at this point.

12 THE COURT: Sure you can. I can do anything.

13 MR. SMITH: You overruled the objections.

14 THE COURT: I'm not going to change anything.
15 You made your record. Deny your motion.

16 The jury will recollect everything there is
17 to know about this case. They don't have Alzheimer's
18 yet.

19 MR. MARKS: Your Honor, while we're at
20 sidebar, I want to tender into the record a proposed
21 instruction pursuant to the motion I made yesterday. I
22 made my record yesterday.

23 THE COURT: That was denied also. Okay.

24 (The sidebar conference was concluded, and
25 the following proceedings were held in open court:)

1 THE COURT: All right, folks. We're good to
2 bring the jury in. And at this stage what we're going
3 to do is read the instructions to them, and then we
4 will let the jury go out and deliberate.

5 Now, during the reading of the instructions,
6 this door to the courtroom will be locked. No one will
7 be allowed to go in or out during the reading of the
8 instructions. So if there's anybody here now who feels
9 the need to go outside, do it now or else you're going
10 to be in here until the doors are unlocked, which won't
11 be that long; but nonetheless, I don't want people
12 getting up and moving about during the reading of the
13 instructions.

14 After the Court has given instructions to the
15 jury and has released the six primary jurors to go into
16 the jury room to discuss the case, we are not yet
17 through, so I don't want you to be standing up, milling
18 about, making noise and having conversations.

19 There are some other matters that need to be
20 taken care of between the Court and the alternate
21 jurors, so please remain seated and remain in your
22 places until the Court tells you that we will be in
23 recess, at which time you can then go out into the
24 hallway.

25 There will be no interviews in the hallway by

1 anybody for any reason, so please be advised of that.

2 I guess that's about all I have to say at
3 this point regarding that. So if you'll just be
4 cooperative, be quiet, and I think it's appropriate
5 while the Court reads the instructions to the jury.

6 Bring the jury out, please.

7 THE BAILIFF: Bringing in the jury. Jurors
8 entering the courtroom.

9 (The jurors entered the courtroom.)

10 THE COURT: Good morning.

11 THE JURY PANEL: Good morning.

12 THE COURT: Have a seat folks, thank you.

13 Well, how is everybody today?

14 THE JURY PANEL: Fine.

15 JUROR: Great.

16 THE COURT: Anything happen over the night by
17 way of exposure to any information about this case,
18 television, radio, newspapers, magazines, one-on-one
19 conversations, anything else, any source of
20 information? Any of you?

21 THE JURY PANEL: No, sir.

22 THE COURT: You all have an open mind still,
23 because we're not finished.

24 THE JURY PANEL: Yes.

25 THE COURT: We will be soon.

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1 But it's important that you never make up
2 your mind until I tell you to go into the jury room and
3 decide the case.

4 When I say those magic words or words like it
5 is the only time that you will be free to discuss among
6 yourselves the issues involved.

7 Now we've been through a long process, and
8 this is the final phase, where I will read you some
9 instructions on the law. I have the instructions here,
10 and you will be given a copy of the instructions to
11 have with you in the jury room. But I will read them
12 to you now.

13 I shall now instruct you on the law that you
14 must follow in reaching your verdict. It is your duty
15 as jurors to decide the issues and only those issues
16 that I submit for determination by your verdict.

17 In reaching your verdict, you should consider
18 and weigh the evidence, decide the disputed issues of
19 fact, and apply the law on which I shall instruct you
20 to the facts as you find them from the evidence.

21 The evidence in this case consists of the
22 sworn testimony of the witnesses, all of the exhibits
23 in evidence, and all facts that may be admitted or
24 agreed to by the parties.

25 In determining the facts, you may draw

1 reasonable inferences from the evidence. You may make
2 deductions and reach conclusions which reason and
3 common sense lead you to draw from the facts shown by
4 the evidence in this case. But you should not
5 speculate on any matters outside of the evidence.

6 In determining the believability of any
7 witness and the weight to be given the testimony of any
8 witness, you may properly consider the demeanor of the
9 witness while testifying; the frankness or the lack of
10 frankness of the witness; the intelligence of the
11 witness; any interest the witness may have in the
12 outcome of the case; the means and the opportunity the
13 witness had to know the facts about which the witness
14 testified; the ability of the witness to remember the
15 matters about which the witness testified; and the
16 reasonableness of the testimony of the witness,
17 considered in light of all of the evidence in this case
18 and in light of your own experiences and common sense.

19 Now you have heard opinion testimony on
20 certain technical subjects from persons referred to as
21 an expert witness. Some of the testimony before you
22 was in the form of opinions about certain technical
23 subjects.

24 Now you may accept such opinion testimony,
25 you may reject it, or you may give it the weight that

1 you think it deserves, considering the knowledge, the
2 skill, experience, training or education of the
3 witness, the reasons given by the witness for the
4 opinion expressed and all of the other evidence in the
5 case.

6 The Florida class has established during
7 Phase I entitlement to an award of punitive damages.
8 In this phase of the case, the Florida class must
9 establish by the greater weight of the evidence the
10 amount of damages.

11 However, the Florida class is not required,
12 as a predicate for punitive damages, to introduce
13 evidence of a defendant's financial worth and ability
14 to pay an award of punitive damages.

15 Greater weight of the evidence means the more
16 persuasive and convincing force and effect of the
17 entire evidence of the case.

18 You will now determine the amount of punitive
19 damages, if any, to be assessed as punishment and as a
20 deterrent to defendants and others. This amount will
21 be in addition to the compensatory damages you have
22 previously awarded and that may be awarded to class
23 members in future proceedings in this case.

24 In making this determination, you should
25 consider the following:

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- 1 (1) the nature, extent and degree of
2 misconduct and the related circumstances;
3 (2) each defendant's financial resources;
4 and
5 (3) any other circumstances which may affect
6 the amount of punitive damages.

7 You may in your discretion decline to assess
8 punitive damages. You may assess punitive damages
9 against one defendant and not the others, or against
10 more than one defendant. Punitive damages may be
11 assessed against different defendants in different
12 amounts.

13 In making your determination, you should
14 consider the following, among other factors:

15 (1) an amount as to each defendant that is
16 reasonable in relation to the harm likely to result
17 from each defendant's conduct as well as the harm that
18 actually had occurred;

19 (2) the degree of reprehensibility of each
20 defendant's conduct, the duration of that harmful
21 conduct, each defendant's awareness, any concealment,
22 and the existence and frequency of similar past
23 conduct;

24 (3) the profitability to each defendant of
25 the wrongful conduct and the desirability of removing

1 that profit and of having each defendant sustain a
2 loss;

3 (4) the financial condition of each
4 defendant and the probable effect thereon of a
5 particular judgment;

6 (5) all the costs of litigation to
7 defendants and to the class;

8 (6) the total punishment each defendant has
9 or will probably receive from other sources, as a
10 mitigating factor;

11 (7) the seriousness of the hazard to the
12 public, the attitude and conduct of each defendant upon
13 discovery of the misconduct;

14 (8) the degree of each defendant's awareness
15 of the hazard and of its excessiveness;

16 (9) the number and level of employees of
17 each defendant involved in causing or covering up the
18 misconduct;

19 (10) the duration of both the improper
20 behavior and its cover-up; and

21 (11) the existence of other civil awards
22 against each defendant for the same conduct.

