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Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for An Entire Class of Injured Smokers

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ENGLE V. R.J. REYNOLDS: THE IMPROPER ASSESSMENT OF PUNITIVE DAMAGES FOR AN ENTIRE CLASS OF INJURED SMOKERS

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ENGLE V. R.J. REYNOLDS: THE IMPROPER ASSESSMENT OF PUNITIVE DAMAGES FOR AN ENTIRE CLASS OF INJURED SMOKERS

BRIAN H. BARR*

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I. INTRODUCTION

For nearly fifty years, a war has been raging in courts throughout this country. The opponents are as follows: the tobacco industry and plaintiffs alleging smoking-related injuries. Until recently, the tobacco industry had won every battle in this ongoing war. In fact, no smoker recovered damages via verdict or settlement against a tobacco company until the 1990s.[1] However, the tide of this great legal battle has shifted.

Recently, in the Eleventh Circuit Court of Florida, a trial concluded that is easily the most stunning victory for plaintiffs alleging smoking-related injuries in the long line of battles against the to-

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* J.D., Florida State University College of Law, 2001; B.A. Baylor University, 1996. This Note is dedicated to my parents, Mr. & Mrs. Hugh D. Barr, Jr., for their continuous love and support throughout my life. I thank Michael Wenger, the *Florida State University Law Review* editorial staff, and Mr. Martin Levin for their assistance in the publication of this Note. A special thanks goes to my fiance, Pam. For her contributions and support to my life, she has my undying love and never-ending thanks.

1. *See* Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 360 (2000). The actual numbers are even more staggering. During the period of 1954 through 1994, 821 suits were filed against the tobacco industry; not a single one of those cases resulted in monetary recovery for a plaintiff. *See* Michael Orey, *Litigation at a Crossroads: Litigation to Watch in 1995*, AM. LAW., May 1995, at 38, 38.

bacco industry. The case was *Engle v. R.J. Reynolds Tobacco Co.*,[2] a class action suit that resulted in a punitive damages award of an unprecedented $144.8 billion.[3] Seeking to punish the tobacco industry for the wrongs it committed against all injured smokers in Florida, this enormous award will, if affirmed upon appeal, eventually be paid to all qualified members of the *Engle* class, a class estimated to be comprised of 500,000 Florida residents.[4]

While the amount of the award alone makes *Engle* a remarkable event, easily the largest award in United States history, the *Engle* case represents much more than just a vast amount of money.[5] In fact, *Engle* was an historic action long before the job of assessing punitive damages was even handed to the jury. *Engle* made history by becoming the first certified class action for injured smokers to ever reach a trial.[6] The case also made history when the jury broke from the status quo by finding the tobacco industry liable for injuries caused to Florida smokers[7] and awarding compensatory damages to three representative class members.[8] These results alone established *Engle* as quite possibly the greatest threat ever to the tobacco industry. However, despite the historic events surrounding this case, the

2. No. 94-08273 (Fla. 11th Cir. Ct. 2000) (Trial record on file with author).

3. *See* Final Judgment and Amended Omnibus Order, Engle v. RJ Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. Nov. 6, 2000), http://news.findlaw.com/cnn/docs/tobacco/englerjfinaljudorder.pdf; *see also* Myron Levin, *Jury Awards $145 Billion in Landmark Tobacco Case*, L.A. TIMES, July 15, 2000, at A1.

4. *See* Richard Willing, *Smokers' Suit Could Have Far-Reaching Implications*, USA TODAY, July 6, 1999, at A3.

5. *See* George Bennett, *Tobacco Industry Told to Pay $145 Billion*, PALM BCH. POST, July 15, 2000, at A1. The *Engle* award is actually seven times larger than the previous record holder of $22 billion against the estate of Ferdinand Marcos. *See id.* The award against Marcos was subsequently overturned on appeal. *See* Roxas v. Marcos, 969 P.2d 1209 (Haw. 1998).

6. *See* Milo Geyelin, *In Florida a Vast Tobacco Case Looms*, WALL ST. J., Oct. 1, 1998, at B1. The first class action to be certified was a nationwide class based on injuries caused by smoker's addiction to nicotine. *See* Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995). However, this class was quickly decertified by the Fifth Circuit Court of Appeal. *See* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). Following the decertification of *Castano*, innovative plaintiffs' lawyers filed actions in individual state courts, thereby limiting the class to a statewide class. *See infra* text accompanying notes 127 and 128. *Engle* is the first class action to reach a trial based on damages caused to smokers by addiction to nicotine. A previous class action, Broin v. Phillip Morris, Inc., 641 So. 2d 888 (Fla. 3d DCA 1994), was the first class action against the tobacco industry to reach trial. *See* Ingrid L. Dietsch Field, *No Ifs, Ands or Butts: Big Tobacco is Fighting for Its Life Against a New Breed of Plaintiffs Armed with Mounting Evidence*, 27 U. BALT. L. REV. 99, 116 (1997). However, *Broin* dealt with injuries caused by secondhand smoke to flight attendants, not injuries caused directly to smokers. *See id.*

7. *See* Verdict Form for Phase I, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. June 17, 1999) (on file with author).

8. *See* Verdict Form for Phase II, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. Apr. 7, 2000) (on file with author). The jury awarded a total of $12.7 million in compensatory damages to three representative class members in the second phase of the *Engle* trial. *See id.*

nation did not take notice of *Engle* until the jury sent a shockwave through the United States by awarding $144.8 billion in punitive damages to the entire *Engle* class.[9]

Although many aspects of the *Engle* case were controversial, such as the certification of the class, the plan set in place by the trial court concerning the assessment of punitive damages caused some of the most concern. While damages must usually be assessed individually,[10] the *Engle* trial plan instructed the jury to assess punitive damages in one lump sum to the entire *Engle* class prior to the assessment of compensatory damages for individual class members.[11] The controversy was that the tobacco companies would be ordered to pay punitive damages to a class of an estimated 500,000 members prior to determining the actual damages caused to individual class members. This would set up a situation in which each class member who later proves individual liability in the third and final phase of the *Engle* trial plan would become entitled to an equal portion of the punitive damages award irrespective of the amount of harm caused.