23 Now, on the punitive damage issue, you may
24 award punitive damages based on your verdict in Phase I
25 as to fraud and misrepresentation, fraud by

1 concealment, civil conspiracy to misrepresent, civil
2 conspiracy to conceal, and the intentional infliction
3 of emotional distress. You may not award punitive
4 damages based upon strict liability, breach of express
5 or implied warranty or negligence.

6 Now during the trial you've heard testimony
7 and evidence that was presented estimating the size of
8 the Florida class. The class is defined as: All
9 Florida citizens and residents and their survivors who
10 have suffered, presently suffer or who have died from
11 diseases and medical conditions caused by their
12 addiction to cigarettes that contain nicotine.

13 In determining the class members who are
14 eligible to receive punitive damages, I instruct you
15 that only persons who meet the class definition are
16 eligible for class membership. Persons who do not meet
17 this criteria are not class members and should not be
18 considered in determining the amount of punitive
19 damages, if any.

20 During the trial you have heard evidence
21 about the Florida Settlement Agreement and the Master
22 Settlement Agreement that were voluntary settlements of
23 pending litigation between various states and the
24 defendants.

25 These cases and the voluntary settlements

1 reached address entirely different issues and claims
2 and have nothing to do with this class action brought
3 by the class of Florida smokers and their survivors.

4 I hereby instruct you that the Florida
5 Settlement Agreement and the Master Settlement
6 Agreement do not constitute punishment of or deterrence
7 to these defendants. You may consider evidence as to
8 the Florida Settlement Agreement and the Master
9 Settlement Agreement solely on the basis of the
10 defendants' financial resources and obligations and
11 changed conduct.

12 In arriving at an appropriate award of
13 punitive damages, if any, you may consider each
14 defendant's current financial condition and resources.
15 Your award against a particular defendant must be such
16 that it could be paid by that defendant without
17 financially destroying or bankrupting that defendant.
18 This should be determined by evaluating each
19 defendant's financial condition and resources at the
20 time your verdict is rendered.

21 It is only a defendant's current ability to
22 pay a punitive damage award that is relevant, and not
23 whether a defendant can pay using a payout or an
24 installment plan.

25 "Financial resources" includes but are not

1 limited to net worth. "Financial resources" also
2 encompass many capabilities and potentials other than
3 naked assets and liability.

4 "Financial resources" include:

- 5 (1) money or any property that can be
6 converted into supplies;
7 (2) means of raising money or supplies;
8 (3) capabilities of raising wealth or to
9 supply necessary wants;
10 (4) available means or capability of any
11 kind;
12 (5) income;
13 (6) cash flow;
14 (7) expenses;
15 (8) anticipated income;
16 (9) anticipated diminution of income; and
17 (10) anticipated casualties.

18 In determining an appropriate award of
19 punitive damages, if any, it is only the assets of the
20 defendant on trial and not the assets of the parent or
21 sister corporations that can be considered in awarding
22 punitive damages.

23 The fact that the defendants in this case are
24 all corporations must not prejudice you in your
25 deliberations or in your verdict.

1 You may not discriminate between corporations
2 and natural individuals. Both are persons in the eyes
3 of the law, and both are entitled to the same fair and
4 impartial consideration by the same legal standard.

5 Your verdict on the issues raised by the
6 punitive damages claim of the Florida class against
7 defendants must be based on the evidence that has been
8 received during the trial of Phase I and II-A of this
9 case and on the evidence that has been received in
10 these proceedings and the law on which I have
11 instructed you.

12 In reaching your verdict you are not to be
13 swayed from the performance of your duty by either
14 prejudice or sympathy for or against any party.

15 Your verdict must be unanimous; that is, your
16 verdict must be agreed to by each of you.

17 We will give you of course the form of the
18 verdict.

19 I have a form here which I will present to
20 you, and excluding the formal heading of it, it reads:
21 Verdict Form for Phase II-B, Punitive Damages. We the
22 jury return the following verdict:

23 What is the total amount of punitive damages,
24 if any, which you assess against the defendants?

25 And then there is a list.

1 Philip Morris Incorporated. There is a
2 dollar sign and a line.

3 RJ Reynolds Tobacco Company, dollar sign with
4 a line.

5 Brown & Williamson Tobacco Corporation,
6 individually and as successor by merger to the American
7 Tobacco Company, a dollar sign and a line.

8 Lorillard Tobacco Company/Lorillard Inc., a
9 dollar sign with a line.

10 Liggett Group Inc./Brooke Group Holding Inc.,
11 a dollar sign with a line.

12 Council for Tobacco Research, a dollar sign
13 with a line.

14 And Tobacco Institute, a dollar sign and a
15 line.

16 If you elect not to assess punitive damages
17 against any defendant, then you should enter a zero in
18 the amount of damages. So say we all, this blank day
19 of blank, 2000.

20 Have a person for your foreperson, whoever he
21 or she may be, to sign the verdict form.

22 So, whoever is the foreperson, tell them to
23 sign it not in script but in print. And whatever your
24 verdict is, fill it in, add the appropriate day.

25 Now, the clerk has prepared and will prepare

1 for you all of the evidence that was assembled in the
2 Phase II-B, this part of the trial. And, of course, in
3 your considerations you may also consider the evidence
4 that you heard in Phase I and Phase II-A, but it's so
5 much that we're not going to bring it into the jury
6 room because there is just no room in there for you if
7 you need it.

8 But if you need anything from any of the
9 previous phases, let us know what they are. The clerk
10 will dig them out and give them to you.

11 You will have a clean sheet of paper or a pad
12 with which to write some notes to us if you need any
13 information, of course.

14 Write us a note, fold it up, give it to the
15 bailiff, who will give it to me, and then I'll make a
16 decision and return the note to you with an answer.

17 Please keep the notes we exchange back and
18 forth. Do not destroy them. We need them for the
19 record.

20 If you look through any of the evidence and
21 they are stapled or clipped together, please keep them
22 stapled or clipped together. Don't unattach them,
23 because we need them in the order they were given.

24 And when you have reached a verdict in this
25 cause, simply fill out the form, sign it, fold it up,

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1 knock on the door, let us now you have a verdict.

2 We have also provided lunch for those of you
3 who are going to be in the jury room deciding this
4 case, so you don't have to worry about that.

5 It's at this time, ladies and gentlemen, that
6 I will utter the magic words, that now is the time for
7 you folks to go in and decide this case.

8 The first row, the first six of you, are the
9 primary jurors, and you will go into the jury room and
10 reach a verdict.

11 THE BAILIFF: Please rise for the jury.

12 (The jurors exited the courtroom.)

13 THE COURT: All right. Have a seat, folks.
14 Olga, you will collect all those notes.

15 All right. Now, the rest of you, you, as you
16 probably knew, were the alternates. You ask the
17 question: Why am I an alternate for two years?

18 Well, the answer is obvious. In a case of
19 this magnitude and this size, it would be highly
20 impractical if one of the primary jurors became ill or
21 otherwise unable to perform, and we would be at a
22 standstill and stymied; we would probably have to start
23 all over again. And that could happen at any stage of
24 the the trial, over the entire two-year period of time.

25 That's why we needed enough people to fill in

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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-B

PUNITIVE DAMAGES

We, the Jury, return the following Verdict:

What is the total amount of punitive damages, if any, which you assess against Defendants?

Philip Morris, Incorporated

\$ 73,460,000,000

RJ Reynolds Tobacco Company

\$ 36,280,000,000

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

\$ 17,590,000,000

Lorillard Tobacco Company/Lorillard, Inc.

\$ 16,250,000,000

Liggett Group Inc./Brooke Group Holding, Inc.

\$ 790,000,000

Council for Tobacco Research

\$ 1,195,210

Tobacco Institute

\$ 278,339

If you elect not to assess punitive damages against a defendant, you should enter
a zero (0) as the amount of damages.

SO SAY WE ALL, this 14th day of July, 2000.

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

LUCILLE RUTH SOFFER, as
personal representative of the
Estate of MAURICE BENSON
SOFFER,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D11-3724

Appellant/Cross-Appellee,

v.

R. J. REYNOLDS TOBACCO
COMPANY, ET AL.,

Appellee/Cross-Appellant.

_____/

Opinion filed October 24, 2012.

An appeal from the Circuit Court for Alachua County.
Hon. Robert E. Roundtree, Jr., Judge.

John S. Mills, The Mills Firm, Tallahassee, Mark A. Avera, Rod Smith, Dawn M. Vallejos-Nichols, Avera & Smith, Gainesville, and James W. Gustafson, Jr., Searcy Denney Scarola Barnhart & Shipley, Tallahassee, for Appellant.

Robert B. Parrish, Moseley, Pritchard, Parrish, Knight & Jones, Jacksonville, and Gregory G. Katsas, Jones Day, Washington, D.C., for Appellee.

MAKAR, J.

Lucille Soffer, the personal representative of the estate of her deceased husband, Maurice Soffer, appeals the final judgment in this Engle-progeny

wrongful death action. Mrs. Soffer contests the trial court’s disallowing a claim for punitive damages on negligence and strict liability theories. R.J. Reynolds cross-appeals, seeking a new trial based on evidentiary errors as well as reversal of the trial court’s orders regarding its statute of limitations defense and the preclusive effect of the Engle class-wide jury findings. We affirm the cross-appeal, but address the question of whether Mrs. Soffer, as a member of the plaintiff class in Engle, is entitled to seek punitive damages as additional relief for her negligence and strict liability counts. We hold that she may not, but certify a question of great public importance.

I

Mrs. Soffer is termed a “progeny plaintiff,” meaning a member of the class approved in Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (also called the Engle Class). Those progeny plaintiffs who choose to bring actions pursuant to Engle do so, in large measure, because of the significant benefits that membership in the Engle Class confers upon them. First, progeny plaintiffs are entitled to the res judicata effect of certain factual findings made in Engle, thereby relieving them of the substantial burden, time, cost, and risk of proving the tortious-conduct elements of their actions against the defendants. Second, progeny plaintiffs are entitled to a lengthy tolling of Florida’s statute of limitations, which ordinarily is two years. For example, the complaint in this case was filed on December 18,

2007, which is more than 15 years after Mr. Soffer died; absent the equitable tolling that Engle provides for progeny plaintiffs, Mrs. Soffer's action against the defendants would be time-barred by more than a decade.

The Engle Class based its theories of recovery on counts alleging negligence and strict liability as well as two intentional tort theories: fraud by concealment and conspiracy to commit fraud. The trial was tri-furcated: Phase I, during which the jury heard evidence in a year-long proceeding to resolve "issues of liability and entitlement to punitive damages for the class as a whole"; Phase II-A, which involved a determination of compensatory damages for the named plaintiffs; and, Phase II-B, which involved the determination of the amount of punitive damages for the class as a whole. Id. at 1256-57. Individualized determinations on issues of liability and compensatory damages were to take place in separate trials to separate juries for each of the class members, with punitive damages to be divided by the trial court amongst successful individual plaintiffs. Id. at 1258.

In Phase I, the jury in Engle made a range of specific factual determinations supporting the four theories of recovery mentioned above. Because the trial court in Engle denied as untimely the plaintiffs' motion to amend their complaint to seek punitive damages under negligence and strict liability theories, the jury did not address punitive damages as to these counts; instead, punitive damages for the Engle Class were limited to only the two intentional tort counts, which had been

timely asserted. On these latter two counts, the jury determined that the class was entitled to punitive damages, which were set at \$145 billion. Id. at 1256-57.

On appeal, the Third District reversed, decertifying the class and quashing the jury award. The supreme court, however, reversed in part and affirmed in part, holding that most of the Phase I factual findings were entitled to res judicata effect with respect to members of the Engle Class (with certain limitations). It also, in effect, equitably tolled the statute of limitations for all members of the Engle Class who brought actions “filed within one year of the mandate in this case.” Id. at 1277.

The supreme court made two holdings as to punitive damages. First, it was error for the jury to consider entitlement to punitive damages during Phase I of the trial; doing so violated principles of due process because the jury’s determination of the lump sum award of \$145 billion in Phase I occurred before the jury made any determination about the ultimate liability of individual defendants in Phase II. This was legal error because there was “no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed.” Id. at 1262. It was also error because the jury’s punitive damages award preceded any finding that the “plaintiffs had established causation and reliance.” Id. Second, the court held that the amount of the punitive damages was excessive; thus, even if the finding of entitlement to punitive damages in Phase I

had been permissible, the classwide punitive damages award was “clearly excessive” and would “result in an unlawful crippling of the defendant companies.” Id. at 1265 and n.8. The court in Engle did not pass upon whether progeny plaintiffs were entitled to assert claims for punitive damages under the negligence and strict liability theories previously and specifically disallowed to members of the Engle Class as untimely.

II

Maurice Soffer died in May of 1992 of lung cancer caused by smoking. Mrs. Soffer brought this wrongful death action against R.J. Reynolds seeking to take advantage of the Engle Class findings. She asserted causes of action identical to those asserted in Engle: negligence, strict liability, and the two intentional tort theories. As in Engle, the trial court allowed the jury to consider punitive damages on the two intentional tort counts, but disallowed them as to the negligence and strict liability counts. The trial court found the punitive damages claims, as to the negligence and strict liability causes of action, were barred by the statute of limitations; because the lead plaintiffs in Engle had not timely asserted such claims, therefore, the trial court reasoned, they are unavailable to progeny plaintiffs. The jury found for Mrs. Soffer on the strict liability and negligence counts, awarding \$2,000,000 in compensatory damages; the jury rejected recovery

on the intentional tort counts, thereby making it unnecessary to consider an award of punitive damages on those counts.¹

In this appeal, Mrs. Soffer asserts that Engle does not preclude progeny plaintiffs from seeking awards of punitive damages on negligence and strict liability theories, which—as a general matter under ordinary circumstances—may be sought under Florida law. The causes of action in this case, Mrs. Soffer argues, are identical to those asserted in Engle; only the requested additional remedy—punitive damages for the non-intentional tort counts—is different. She claims she is not bound to the remedies timely sought in Engle and that principles of equitable tolling do not apply to bar her assertion of punitive damages for the negligence and strict liability theories upon which she prevailed (the jury in her case having rejected the intentional tort theories for which the Engle Class sought and initially was awarded punitive damages).