Based on the argument that the *Engle* trial plan violated Florida law and the tobacco industry's due process rights, the tobacco industry appealed to the Third District Court of Appeal of Florida in an attempt to stop the trial court's plan for the assessment of punitive damages. Initially, the Third District Court ruled in favor of the tobacco industry and quashed the trial court's order permitting the assessment of lump sum punitive damages prior to a determination of compensatory damages and stated that "the issue of damages, both compensatory and punitive, must be tried on an individual basis."[12] However, just two weeks later, the Third District Court vacated this ruling and set a date for oral argument on the issue.[13] Following oral argument, the Third District Court reversed course and allowed the trial court to assess punitive damages prior to the assessment of compensatory damages.[14] The Florida Supreme Court subsequently denied the tobacco industry's petition for relief.[15] However, the peti-

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9. *See* Final Judgment and Amended Omnibus Order, Engle v. RJ Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. Nov. 6, 2000), http://news.findlaw.com/cnn/docs/tobacco/englerjfinaljudorder.pdf; *see also* Levin, *supra* note 3.

10. *See generally Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1517-23 (1976) (discussing the various methods courts employ for calculating and distributing damages in class action lawsuits).

11. *See* R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. L. Weekly D2061 (Fla. 3d DCA Sept. 3, 1999) (quashing the trial court's order permitting the jury to assess lump sum punitive damages), *vacated*, 24 Fla. L. Weekly D2192 (Fla. 3d DCA Sept. 17, 1999).

12. R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. L. Weekly D2061 (Fla. 3d DCA Sept. 3, 1999).

13. *See* R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. L. Weekly D2192 (Fla. 3d DCA Sept. 17, 1999).

14. *See* R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. L. Weekly D2392 (Fla. 3d DCA Oct. 20, 1999).

15. *See* R.J. Reynolds Tobacco Co. v. Engle, 751 So. 2d 51, 51 (Fla. 1999).

tion was denied without prejudice so that the tobacco companies could raise this issue in any direct appeal.[16]

This Note will discuss the legality of this trial plan under both Florida law and federal constitutional law and the likely outcome of any postverdict appeals. The Note will begin, in Part II, by giving a history of tobacco litigation in the United States and placing the *Engle* case in perspective with the litigation that preceded it. In Part III, the background of *Engle* will be discussed, from the implementation of the current trial plan to the record award of punitive damages. Part IV will discuss federal constitutional law on punitive damages, focusing particularly on the due process requirements surrounding the assessment of punitive damages. Part IV will also review Florida law on the assessment of punitive damages as it stood when the trial of *Engle* began. Finally, in Part V, the principles of both federal constitutional and Florida law will be applied to *Engle*, and the Note will discuss the likely outcome of any subsequent appeal.

II. THE HISTORY OF TOBACCO LITIGATION

To fully understand the importance of *Engle*, the case must be put in perspective by reviewing the history of tobacco litigation. For nearly fifty years, litigation attempting to hold the tobacco industry accountable for its actions has been pursued in the courts of this country. This history has traditionally been discussed as occurring in three separate waves.[17] Each wave in this history represents the application of different legal theories and strategies by both the tobacco plaintiffs and the tobacco industry.[18] The first two waves were a complete wipeout by the tobacco industry. However, with the advent of the third wave, the tobacco plaintiffs finally hit upon a successful combination of strategy and theory.

A. *The First Wave of Tobacco Litigation*

In 1953, the public began to receive news of studies from the scientific community establishing a relationship between smoking and cancer.[19] This news was the catalyst of the first wave of tobacco liti-

16. *See id.*

17. *See* Maria Gabriela Bianchini, *The Tobacco Agreement That Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 710 (1999). *See, e.g.*, Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1338 (1999).

18. *See* Bianchini, *supra* note 17, at 710; Kearns, *supra* note 17, at 1338.

19. *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 856 (1992). These findings reached the public when they were published in the *Journal of the American Medical Association* and *The Reader's Digest*. *See id.*

gation.[20] During this wave nearly 150 suits were filed; however, the great majority of them were dropped without formal disposition.[21] Only ten cases reached trials, and the jury ruled for the tobacco industry in all of them.[22] Obviously, the disposal of nearly 150 cases without being forced to pay out a cent in damages is an extraordinary achievement. This achievement was a direct result of the legal theories adopted by the plaintiffs and the defense strategies adopted by the tobacco industry.

The tobacco industry made the express decision to vigorously defend every suit and refuse to even consider offers of settlement.[23] In implementing this vigorous defense policy, the tobacco industry generally established two very effective lines of defense. The first line of defense was to "spare no cost in exhausting their adversaries' resources" and to financially overcome each of the plaintiffs prior to the trial phase in each case.[24] This line of defense was successful because first-wave plaintiffs were generally litigating alone and the heavy costs of maintaining suit eventually overburdened the plaintiffs' lawyers.[25] As the tobacco companies predicted, most plaintiffs' lawyers were forced to drop their cases simply as a result of a negative cash flow.[26] This strategy was also effective because the tobacco companies made litigation so expensive that no lawyer representing a single plaintiff on a contingency fee basis could afford to maintain the case. Quite simply, the lawyer's costs would far exceed any potential gain from a favorable verdict.[27] Thus, it was a very difficult burden to overcome the pretrial financial hurdles put in place by the tobacco industry. However, the prospects of recovery were not any better for the few cases that survived to trial.

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20. *See id.* at 857. Plaintiffs' suits during the first wave of tobacco litigation were based on both negligence and warranty theories. *See id.* at 859-60.

21. *See id.*

22. *See* Dietsch Field, *supra* note 6, at 101.

23. *See* Rabin, *supra* note 19, at 857-58.

24. *Id.* at 857.

25. *See id.* at 858. Professor Rabin's description of the lone personal injury lawyer during the first wave is as follows:

> Personal injury lawyers were, for the most part, lone wolves. They practiced alone or in very small firms, relying on the quick disposition of a high turn-over caseload to survive—in some instances, to flourish—in a contingency fee system. Heavy front-end costs, which cannot realistically be recouped in a losing case from an impecunious client, are a major disincentive to involvement in high-risk cases. So, too, are lengthy pretrial delays without prospect of settlement; cash-flow concerns are endemic to contingency fee representation.

Id.

26. *See id.* at 859.

27. *See* Tucker S. Player, Note, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. REV. 311, 313 (1998).

The reward of surviving the financial maze put in place by the tobacco industry was a verdict for the defense.[28] During the first wave of suits, which were filed based on negligence and warranty theories, the tobacco industry successfully argued to the jury that the risk of harm caused to the plaintiffs by smoking was not foreseeable.[29] In stark contrast to the later waves of tobacco litigation, juries consistently found that even though the injuries at issue were due to cancer caused by smoking cigarettes, the risk of injury could not have been foreseen by the tobacco industry.[30] Because the tobacco companies could not foresee that their products created a risk of harm, the companies could not be held liable for any injury caused by their products.[31] Because the plaintiffs' suits were based on theories of negligence and breach of warranty, and courts were hesitant to allow claims of strict liability, a finding of unforeseeability prevented recovery.[32]

The end of the first wave was signaled in 1965 with the adoption and publication of the *Second Restatement of the Law of Torts*.[33] The Restatement discussed the requirements necessary to find a manufacturer liable for a defective product. The writers of the Restatement felt that for liability to attach, products must be both in a defective condition and unreasonably dangerous.[34] Under the Restatement view, while cigarettes were felt to be unreasonably dangerous, they were not considered to be defective.[35] This view was best summed up by a Restatement comment where the writers stated that "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous."[36] This comment effectively ended the first wave of tobacco litigation as it gave the tobacco companies nearly per se immunity against suit.[37]

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28. The tobacco companies maintained their strategy of placing an extreme financial burden on the plaintiff once the case reached trial. As a result, of the 10 cases that reached trial, four were dropped at some point during the trial. *See* Rabin, *supra* note 19, at 860.

29. *See id.* at 860-61. In the later waves, the primary dispute revolved around causation. *See id.* However, in the first wave, "juries seemed to accept the evidence of a generic link between smoking and cancer." *Id.* at 860.

30. *See* Dietsch Field, *supra* note 6, at 105-06.

31. *See* Rabin, *supra* note 19, at 861.

32. *See id.* at 859. Although foreseeability is not required to find a manufacturer liable in a breach of implied warranty action, courts during this period did not hold a favorable view of true strict liability. *See id.* at 861. In fact, as announced in possibly the leading case of the first wave, the manufacturer "is an insurer against foreseeable risks—but not against unknowable risks." Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 37 (5th Cir. 1963).

33. *See* Rabin, *supra* note 19, at 864; Player, *supra* note 27, at 314.

34. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965); *see also* Rabin, *supra* note 19, at 863.

35. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

36. *Id.*

37. *See* Player, *supra* note 27, at 314.

As the first wave of tobacco litigation came to a close, running from roughly 1954-65, the tobacco industry had defeated the plaintiffs in every suit filed and had sent a strong message to any potential plaintiffs contemplating suit. Evidently, the plaintiffs received the tobacco industry's message as it took nearly twenty years for the second wave of tobacco litigation to begin.

B. *The Second Wave of Tobacco Litigation*

When the second wave of tobacco litigation began in the early 1980s, great strides had been made in attempts to prove the link between smoking and cancer. The first such stride was the U.S. Surgeon General's Report of 1964.[38] Due to this report, "[t]he connection between smoking and cancer was now firmly implanted in the minds of Americans."[39] In response, Congress passed two new acts on smoking: the 1965 Federal Cigarette Labeling and Advertising Act (1965 Cigarette Act);[40] and the Public Health Cigarette Smoking Act of 1969 (1969 Cigarette Act).[41] These three events firmly engrained in the heads of the American public that cigarette smoking was dangerous and unhealthy.[42]

Like the American public, the plaintiffs' attorneys who handled the second wave of tobacco litigation also learned a great deal between the end of the first wave and the beginning of the second. One major development leading to the beginning of the second wave of tobacco litigation was the rise of mass tort litigation—particularly asbestos litigation.[43] The rise of asbestos litigation gave the future tobacco attorneys extensive experience in effectively establishing the causal link between smoking and cancer.[44] Ironically, the experience was gathered arguing that the cause of cancer in the asbestos cases

38. *See id.* (citing PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 26 (1964)). While this report was originally viewed as good evidence of a causal link between smoking and cancer and beneficial to plaintiffs, the report ended up being a good line of defense for the tobacco industry. The results of the report became common knowledge and were good support for the argument that the plaintiffs knew the dangers of smoking and had assumed the risk.

39. Player, *supra* note 27, at 315.

40. Pub. L. No. 89-92, 79 Stat. 283 (1965) (codified as amended at 15 U.S.C. § 1333 (1994)). This legislation made it unlawful to "manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear" warnings on the effects of tobacco use. *Id.*

41. Pub. L. No. 91-222, 84 Stat. 88 (1969) (codified at 15 U.S.C. § 1334 (1994)). This legislation included the following preemption clause: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." *Id.*

42. *See* Rabin, *supra* note 19, at 864.