R.J. Reynolds argues, on the other hand, that progeny plaintiffs—as members of the Engle Class—may assert only those timely claims and remedies previously pursued and ultimately approved by the Florida Supreme Court in its path-breaking decision. In doing so, progeny plaintiffs receive substantial benefits

¹ In pertinent part, the jury instructions read: “Punitive damages may be awarded against R.J. Reynolds Tobacco Company based only on your findings that Reynolds is liable to Mrs. Soffer for fraudulent concealment or agreement to conceal. You may not find that punitive damages are warranted against Reynolds based upon Mrs. Soffer’s claim for negligence or strict liability.”

and must “take the bitter with the sweet”; they cannot unilaterally accept the enormous benefits of equitable tolling and the res judicata effect of Phase I findings without accepting the limitations, express and implied, in that decision. To allow new claims for punitive damages at this late date would fundamentally alter the character of this unprecedented litigation. As members of the Engle Class, progeny plaintiffs are subject to the posture of the case as it exists, which includes the established prohibition on punitive damages for the negligence and strict liability theories as to all class members; principles of equitable tolling do not revive claims for punitive damages that were not timely presented in the first instance. We agree with each of these points.

In doing so, we do not agree with Mrs. Soffer’s assertion that punitive damages—simply because they are generally permitted for negligence and strict liability—are merely an additional remedy that members of the Engle Class may pursue. While we have no dispute with the general proposition that plaintiffs who assert negligence and strict liability counts normally are permitted to plead and perhaps prove entitlement to punitive damages under applicable standards, this point only takes us so far. It does not thereby follow that progeny plaintiffs as members of the Engle Class, who are part of one of the most uniquely structured and extraordinarily adjudicated cases in the state’s history, are thereby entitled to the benefits that might occur or be available in the usual course of a routine case

that is litigated by an individual plaintiff from start to finish. To us, the unique context of Engle matters.

Progeny plaintiffs wear the same shoes, so to speak, as the plaintiffs in Engle because they *are* the plaintiffs from Engle.² Progeny plaintiffs thereby must accept the status and procedural posture of the Engle litigation as they find it; they must accept the parameters that are framed by that litigation—including the absence of a timely claim for punitive damages under negligence and strict liability theories. The supreme court’s decision in Engle vacated the punitive damages award that was supported by and linked solely to the intentional tort theories of recovery; it thereby could be said to have wiped the slate clean as to punitive damages for those two counts. The decision says nothing to suggest, however, that the supreme court intended to preserve for the progeny plaintiffs anything other than the claims and remedies properly and timely asserted in that litigation.

This result is far from unfair. As members of the class, Engle progeny plaintiffs are in the same position they would have been in had they filed a complaint identical to the Engle class-action complaint on the same date the original complaint was filed. Here, Mrs. Soffer is not merely seeking to take advantage of Engle via the filing of a new and independent claim; rather, she was a

² See Nat’l Lake Devs., Inc. v. Lake Tippecanoe Owners Ass’n, Inc., 417 So. 2d 655 (Fla. 1982) (individual members of plaintiff class may choose to opt out and not be bound by a court’s judgment; members not opting out “are bound by the resulting decree” even if they are absent from the proceeding).

party to Engle and, to the extent her claims differ from those in that case, she must meet the requirements for amending her complaint, which she cannot do. There is no indication in Engle that our supreme court intended to extend its decision beyond the claims and remedies that had actually been timely asserted in the first place. Punitive damage claims under negligence and strict liability theories were untimely and not authorized as part of the Engle litigation; they were authorized only for the two intentional tort counts of fraud by concealment and conspiracy to commit fraud. If the supreme court had intended that its decision be so open-ended as to allow claims for punitive damages not otherwise made available in the course of Engle, it would have said so; it has not and we decline to expand the breadth of possible remedies or benefits available to progeny plaintiffs absent clearer direction from our supreme court.

III.

In conclusion, progeny plaintiffs, such as Mrs. Soffer, may choose to accept the preclusive benefits of the Phase I findings in Engle and the benefits of that decision's tolling of the statute of limitations, but in doing so they are constrained to the punitive damage claims timely sought in the operative class-action complaint; they may not tack on additional punitive damage claims lest they unjustifiably broaden the intended scope and effect of Engle and change the nature of the litigation. Progeny plaintiffs may assert punitive damage claims to the same

extent as allowed in Engle, as Mrs. Soffer did here; but they may not assert such claims based on strict liability and negligence theories. To do so would provide an unjustifiable and potentially unintended windfall by expanding Engle beyond its existing parameters, which is not a task for this Court in the first instance under the circumstances presented. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (noting that district courts may certify questions of great public importance where appropriate). In recognition of our role in Florida's appellate system, we certify the following question as one of great public importance for the supreme court's consideration:

ARE MEMBERS OF THE CLASS IN ENGLE V. LIGGETT GROUP, INC., 945 SO. 2D 1246 (FLA. 2006) ENTITLED TO PURSUE AN AWARD OF PUNITIVE DAMAGES UNDER THEORIES OF NEGLIGENCE OR STRICT LIABILITY?

AFFIRMED.

DAVIS, J., CONCURS. LEWIS, J., CONCURS IN PART AND DISSENTS IN PART.

LEWIS, J., concurring in part, and dissenting in part.

I agree with the majority that the issues raised by R.J. Reynolds Tobacco Company (“Reynolds”) on cross-appeal must be affirmed. I also agree with the majority to certify a question to the Florida Supreme Court. However, for the reasons that follow, I would reverse the trial court’s ruling that punitive damages can only be awarded on the intentional tort claims and remand for a new trial on the issue of Mrs. Soffer’s entitlement to punitive damages on her negligence and strict liability claims only, and, if so, the amount of punitive damages.

Mrs. Soffer, as personal representative of the Estate of Maurice Benson Soffer, brought this action pursuant to Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (“Engle III”), alleging that she was a member of the Engle class and asserting claims of negligence, strict liability, fraud by concealment, and conspiracy to commit fraud by concealment. Mrs. Soffer sought compensatory and punitive damages. As a basis for punitive damages, Mrs. Soffer alleged that Reynolds “engaged in conduct that was fraudulent and conspired to engage in such conduct, or engaged in conduct, with such gross negligence as to indicate willful and wanton disregard for the rights of others, including [Mrs. Soffer.]” Mrs. Soffer’s demand for punitive damages was not limited to any one claim.

During the charge conference, Reynolds argued that the jury should be instructed that it may only consider punitive damages on the intentional tort claims

(the concealment and conspiracy claims). Mrs. Soffer urged the trial court to allow the jury to consider awarding punitive damages on all claims. The trial court rejected Mrs. Soffer's request for such instruction and ultimately instructed the jury, in pertinent part, as follows:

Punitive damages may be awarded against R.J. Reynolds Tobacco Company based only on findings that Reynolds is liable to Mrs. Soffer for fraudulent concealment or agreement to conceal. You may not find that punitive damages are warranted against Reynolds based upon Mrs. Soffer's claim for negligence or strict liability.