43. *See id.*

44. *See id.* at 865.

was solely asbestos exposure and *not* the exposure to smoking.[45] The plaintiffs' attorneys then solved the major problem of the first wave—the cost of litigating against the tobacco industry—by pooling resources with other attorneys instead of acting alone.[46] Further, the plaintiffs no longer had to worry about the problem of foreseeability because strict liability, which focused on the intrinsically dangerous nature of a product, was now fully accepted in products liability law.[47] However, even with all of these new found advantages, by the close of the second wave and the filing of 175-200 cases,[48] the tobacco industry would still be able to proclaim that "after thirty-five years of litigation, . . . it had not paid out a cent in tort awards."[49]

In continuing its impressive winning streak, the tobacco industry relied on one of its favorite defenses from the first wave and developed several new theories of defense to combat the unique legal theories being applied by the plaintiffs. The tobacco industry's first line of defense was, as in the first wave, to wear down the plaintiffs by simply making the litigation more expensive than the prospect of any recovery.[50] While the pooling of resources allowed many more plaintiffs in the second wave to reach the trial stage than in the first wave, the strategy of financially wearing down the plaintiffs was still an effective way to eliminate many cases.[51] However, the most effective pretrial strategy was no longer to try to overextend the finances of the plaintiff but to argue that federal law preempted the plaintiffs' claims.[52] Still, while these were two large hurdles for the plaintiffs to overcome, the prospects of reaching trial were much better than in the first wave. Yet, once a case reached trial, the plaintiffs had to

45. *See id.*

46. *See id.* at 866.

47. *See id.* The most common form of strict liability in tort was the form adopted by the *Restatement (Second) of Torts* section 402A. Under section 402A:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the consumer without substantial change in the condition in which it was sold.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965). The doctrine of strict liability in tort as stated in section 402A was adopted by the Florida Supreme Court in 1976. *See* West v. Caterpillar Tractor Co., 336 So. 2d 80, 87 (Fla. 1976). The plaintiffs also had the advantage of the comparative fault principle in that some of the risks of smoking could be assumed by the plaintiff without losing the right to recover. *See* Rabin, *supra* note 19, at 866.

48. *See* Rabin *supra* note 19, at 867 n.88.

49. *Id.* at 874.

50. *See id.* at 867-68.

51. *See id.* at 868.

52. *See* Player, *supra* note 27, at 318. The argument was simply that the 1965 and 1969 Cigarette Acts preempted all state common law damages claims. Allowing these claims would effectively force the tobacco companies to apply different warnings on their cigarette packaging and advertising and thus circumvent the purpose of Congress. *See id.*

overcome the two great trial arguments of the tobacco industry: causation and assumption of risk.[53]

These two arguments were simply too much for the plaintiffs to overcome. In arguing causation, the tobacco industry began by "attacking the plaintiff and his lifestyle" to show that perhaps tobacco use was not the cause of the plaintiff's injuries.[54] The tobacco companies would then present their own independent research to challenge the reports linking tobacco use to cancer.[55] Based on this evidence, many juries had difficulty believing that tobacco use was the legal cause of the plaintiffs' injuries.[56] Still, even if the plaintiffs were able to convince the jury that smoking was the legal cause of injury, the plaintiffs had to convince juries that they had not assumed the risk of smoking.

The most effective trial argument of the tobacco industry in the second wave was assumption of risk.[57] Because the general public considered it common knowledge that smoking caused cancer, the tobacco lawyers simply argued that plaintiffs knew smoking was potentially dangerous and chose to do it anyway.[58] The plaintiffs unsuccessfully tried to deflect this argument by arguing that, while they had assumed some risk, addiction to the nicotine in tobacco products prevented smokers from making an informed decision on whether to smoke.[59] At the very least, plaintiffs argued that the tobacco industry must be held partly liable.[60] However, juries were not impressed with these arguments and generally found that the plaintiffs were totally to blame for their injuries.[61]

Still, despite all of the disappointments of the second wave, the plaintiffs did not suffer a total loss. In 1988, the first jury verdict ordering a tobacco company to pay damages to an injured smoker was entered in *Cippollone v. Liggett Group, Inc.*[62] The jury in *Cippollone* found the tobacco companies were 20% liable for the injuries to the plaintiff, Rose Cippollone, but, because New Jersey law required a finding of 50% liability to allow recovery, no damages were awarded

53. *See id.* at 316-17.
54. *Id.* at 316.
55. *See id.*
56. *See id.* at 317.
57. *See id.*
58. *See id.*
59. *See id.* at 317-18.
60. *See id.*
61. *See id.* at 317. A good example of this type of reaction is the case of *Horton v. American Tobacco Co.*, No. 12325 (Miss. Cir. Ct. Nov. 2, 1990). In *Horton*, the jury found that the American Tobacco Company was at fault for the plaintiff's injuries, but denied the plaintiff any award of damages. *See* Rabin, *supra* note 19, at 871.
62. 693 F. Supp. 208, 210 (D.N.J. 1988). The estate of Rose Cippollone brought suit for injuries allegedly sustained from smoking cigarettes manufactured by Liggett Group. *See id.*

for Mrs. Cippollone's injuries.[63] However, the jury awarded $400,000 in damages to Mrs. Cippollone's husband for his claim of wrongful death.[64] It appeared that the plaintiffs had ended the tobacco industry's impressive winning streak; however, the brief success enjoyed by this verdict was not to last.

Upon appeal, the United States Court of Appeals for the Third Circuit overturned the jury award and held that all common law damages claims were preempted by the 1965 and 1969 Cigarette Acts.[65] The U.S. Supreme Court then granted certiorari to resolve the issue of preemption as it concerned the 1965 and 1969 Cigarette Acts.[66] In its ruling, the Court held that all common law damages claims were not preempted by the Cigarette Acts and found the following: 1) the 1965 Cigarette Act did not preempt state common law damages claims;[67] 2) the 1969 Cigarette Act did preempt state common law damage claims for failure to warn;[68] and 3) the 1969 Cigarette Act did not preempt claims of express warranty, intentional fraud and misrepresentation, or conspiracy.[69] *Cippollone* was then remanded for a new trial.[70] While this appeared to be good news for the Cippollone family, the enormous expense of pursuing the case up to the Supreme Court, about $6.2 million,[71] forced the Cippollones' lawyers to drop the suit.[72]

Cippollone marked the end of the second wave of tobacco litigation.[73] While the plaintiffs had obtained their first favorable jury verdict, in terms of actual recovery, the plaintiffs had failed to recover any compensation from the tobacco industry. Further, this lone favorable verdict was not for injuries caused to a smoker, as the jury felt the smoker was to blame for her injuries, but was for a wrongful death claim by the smoker's spouse. Thus, it appeared the only way for the plaintiffs to overcome the defense of assumption of risk and convince the jury that they were not to blame would be to prove a mass cover-up and conspiracy. However, after forty years of litigation, plaintiffs had thus far failed to recover the proverbial smoking gun from internal tobacco industry documents.[74] If such an internal document could be found, perhaps juries would no longer believe that

63. *See id.*
64. *See id.*
65. *See* Cippollone v. Liggett Group, Inc., 893 F.2d 541, 581-82 (3d Cir. 1990).
66. *See* Cippollone v. Liggett Group, Inc., 499 U.S. 935 (1991).
67. *See* Cippollone v. Liggett Group, Inc., 505 U.S. 504, 519-20 (1992).
68. *See id.* at 524.
69. *See id.* at 531.
70. *See id.*
71. *See* Dietsch Field, *supra* note 6, at 114.
72. *See* Richard A. Daynard & Graham E. Kelder, Jr., *The Many Virtues of Tobacco Litigation*, TRIAL, Nov. 1, 1998, at 34, 36.
73. *See* Player, *supra* note 27, at 319.
74. *See* Rabin, *supra* note 19, at 875.

the plaintiffs had assumed the risk of smoking. However, the prospect of finding such a document seemed so bleak that one leading commentator lamented at the close of the second wave that "[w]hile it is possible that a new wave of lawsuits would unearth egregious evidence of a cover-up, it seems unlikely."[75]

C. *The Third Wave of Tobacco Litigation*

The predictions of the plaintiffs' inability to prove a mass cover-up turned out to be incorrect. Not only would plaintiffs be able to prove a mass cover-up, the third wave of tobacco litigation would bring the first real successes against the tobacco industry. Ironically, the only permanent successes have been enormous settlements—an abrupt shift in strategy from the first two waves of litigation when the tobacco companies refused to even consider settlement.

There are many causes to this recent turnaround. First, the plaintiffs are now applying strategies intended to prevent the tobacco industry from taking advantage of its superior financial position. This has been done largely through the filing of large class actions, case-management orders designed to prevent the tobacco industry from causing inordinate delay, and lawsuits by state governments for reimbursement of state funds spent on healthcare for smoking-related injuries.[76] In addition, plaintiffs are now able to take advantage of a wealth of internal tobacco documents that prove the one thing that can overcome the past problems of causation and assumption of risk—a long-running conspiracy by the tobacco industry.

The first documents became available to the plaintiffs on May 12, 1994, when a box of documents belonging to the Brown and Williamson Tobacco Company, known collectively as the Cigarette Papers, was anonymously sent to Professor Stanton Glantz at the University of California.[77] Detailing years of deception and a mass conspiracy to cover-up the truths of tobacco use by the entire tobacco industry, the Cigarette Papers proved the "egregious cover-up" that commentators felt was "unlikely" just two years earlier.[78] While these documents alone may have been enough to show the deceptive practices of the tobacco industry, the tobacco plaintiffs received further proof after twenty-two state Attorneys General settled their suits for reimbursement of Medicaid expenses with the Liggett & Myers Corpora-

75. *Id.* at 875.
76. *See* Daynard & Kelder, *supra* note 72, at 36.
77. *See* Player, *supra* note 27, at 322.
78. *Id.* The documents were sent to Professor Glantz by a paralegal working for the firm representing Brown and Williamson Tobacco Corporation. *See id.* Among other damaging revelations, the documents "detailed over thirty years of fraud and deceit by not only [Brown and Williamson] but also the entire tobacco industry. The documents revealed that the industry [had] known conclusively since the sixties that tobacco use [was] directly correlated with cancer and that . . . nicotine was an addictive drug." *Id.*

tion (hereinafter Liggett & Myers).[79] As part of the settlement with Liggett & Myers, Bennett LeBow, the corporation's CEO, agreed to publicly affirm that smoking does in fact cause numerous illnesses and that the tobacco companies do indeed target children.[80] However, the biggest contribution of Liggett & Myers was 250,000 pages in documents that further implicated the tobacco industry in a mass conspiracy.[81]

With these documents in hand and the protection of court orders forcing the tobacco industry to litigate without excessive delay, individual plaintiffs finally began to defeat the great trial arguments of the tobacco industry and obtain favorable jury verdicts. The first such verdict was entered by a Florida jury in *Brown & Williamson Tobacco Corp. v. Carter*.[82] The *Carter* jury was the first to decide a case during the third wave, and by no coincidence, was also the first jury to hear the information provided in the Cigarette Papers.[83] However, the great hopes of success in the third wave for individual plaintiffs were dimmed when the jury's verdict assessing $750,000 in damages was overturned on appeal.[84]

Shortly after *Carter*, another verdict assessing damages against the tobacco company occurred in the case of *Brown & Williamson Tobacco Corp. v. Widdick*.[85] This time another Florida jury found in favor of the plaintiff and assessed damages of $950,000 against Brown & Williamson.[86] Unfortunately for the plaintiffs, *Widdick*, like *Carter*, remained true to the history of tobacco litigation and was also overturned on appeal.[87] However, unlike the second wave of tobacco litigation, the prospect of having a favorable verdict overturned on appeal has not prevented others from trying to hold the tobacco industry liable.

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79. *See* Dietsch Field, *supra* note 6, at 122.

80. *See id.* at 122-23.

81. *See id.* at 123. In exchange for these concessions and an agreement to pay 25% of its pretax profits for the next 25 years to the states, the suits against Liggett were dropped and plaintiffs in those 22 states were barred from suing Liggett. *See id.* at 123.

82. 723 So. 2d 833 (Fla. 1st DCA 1998) (discussing the jury verdict handed down in Duval County Circuit Court).

83. *See* Daynard & Kelder, *supra* note 72, at 36.