The jury returned a verdict for Mrs. Soffer on the negligence and strict liability claims, but for Reynolds on the concealment and conspiracy claims. Pursuant to the trial court's instruction, the jury did not answer the question of whether punitive damages were warranted on Mrs. Soffer's claim for negligence or strict liability.

I.

Whether a claim may support an award of punitive damages is reviewed de novo. See Estate of Williams ex rel. Williams v. Tandem Health Care of Fla., Inc., 899 So. 2d 369, 376 (Fla. 1st DCA 2005). "Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future." Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999). Pursuant to section 768.72(2), Florida Statutes (2005), a defendant

may be held liable for punitive damages, if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. See also Ballard, 749 So. 2d at 486 (finding that “punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others.”); R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1070 (Fla. 1st DCA 2010) (noting that punitive damages may be awarded for intentional misconduct or gross negligence), *rev. denied*, 67 So. 3d 1050 (Fla. 2011).

Reynolds does not dispute this point, but argues that Engle class members are different and cannot, as a matter of law, request punitive damages on their negligence and strict liability claims because the class demand for punitive damages in Engle was based only on the intentional tort claims and not the class claims for negligence and strict liability. Reynolds further argues that “preclusion principles” therefore prohibit an Engle class member from seeking punitive damages on these claims. In essence, Reynolds seeks to expand the res judicata effect of the Engle III holding in arguing that because the Engle class only sought punitive damages on the intentional tort claims, Mrs. Soffer’s claim for punitive damages was likewise limited. Reynolds argues that Mrs. Soffer secured various benefits by filing a complaint pursuant to Engle; therefore, she was also subject to

Engle's limitation. Reynolds further argues that since Mrs. Soffer secured benefits from filing a complaint pursuant to Engle, she should not be entitled to recover punitive damages on negligence and strict liability claims. Reynolds' arguments are without merit. In my view, Engle class members are not prohibited from recovering punitive damages on their negligence and strict liability claims.

A. Identical Claims

The first benefit that Mrs. Soffer secured was the benefit of invoking the res judicata effect of the Phase I findings. Particularly, she was able to rely on the Engle jury's Phase I findings and did not have to independently prove up the conduct elements of her claims or demonstrate the relevance of the findings to her lawsuit. See Martin, 53 So. 3d at 1067-69. The Phase I findings established the conduct elements of her strict liability and negligence claims, and she was required only to prove legal causation and damages. See R.J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707, 717-18 (Fla. 4th DCA 2001).

Reynolds argues that, by Mrs. Soffer securing the aforementioned benefit, she was required to limit her claims to those pled by the Engle class and was bound by the restrictions that the Engle trial and appellate courts imposed on the Engle class members. As such, Reynolds argues that Mrs. Soffer was required to limit her punitive damage claims to the intentional torts because the Engle class members did not seek punitive damages on strict liability and negligence, and, when the

Engle class sought to expand their claim to do so, the trial court denied their request.

Engle III does not impose a blanket requirement that Engle progeny plaintiffs must file identical claims to the original class. Rather, it suggests that in order to take advantage of the Phase I findings, progeny plaintiffs must file the same claims. Here, Mrs. Soffer was able to take advantage of the Phase I findings because she, in fact, filed the same claims as the original class (strict liability, negligence, fraud, and conspiracy to commit fraud). The only difference is the remedy. The fact that her remedy of punitive damages was more extensive than that sought by the Engle class is not necessarily fatal. First, a claim for punitive damages is “not a separate and distinct cause of action but is auxiliary to, and dependent upon, the existence of an underlying claim.” See Liggett Group Inc. v. Engle, 853 So. 2d 434, 456 (Fla. 3d DCA 2003) (“Engle II”), *quashed in part by Engle III*, 945 So. 2d at 1254; see also Country Club of Miami Corp. v. McDaniel, 310 So. 2d 436, 437 (Fla. 3d DCA 1975). Second, her reliance on the Phase I findings was not relevant to her claim for punitive damages, which she had to independently prove. See e.g., Brown, 70 So. 3d at 717-18 (clarifying that the plaintiff must prove legal causation and damages). Third, the supreme court retained most of the jury’s Phase I findings, except that it did not retain the finding on entitlement to punitive damages, which it found to be premature. See Engle III,

945 So. 2d at 1269. The supreme court vacated the \$145 billion punitive damage award holding, in pertinent part, as follows:

Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials.

Id. at 1269, 1276.

Accordingly, in my view, the supreme court did not intend to give res judicata effect to punitive damages claims and specifically allowed class members to initiate “individual damages actions.”

B. Equitable Tolling

After decertification, Engle III allowed individual plaintiffs within the class to proceed individually so long as the action was filed within one year of the mandate in the case. 945 So. 2d at 1277. Reynolds argues that since Mrs. Soffer secured the benefit of equitable tolling of the two-year wrongful death statute of limitations, she would no longer be entitled to the benefits of equitable tolling if she were permitted to recover punitive damages on her strict liability and negligence claims.

Reynolds relies on Hromyak v. Tyco International Ltd., 942 So. 2d 1022 (Fla. 4th DCA 2006), in support of its argument that equitable tolling only applies where the former class member brings a claim that is identical to the one pursued by the class itself. There, construing American Pipe & Construction Co. v. Utah,

414 U.S. 538 (1974), and Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983), the Fourth District held that the trial court did not err in determining that class action tolling did not apply to the stockholder's suit because the new claims were not identical to the class' claims. Hromyak, 942 So. 2d at 1023. The Fourth District interpreted American Pipe to require that the claims in the later action be the same as those alleged in the earlier action for tolling to apply. Id. Here, Mrs. Soffer asserted the exact same claims as were asserted in Engle, and the only difference is the kind of damages she sought. Engle II, 853 So. 2d at 441. As noted by Mrs. Soffer, Reynolds' argument on this point is based on the faulty premise that a demand for punitive damages is an independent claim. But punitive damages are merely a remedy and can only be recovered pursuant to a substantive claim. See e.g., Country Club of Miami Corp. v. McDaniel, 310 So. 2d 436, 437 (Fla. 3d DCA 1975). The principle of law from Hromyak is exclusively tied to the statute of limitations, and there is no separate statute of limitations for a demand of punitive damages. The statute of limitations for each underlying claim is what controls. Mrs. Soffer's demand for punitive damages was filed as a continuation of the litigation begun by the Engle class. As such, because Mrs. Soffer asserts the same substantive claims as those asserted by the Engle class, the principle in Hromyak is satisfied.

Accordingly, Mrs. Soffer's demand for punitive damages on the negligence and strict liability claims was merely a different type of remedy than that sought in Engle, rather than a separate cause of action. The statute of limitations bars only the right to enforce a cause of action. § 95.11, Fla. Stat. (2005). A remedy, on the other hand, is the method by which the court addresses a legal injury. Because the statute of limitations operates to bar enforcement of causes of action, not to determine which remedies are available, in my view, the trial court erred in instructing the jury not to determine entitlement to punitive damages if they found for Reynolds on the intentional tort claims.