84. *See Carter*, 723 So. 2d at 836. The Florida First District Court of Appeal held that the statute of limitations had run on the plaintiff's claim. *See id.* at 836. Fortunately for the plaintiff, the Florida Supreme Court subsequently quashed the opinion of the First District Court and held that the statute of limitations had not run on the plaintiff's claim. *See* Carter v. Brown & Williamson Tobacco Corp., 25 Fla. L. Weekly S1072 (Fla. Nov. 22, 2000).

85. 717 So. 2d 572 (Fla. 1st DCA 1998) (discussing the jury verdict handed down in Duval County Circuit Court).

86. *See* Noreen Marcus, *Big Tobacco's Victory Record Remains Intact*, FT. LAUD. SUN SENT., June 23, 1998, at B6.

87. *See Widdick*, 717 So. 2d at 573. This time the verdict was overturned because the trial court abused its discretion in not granting Brown & Williamson's motion for change of venue. *See id.* at 573-74.

Since *Widdick*, several juries outside of Florida have held in favor of the plaintiffs and have ordered tobacco companies to pay damages. In particular, a California jury assessed damages against the tobacco industry in the amount of $51.5 million and an Oregon jury assessed damages in the amount of $80.3 million.[88] While these judgments were subsequently reduced and are currently in the process of appeal, they show that juries are no longer convinced by the arguments of the tobacco industry.[89] Still, the likelihood of a recovery large enough to offset the great expense of bringing tobacco suits to trial makes the prospect of successfully bringing suit as an individual plaintiff a very risky proposition. However, suits by lone, individual plaintiffs are no longer the real threat to the tobacco industry.[90] The real threat comes in the form of two actions unique to the third wave of tobacco litigation: 1) suits filed by individual states to recover state Medicaid funds spent on tobacco-related injuries and 2) class actions filed on the behalf of mass plaintiffs against the entire tobacco industry. These two types of actions are producing results against the tobacco industry that could not have been imagined just a few years ago.

1. State Actions for Reimbursement of Medicaid Funds

The civil actions filed by individual states seeking Medicaid reimbursement were the first of the two real threats to produce actual results against the tobacco industry. Medicaid was established by Title XIX of the Social Security Act to serve as a medical assistance program.[91] Designed to provide medical services for eligible individuals through the cooperation of state and federal government, the Medicaid program requires the state to "take all reasonable measures to ascertain the legal liability of all third parties . . . to pay for care and service available under the plan."[92] Thus, a state, as an administrator of the Medicaid program, can state a claim for restitution against the tobacco industry when the state was forced to pay the cost of treating its citizens for injuries caused by products of the tobacco industry.[93]

Mississippi was the first state to take advantage of this language and filed suit against the tobacco industry on May 23, 1994.[94] By 1997, forty of the fifty states, including Florida, on February 21,

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88. *See* Levin, *supra* note 3.
89. *See id.*
90. *See* Bianchini, *supra* note 17, at 712.
91. *See* 42 U.S.C. § 1396a(a)(25) (2000).
92. *Id.*
93. *See* Cliff Sherrill, Comment, *Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution*, 19 U. ARK. LITTLE ROCK L.J. 497, 501 (1997).
94. *See* Dietsch Field, *supra* note 6, at 116.

1995,[95] had followed Mississippi's lead and filed suit seeking to obtain Medicaid reimbursements.[96] The theory of recovery underlying each individual suit was essentially the same: the tobacco industry had allegedly conspired to conceal the addictive nature of nicotine and that smoking caused many different types of disease and illness.[97] There were two primary arguments used by the states: 1) the state cannot have assumed the risk of smoking as the state was simply a bystander paying to treat the tobacco-related illnesses of its citizens; and 2) the states could prove, largely through the Cigarette Papers and the Liggett & Myers documents, that the tobacco industry knew about the health problems associated with smoking, concealed that information and, in fact, manipulated the nicotine levels of its products in order to maintain a steady customer base.[98]

By 1996, as a result of the suits filed by the individual states, the tobacco industry was forced to defend suits, not against individual plaintiffs with limited financial means, but against well-financed states with highly damaging evidence in the form of internal industry documents.[99] The tobacco industry was finally forced to face the great possibility of losing cases and huge judgments being entered

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95. *See* Christa Sarafara, *Making Tobacco Companies Pay: The Florida Medicaid Third-Party Liability Act*, 2 DEPAUL J. HEALTH CARE L. 123, 136 (1997). The State of Florida went further than just suing the tobacco industry; the Florida Legislature amended state law to better the state's chances of recovering against the tobacco industry. *See id.* at 133-34. The amended law specifically precluded any third party who may be liable for Medicaid costs from using affirmative defenses like comparative negligence, assumption of risk, and "all other affirmative defenses normally available to a liable third party." FLA. STAT. § 409.910(1) (1997) (currently codified at FLA. STAT. § 409.910(1) (2000)). The new statute also allowed the state to make a claim for Medicaid reimbursement without having to assume the position of the Medicaid recipient or identify each recipient individually. *See id.* As if this were not enough, the amended law eliminated the burden of proving which manufacturer caused which specific injury, eliminated the statute of repose, and allowed for proof of causation through statistical analysis. *See id.* The effect of the statute was to allow the state to mount an all-out offensive strictly against the tobacco industry. The Florida Supreme Court explained that Governor Lawton Chiles even "ordered the relevant executive branch officials to pursue the recovery of Medicaid expenditures from only the tobacco industry." Agency for Health Care Admin. v. Associated Indus. of Fla., 678 So. 2d 1239, 1246 (Fla. 1996) (citing Fla. Exec. Order No. 95-105 (Mar. 28, 1995).

96. *See* Bianchini, *supra* note 17, at 712. Suits to recover costs spent by government to treat tobacco-related illnesses are not limited to just the individual states. Several foreign countries, like Bolivia, Guatemala, Nicaragua, Panama, Thailand, Venezuela, and Brazil have filed suit in American courts. *See* Dagan & White, *supra* note 1, at 363 (citing Alison Frankel, *One Planet, A Multitude of Tobacco Plaintiffs*, AM. LAW., Apr. 1999, at 24; *Rio Sues U.S. Tobacco Firms for Cost of Treating Smokers*, WALL ST. J. INTERACTIVE ED., July 14 1999, http://interactive.wsj.com). In addition, several other foreign countries have filed suit in courts within their respective countries. *See* Dagan & White, *supra* note 1, at 363 (citing Saundra Torry, *Cigarette Firms Sued by Foreign Governments: Tobacco Industry Faces Foreign Lawsuits in U.S.*, WASH. POST, Jan. 17, 1999, at A12).

97. *See* Sherrill, *supra* note 93, at 506.

98. *See id.* at 512.

99. *See* Bianchini, *supra* note 17, at 712.

against it.[100] With all of this mounting pressure, for the first time in the history of tobacco litigation, the tobacco industry blinked.

The first break came on March 20, 1997, when Liggett & Myers broke rank with the rest of the tobacco industry and offered to settle with the states.[101] Because Liggett & Myers was one of the smallest tobacco companies and facing financial difficulty, it decided it could not afford to maintain the status quo by refusing to talk settlement and risking a massive judgment.[102] Thus, for a comparatively slight financial pay out, some very damaging admissions, and the release of internal documents, Liggett & Myers "struck a deal with the states' Attorneys General and ended the conspiracy of silence and fraud which had endured for over fifty years."[103]

Shortly following the settlement with Liggett & Myers, the tobacco industry as a whole broke against its past traditions and entered into negotiations with the all of the states' Attorneys General.[104] The tobacco industry decided to break from its prior history and enter these negotiations in an attempt to level the playing field by getting the states out of tobacco litigation and getting back to the days of litigating against individual plaintiffs with limited financing.[105]

Thus, on June 20, 1997, a deal was struck between the tobacco industry and the Attorneys General of forty states.[106] In exchange for the payment of $368.5 billion to the individual states, the states agreed to recommend a federal bill to Congress that limited tobacco industry liability to individual and class plaintiffs.[107] Finalization of the settlement then rested on action by Congress.[108] However, in June 1998, because of the numerous changes made to the proposed legislation by various legislators, by the time the bill reached the

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100. *See id.*

101. *See* Player, *supra* note 27, at 329.

102. *See id.* at 330.

103. *Id.* (citing Joseph Menn & Carrick Mollenkamp, *Global Tobacco Pact Could Break Liggett*, NEWS AND OBSERVER (Raleigh, N.C.), May 27, 1997, at A5).

104. *See* Dietsch Field, *supra* note 6, at 125.

105. *See* Bianchini, *supra* note 17, at 712-13.

106. *See id.* at 705.

107. *See* Dagan & White, *supra* note 1, at 364.

108. *See* Bianchini, *supra* note 17, at 705. The passage of the proposed settlement by Congress would have vastly limited the liability of the tobacco industry. To start, the proposed settlement would settle "all lawsuits filed by state or local governments, most pending class action lawsuits, and all individual suits based on claims of addiction or dependency." *Id.* at 708. Further, "[a]ll class action lawsuits, and other procedural aggregation devices were to be banned . . . ." *Id.* This, of course, would force all future suits against the tobacco industry to be brought individually, tilting the playing field back in favor of the tobacco industry. To top the entire thing off, the settlement would ban all suits based on claims of addiction and dependency, would eliminate punitive damages, and cap the total amount that could be ordered paid to claimants in any single year. *See id.* at 709. "In short, the agreement would have stopped existing lawsuits and deterred future suits." *Id.*

Senate floor, the tobacco industry had withdrawn its support for the bill and successfully lobbied for its defeat.[109]

While the proposed bill was winding its way through Congress, the tobacco industry and the individual states did not have time to wait and see if Congress would pass the proposed legislation as the state suits continued toward trial. Wanting to settle these cases prior to trial, the tobacco industry entered into negotiations with several states whose trials were quickly approaching. In July 1997, Mississippi became the first state to settle with the tobacco industry for a total of $3.4 billion.[110] Florida soon followed by settling for $11.3 billion.[111] Florida was followed by Texas, who settled its suit for $14.5 billion.[112] Finally, Minnesota, which settled only after its trial had entered closing arguments, settled with the tobacco industry for $6.5 billion and became the final state to settle individually with the tobacco industry.[113] If the proposed global settlement were to be finalized by the appropriate congressional action, those individual settlements would serve as those four states' individual payments. When Congress failed to pass the required legislation, Mississippi, Florida, Texas, and Minnesota became the only states with hard deals in place.

The remaining forty-six states got their deal in November 1998.[114] Approved by the remaining forty-six states and the tobacco industry, the settlement provided for a total of $206 billion to be paid out by the tobacco industry in annual installments until 2025.[115] Because this deal did not require comprehensive legislation to pass Congress, it became final once agreed upon by all parties.[116] Thus, all fifty states were now settled with the tobacco industry. For under $300 billion, the tobacco industry was able to reimburse all fifty states for Medicaid funds spent to treat injuries caused by tobacco products. To date, these state settlements have produced the only actual monetary recoveries from the tobacco industry untouchable on appeal.

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109. *See* Dagan & White, *supra* note 1, at 370. For example, the total amount of settlement proceeds to be paid by the state was increased to $516 billion, and the protections from civil liability included in the original settlement were not included in the version of the bill that made it through committee. *See id.* at 369.

110. *See id.* at 370.

111. *See id.*

112. *See id.* at 370-71.

113. *See id.* at 371.

114. *See id.*

115. *See id.* at 372.