II.

Reynolds asserts that if Mrs. Soffer is entitled to seek punitive damages on her negligence and strict liability claims, this Court should also reverse the trial court's judgment awarding compensatory damages and remand for a new trial on all claims. I disagree. In my view, on remand, the new trial should be limited to the issue of punitive damages. There is ample authority for allowing a new trial limited to the issue of punitive damages. Stephens v. Rohde, 478 So. 2d 862, 863 (Fla. 1st DCA 1985) (disagreeing with a claim that compensatory damages and punitive damages were so intertwined as to require a new trial on both; thus, reversing the trial court's action in striking the appellant's punitive damages claim and remanding for a new trial on the issue of whether such damages should be imposed

and, if so, the amount thereof); Estate of Canavan v. Nat'l Healthcare Corp., 889 So. 2d 825, 827 (Fla. 2d DCA 2004) (remanding for new trial on amount of punitive damages only); Rappaport v. Jimmy Bryan Toyota of Fort Lauderdale, Inc., 522 So. 2d 1005, 1006 (Fla. 4th DCA 1988) (remanding for new trial on entitlement and amount of punitive damages only).

Accordingly, I would reverse the trial court's ruling that punitive damages can only be awarded on the intentional tort claims and remand for a new trial on the issue of Mrs. Soffer's entitlement to punitive damages on her negligence and strict liability claims only, and, if so, the amount of punitive damages.



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

LUCILLE RUTH SOFFER, etc.,

Appellant/Cross-Appellee,

v.

Case No. 1D11-3724

L.T. No. 2007 CA 5192

R.J. REYNOLDS TOBACCO COMPANY,

Appellee/Cross-Appellant.

APPELLANT'S MOTION FOR REHEARING OR REHEARING EN BANC

Appellant Lucille Soffer seeks rehearing by the panel or en banc on the issue of whether members of the class approved in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), are prohibited from seeking punitive damages on their negligence and strict liability claims because the class had been denied leave to do that solely on the ground that the motion to amend the class complaint came on the eve of the class trial. Respectfully, the 2-1 panel majority (I) overlooked Florida law holding that the trial court is free to grant leave to amend a complaint before a second trial when the first one is overturned, even where leave to amend was originally denied because it was sought on the eve of the first trial, and (II) mistakenly concluded that equitable tolling applies to *Engle* claims, a conclusion that overlooks the fact that the Florida Supreme Court affirmed the original certification of the class. The majority may have also (III) erroneously concluded that a demand for punitive damages is subject to the statute of limitations.

Mrs. Soffer filed her individual complaint alleging that she is a member of the *Engle* class in 2007, over 15 years after her husband died from lung cancer caused by smoking Reynolds' cigarettes. (Slip Op. 2-3, 5.) The trial court granted her motion for leave to amend the complaint to seek punitive damages without any limitations on which counts they could be recovered. (Slip Op. at 11.) However, at trial and over Mrs. Soffer's objection, the trial court instructed the jury that it could only consider punitive damages if it found for her on the intentional tort claims, but not on her claims for negligence and strict liability. (Slip Op. at 5.) The trial court rejected Mrs. Soffer's argument that she should be entitled to seek punitive damages on the non-intentional tort claims because, in the majority's words, the trial court concluded that the "punitive damages claims, as to the negligence and strict liability causes of action, were barred by the statute of limitations." (Slip Op. at 5.) This was merely the majority's surmise of the trial court's reasoning; the trial court never said this.¹

The jury returned a verdict for Mrs. Soffer on the negligence and strict liability claims, but for Reynolds on the intentional tort claims; therefore, following the trial court's instruction, the jury did not reach the issue of punitive

¹ Reynolds had not raised this issue below either. It simply argued that preclusion principles and *res judicata* somehow precluded punitive damages. (R.57:11,388-91.) It abandoned this argument in its answer brief, and the panel did not address it.

damages. (Slip Op. at 5-6.) It awarded \$5 million in compensatory damages, which the trial court reduced to \$2 million based on the jury's finding that Mr. Soffer was 60% at fault. (R.57:11525-26; Slip Op. at 5.)

On appeal, a two-judge majority affirmed in an opinion by Judge Makar, joined by Judge Davis. The majority accepted Reynolds' arguments that, based on principles of equitable tolling, *Engle* class members cannot seek punitive damages on these counts because the *Engle* trial court had denied the class's motion to amend the class complaint to seek punitive damages on these counts because the class had waited until too close to the trial date to ask. (Slip Op. at 6-7.)

Mrs. Soffer mostly agrees with the premise of the majority's reasoning and probably could not state it better herself:

Progeny plaintiffs wear the same shoes, so to speak, as the plaintiffs in *Engle* because they **are** the plaintiffs from *Engle*. Progeny plaintiffs thereby [sic] must accept the status and procedural posture of the *Engle* litigation as they find it

.... As members of the class, *Engle* progeny plaintiffs are in the same position they would have been in had they filed a complaint identical to the *Engle* class-action complaint on the same date the original complaint was filed. Here, Mrs. Soffer is not merely seeking to take advantage of *Engle* via the filing of a new and independent claim; rather, she was a party to *Engle* and, to the extent her claims differ from those in that case, she must meet the requirements for amending her complaint

(Slip Op. at 8-9.) As explained below, Mrs. Soffer respectfully submits that this premise only shows why she should prevail, even though the majority concluded it

demonstrated that her motion for leave to seek punitive damages on the non-intentional tort claims was “untimely.” (Slip Op. at 8-9.)

The majority concluded its opinion by certifying as a question of great public importance the issue of whether an *Engle* class member can pursue punitive damages on claims for negligence and strict liability. (Slip Op. at 10.) Judge Lewis concurred in certifying the question, but dissented from the majority’s ruling. (Slip Op. at 11.) While Mrs. Soffer agrees with Judge Lewis’s opinion and commends it to the en banc court’s attention, out of respect for the panel and the prohibition against simply re-arguing the merits on rehearing, she limits her arguments herein to explaining exactly where the majority’s reasoning went awry.

Argument

Rehearing is appropriate because the majority overlooked and misapprehended Florida law at least for the reasons set out in points I and II below. Before addressing the merits of those points, Mrs. Soffer emphasizes that rehearing en banc is also appropriate because this issue is of exceptional importance. It affects each of the literally thousands of *Engle* progeny cases working their way through the courts. Indeed, the majority unanimously recognized the great public importance of the issue by certifying the question to the supreme court. But the availability of supreme court review is not an adequate substitute for en banc review because, in light of the procedural posture of this case, Mrs. Soffer has a

strong disincentive to delay her recovery of the \$2 million in compensatory damages this Court has affirmed while she seeks supreme court review that might result in a new trial for punitive damages. In other words, while this issue is extraordinarily important to all *Engle* class members, the additional one to two years of delay may well dissuade Mrs. Soffer from pursuing supreme court review. Thus, despite the certification, there is a good chance that if rehearing en banc is not granted, this issue will continue to arise in this and other district courts for the foreseeable future.

Rehearing en banc is also appropriate to “maintain uniformity in the court’s decisions.” Fla. R. App. P. 9.331(d)(1). First, as Judge Lewis noted in dissent, the panel’s decision is inconsistent with this Court’s prior holding that the punitive damage award in the very first *Engle* appeal to be decided was supported because the plaintiff had prove entitlement to punitive damages “for intentional misconduct **or gross negligence.**” (Slip Op. at 13 (citing *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1070 (Fla. 1st DCA 2010) (emphasis added)).) While it is true that in *Martin* this Court did not have to explain why punitive damages could be sustained based solely on gross negligence because it also affirmed the judgment on Mrs. Martin’s intentional tort claims, it has since affirmed at least one judgment awarding an *Engle* class member punitive damages against Reynolds and a

codefendant based solely on negligence and strict liability claims in *Philip Morris USA, Inc. v. Huish*, 85 So. 3d 489 (Fla. 1st DCA 2012) (PCA).²

While the *Huish* decision was a PCA and therefore not binding on the panel in this case, it nonetheless is a decision of this Court that is flatly inconsistent with the majority's decision, and that should be enough to warrant en banc review. See generally *Schreiber v. Chase Fed. Sav. & Loan Ass'n*, 422 So. 2d 911, 912 n.1 (Fla. 3d DCA 1982) (en banc) (explaining why a district court may grant rehearing en banc based on conflict between a written opinion and a PCA), *quashed on other grounds* 479 So. 2d 90 (Fla. 1985)³; Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path Around a Brick Wall*, 32 Stetson L. Rev. 367, 379-81 (2003) (same). Indeed, before the constitution limited the supreme court's conflict jurisdiction to "express" conflicts, a qualifier noticeably absent from Rule 9.331, the supreme court regularly accepted conflict jurisdiction of PCA's where

² That this issue was squarely raised with no preservation issues is apparent from the briefs in *Huish*. (Case No. 1D10-2492, Init. Br. at 32-38, Sept. 26, 2011; Answer Br. at 33-38, Dec. 4, 2011; Reply Br. at 8-11, Jan. 13, 2012.) This Court is free to take judicial notice of briefs in other appeals to determine the issues argued. *E.g.*, *Arnold Lumber Co. v. Harris*, 503 So 2d 925, 927 n.1 (Fla. 1st DCA 1987); *Exchange Investments, Inc. v. Alachua County*, 481 So. 2d 1223, 1227 (Fla. 1st DCA 1985) (Ervin, J., concurring in part and dissenting in part).

³ The supreme court rejected the argument that en banc review should not have been granted based on conflict between a written opinion and a PCA and confirmed that each district court of appeal "has authority to adopt the standard of conflict it believes necessary or appropriate in order to harmonize the decisions of the court and avoid costly relitigation of similar issues within its appellate district." 479 So. 2d at 92-94.

the conflict was apparent based on the record. *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 222-26 (Fla. 1965); *see also* Fla. R. App. P. 9.030 1980 committee note (noting that the amendment to require conflicts to be express “represents the most radical change in the supreme court’s jurisdiction”).

A good test for determining whether uniformity of decision is at issue is “the rather practical one that decisions lack uniformity whenever it appears that they are so inconsistent and disharmonious that they would not have been rendered by the same panel of the court.” *Id.* (quoted with approval by *State v. Georgoudiou*, 560 So. 2d 1241, 1246 (Fla. 5th DCA 1990) (Harris, J., concurring in grant of rehearing en banc)). Because the standard of review is de novo and neither case involves any claims of failure to preserve error, there does not appear to be any principled basis to conclude that any of the three judges on the *Huish* panel (Roberts, Clark, and Swanson, JJ) would have rendered the same decision as the majority in this case. While there may be no confusion in this Court’s legal precedents, the fact remains that not only has the same issue been treated inconsistently by this Court in two indistinguishable cases, but the same defendant has experienced conflicting results on this issue. As other courts have recognized, “a primary function of the en banc rule is to standardize the decisions of each district so as to minimize the importance of the ‘luck of the [appellate] draw.’ ” *Schreiber*, 422 So. 2d at 912 n.1 (quoting *McAllister v. McAllister*, 345 So. 2d 352, 254 (Fla. 4th DCA 1977)).

Accordingly, the requirements for rehearing en banc are met in this case. But regardless of whether the decision is made by one or both members of the majority reconsidering their decision or the en banc court intervening, rehearing is needed to correct at least two clear errors that led the majority to affirm instead of reverse.

I. THE MAJORITY OVERLOOKED FLORIDA LAW HOLDING THAT THE TRIAL COURT IS FREE TO GRANT LEAVE TO AMEND A COMPLAINT BEFORE A SECOND TRIAL.

The majority's opinion should be reconsidered primarily because it depends on the mistaken premise that after the *Engle* trial proceedings on entitlement to punitive damages were reversed, the trial court's pretrial ruling rejecting the motion to amend to seek punitive damages on the non-intentional torts would have barred the class from renewing that motion before any new trial on punitive damages. But if the class had not been decertified and the case was simply remanded for a new trial to resolve both compensatory and punitive damages, the class would have been free to renew its motion, and the trial court would have had to grant it (so long as the class did not again wait until the eve of the new trial). Because the class would have been entitled to do this absent decertification, Mrs. Soffer was entitled to do the same thing in her individual action because, as the majority emphasized, "*Engle* progeny plaintiffs are in the same position they would have been in had they filed a complaint identical to the *Engle* class-action complaint on the same date the original complaint was filed." (Slip Op. at 8.)

The majority must have overlooked the following passage from Mrs. Soffer's reply brief after Reynolds made the same mistake:

The other basis for Reynolds' argument is its claim that when a plaintiff is denied leave to amend a complaint during trial – as happened when the class representatives moved to amend the complaint to seek punitive damages on the negligence and strict liability claims during the *Engle* trial – he is foreclosed from seeking leave to amend the complaint in any new trial. Florida law is to the contrary. While trial courts have discretion to deny a request to amend a complaint to add a claim on the eve of trial, that discretion evaporates if a new trial is ordered and the plaintiff moves to amend pending the new trial. *E.g.*, *Ed Ricke & Sons, Inc. v. Green*, 609 So. 2d 504, 506-07 (Fla. 1992); *Hethcoat v. Chevron Oil Co.*, 383 So. 2d 931, 933 (Fla. 1st DCA 1980); *Turner v. Trade-Mor, Inc.*, 252 So. 2d 383, 384-85 (Fla. 4th DCA 1971). Thus, there is no prohibition on *Engle* class members seeking punitive damages on their negligence and strict liability claims.

⁵ The same would be true if the second trial were the result of a successful appeal, unless the reversal was based on the trial court improperly allowing the plaintiff to recover on the unpled claim in the first trial. In that circumstance, the defendant would be entitled to a judgment, not a new trial. *Arky, Freed, et al. v. Bowmar*, 537 So.2d 561, 563 (Fla. 1988).

(Reply Br. at 2.)

For example, in *Agate v. Clampitt*, 80 So. 3d 450 (Fla. 2d DCA 2012), the trial court denied the plaintiffs' motion to amend their complaint to add a claim for quantum meruit because they waited until the "eve of trial" to make the motion. *Id.* at 451. After the appellate court reversed the trial court's disposition of the claims that had been pled, it explained that on remand the amendment to add the new claim would have to be allowed because there would no longer be any prejudice to

the defendant. *Id.* at 452-53. So long as the amendment “is based on the same specific conduct, transaction or occurrence between the parties upon which the plaintiff tried to enforce his original claim,” the amendment was required. *Id.*

There can be no doubt that the amendment Mrs. Soffer sought well before her trial arose from the same conduct as her original claims – the amendment did not even seek to add a new claim; it merely sought to add a demand for punitive damages based on claims already pled. Because the only reason the *Engle* trial court denied leave to amend in *Engle* was because it was sought too close to the trial, once that trial was reversed and new trials required, the original ruling cannot be used to prohibit an amendment before the individual trial. Indeed, the trial court in fact allowed the amendment in this case; it simply refused later on at trial to give the amendment effect with regard to the negligence and strict liability claims. Because the majority’s affirmance of that ruling was based on a misapprehension of Florida law regarding amending a complaint before a second trial, rehearing should be granted and the trial court’s ruling reversed.

II. THE MAJORITY MISTAKENLY CONCLUDED THAT EQUITABLE TOLLING APPLIES TO *ENGLE* CLAIMS.

Although the majority never explained why equitable tolling is relevant to the issue in this case, it clearly accepted Reynolds’ argument that this principle applies in *Engle* cases. Reynolds made this argument to invoke the holding in *Hromyak v. Tyco International Ltd.*, 942 So. 2d 1022 (Fla. 4th DCA 2006), that

when class certification is denied or reversed, class members are entitled to equitable tolling from the date of the class complaint to the date of the reversal so long as they proceed on the same claims. Reynolds contended that by adding a demand for punitive damages, Mrs. Soffer somehow transformed the class claims for negligence and strict liability into different substantive claims. The majority did not address the *Hromyak* test, and Judge Lewis explained why Reynolds' argument that they were different claims was without merit. (Slip Op. at 16.)

But just in case the majority might be inclined to reach a different result under *Hromyak* on rehearing, Mrs. Soffer points out that the majority's conclusion that equitable tolling applies in *Engle* cases is mistaken. Equitable tolling under *Hromyak* and the United States Supreme Court opinion on which it is based, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), only applies when class certification is denied or reversed. But the supreme court in *Engle* unequivocally affirmed the certification of the class. As the majority recognized, "[p]roxy plaintiffs wear the same shoes, so to speak, as the plaintiffs in *Engle* because they **are** the plaintiffs from *Engle*." (Slip Op. at 8.) The same cannot be said for members of a class that was never certified or for which certification was reversed *ab initio*.

Accordingly, *Engle* class members do not need any kind of tolling for their claims to be timely. Mrs. Soffer's original complaint **was** the class complaint, and

her action was commenced for limitation purposes on the day the class complaint was filed as a matter of law and fact, not as a matter of any equitable tolling. Equitable tolling is, as the name indicates, an equitable fiction to protect class members against the unfairness of assuming that plaintiffs seeking to represent a putative class is pursuing their claims even though a class is never certified or, if it is certified, is reversed *ab initio*.

While it is true that the supreme court decertified the *Engle* class and provided that class members had one year to bring individual complaints to continue their claims with the approved *Engle* findings having res judicata affect, that was not the application of any tolling principle. Aside from the fact that the court affirmed the original class certification, the imposition of a one-year deadline instead of merely recognizing that each class member would have whatever time they had remaining as of the date of the class complaint demonstrates that the court was not recognizing any kind of tolling. Rather, it was imposing a simple administrative deadline for class members to meet if they wanted to continue the claims the class had initiated on their behalf. Thus, even though the *Hromyak* “same action” test would be met as explained by Judge Lewis, the test did not even apply. Either way, the trial court’s ruling should be reversed.

III. THE MAJORITY MAY HAVE MISTAKENLY CONCLUDED THAT A DEMAND FOR PUNITIVE DAMAGES IS SUBJECT TO A STATUTE OF LIMITATIONS.

Finally, there at least appears to be an additional misapprehension of the law underlying the majority's opinion. The majority appears to have concluded that there is a statute of limitations for seeking punitive damages. Even though the trial court never expressed its reasoning, the majority characterized the trial court's ruling as determining that the "punitive damages claims, as to the negligence and strict liability causes of action, were barred by the statute of limitations." (Slip Op. at 5.) Its references both to the *Engle* class claim's motion for leave to seek punitive damages on the non-intentional tort claims as "untimely" and to the concept of equitable tolling further suggest that the majority may have believed a statute of limitations was at issue.

If the majority reached that conclusion, it was mistaken. The Legislature has imposed no limitations period for seeking punitive damages, and to the best of undersigned counsel's knowledge, no Florida opinion has ever suggested that there is a time limit for when a plaintiff may seek punitive damages. The only timing consideration of which counsel is aware is the one on which the trial relied in *Engle*, and that is the long-recognized principle that trial courts have discretion to deny leave to amend a complaint – for any reason, not just to seek punitive damages – where leave is sought so close to trial as to prejudice the defendant's

ability to prepare for trial. *See, e.g., Title & Trust Co. of Fla. v. Parker*, 468 So. 2d 520, 522-23 (Fla. 1st DCA 1985) (recognizing that trial courts gain more discretion to deny leave to amend “where the amendment is sought shortly before trial, since the liberality to be exercised in granting amendments diminishes as a case progresses to trial”). But that concept can have no application to Mrs. Soffer’s case because she sought leave to amend well in advance of her trial and leave was, in fact, granted in the trial court’s discretion.

Regardless, there are no statute of limitations issues applicable to Mrs. Soffer’s demand for punitive damages in this case. Indeed, Reynolds’ only response to Mrs. Soffer’s argument on this very point was to point out that it raised a statute of limitations defense as to all of Mrs. Soffer’s claims generally based on the so-called “first injury” rule that Reynolds claims should be recognized. (Answer Br. at 15.) But that defense had nothing to do with the punitive damages claim, and in any event, the panel summarily rejected it by affirming on the cross-appeal without discussion. (Slip Op. at 2.)

WHEREFORE, the Court should grant rehearing or rehearing en banc and remand the case for a new trial limited to the issue of punitive damages.

Rule 9.331(d)(2) Statement

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1070 (Fla. 1st DCA 2010); *Philip Morris USA, Inc. v. Huish*, 85 So. 3d 489 (Fla. 1st DCA 2012).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following persons by email, this 16th day of November, 2012:

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January 02, 2013

CASE NO.: 1D11-3724

L.T. No.: 07-CA-5192

Lucille Ruth Soffer, as Personal Rep. v.
etc.

R. J. Reynolds Tobacco Company,
et al.

Appellant / Petitioner(s),

Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion for rehearing or rehearing en banc, filed November 16, 2012, is denied.

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

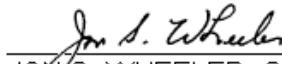
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