116. The settlement also does not include many of the protections the tobacco industry had negotiated in the first global settlement proposal. *See id.* For instance, this settlement does not include a prohibition of class actions or punitive damages. *See id.*

2. *Class Actions*

The second real threat to the tobacco industry in the third wave of tobacco litigation is the class action. The class action has enabled plaintiffs to better meet the tobacco industry's various litigation strategies by allowing the plaintiffs to aggregate and share resources and information.[117] The first class action was filed in federal district court in New Orleans, Louisiana, on March 29, 1994.[118]

The case of *Castano v. American Tobacco Company*[119] was filed on behalf of all people addicted to nicotine in the United States.[120] The class potentially included over one hundred million people and was easily the largest class action ever filed.[121] The case, which depended on theories of negligence, fraud, and deceit in its claim that the tobacco companies had concealed and suppressed material research that showed nicotine is highly addictive, would be taken on and financed by sixty private law firms from across the country.[122] The case was then certified as a class action in a controversial opinion by the United States District Court for the Eastern District of Louisiana on February 17, 1995.[123]

The plaintiffs' goal of resolving all of the nation's tobacco addiction claims in one massive suit was quickly dissolved on interlocutory appeal to the United States Court of Appeals for the Fifth Circuit.[124] Finding that the district court erred by "ignoring variations in state law and how a trial on the alleged causes of action would be tried,"

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117. *See* Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 64 (1997).

118. *See id.* at 72. Note that this was the first class action filed on behalf of smokers, however, an earlier class action was brought against the tobacco industry in 1991 on behalf of flight attendants who claimed harm from secondhand smoke. *See infra* Part.III.A and accompanying text.

119. 160 F.R.D. 544 (E.D. La. 1995).

120. *See* Dietsch Field, *supra* note 6, at 115.

121. *See* Symposium, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. & SOC. INQUIRY 897, 910 (1998).

122. *See id.* The case was initially in the hands of Wendall Gauthier, a private lawyer in New Orleans. *See id.* Mr. Gauthier then contacted the other 60 firms and convinced them to join him in prosecuting the case. *See id.* Each firm agreed to donate $100,000 per year, a total of $6 million per year, to finance the suit. *See id.*

123. *See Castano*, 160 F.R.D. at 560-61. The court defined the class as:

> (a) All nicotine-dependent persons in the United States, its territories, and possessions and the Commonwealth of Puerto Rico, who have purchased and smoked cigarettes manufactured by the defendants [tobacco companies];
> (b) the estates, representatives, and administrators of these nicotine-dependent cigarette smokers; and,
> (c) the spouses, children, relatives and "significant others" of these nicotine-dependent cigarette smokers as their heirs or survivors.

Id. There has already been much scholarly discussion of the *Castano* case. For a good overview of the court's reasons for certifying the class action, see Robert T. Krebs, Note, Castano v. American Tobacco Co.*: Class Treatment of Mass Torts is Going Up in Smoke*, 24 N. KY. L. REV. 673 (1997).

124. *See* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

the Fifth Circuit explained that "the collective wisdom of individual juries is necessary before [this court] commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury."[125] Further, because of the novelty of the plaintiffs' addiction-based claims, the Fifth Circuit concluded that it could not allow the district court to correct any of the perceived errors on remand but must, instead, remand the case and instruct the district court to dismiss the complaint entirely.[126]

The attorneys involved in the *Castano* case, however, were not yet ready to give up the fight. After *Castano* was decertified, the sixty private law firms involved in the filing of *Castano* filed smaller class action suits, called "Sons of *Castano*," in state and federal courts throughout the country.[127] However, with *Castano* standing as precedent, state and federal courts followed the lead of the Fifth Circuit and either refused to certify these class actions or decertified them on appeal.[128]

After the failure of *Castano* and the "Sons of *Castano*" to maintain certification, the class action was viewed as a nonthreat to the tobacco industry.[129] It seemed that the plaintiffs had lost a great advantage and would no longer be able to level the playing field with the tobacco industry through mass class actions. Instead, it appeared plaintiffs would again be forced to bring suit individually.[130] Yet, while all of the attention was being focused on *Castano* and its descendants, the real class action threat to the tobacco industry was brewing in Florida. A Florida attorney, Stanley Rosenblatt, filed two separate class actions against the tobacco industry in Miami, Florida: *Broin v. Phillip Morris Cos.*[131] and *Engle v. R.J. Reynolds Tobacco Co.*[132] These two actions would go on to become not merely the first, and thus far, the only class actions to reach trial against the tobacco industry, but *Engle* would go on to become the only class action to result in a verdict for the plaintiffs.

III. BACKGROUND OF *ENGLE V. R.J. REYNOLDS TOBACCO CO.*

A. Broin v. Phillip Morris Cos.

Originally filed in 1991, *Broin v. Phillip Morris Cos.* was a class action suit seeking to recover for injuries caused to a class of 60,000

125. *Id.* at 751-52.
126. *See id.* at 752.
127. Kearns, *supra* note 17, at 1354.
128. *See id.* at 1354-55.
129. *See* Dagan & White, *supra* note 1, at 362.
130. *See* Bianchini, *supra* note 17, at 717.
131. 641 So. 2d 888 (Fla. 1994).
132. No. 94-08273 (Fla. 11th Cir. Ct. 1994).

flight attendants from the inhalation of secondhand smoke.[133] The class members were nonsmokers throughout the United States who alleged they were injured by secondhand smoke from the cigarettes of airline passengers.[134] Because *Broin* was brought on behalf of a class of nonsmokers, it was particularly dangerous to the tobacco industry because it effectively prevented tobacco lawyers from arguing the defense of assumption of risk.[135]

When the trial court refused to certify *Broin* as a proper class action, it appeared that this case would suffer the same fate as *Castano* and its progeny; however, the Third District Court of Appeal reversed the trial court's order refusing certification and ordered that the case be remanded for the certification of a class of all nonsmoking flight attendants alleging injury.[136] The stage was then set for the first class action against the tobacco industry to proceed to trial before Judge Robert Kaye.

Surprisingly, four months into the trial, in May 1997, the tobacco industry once again backed down from its proud traditions and settled with the *Broin* class for $349 million.[137] Even though the individual class members did not receive any of the settlement proceeds, the settlement reserved the right for each class member to bring suit individually against the tobacco industry to recover for his or her injuries.[138]

While the *Broin* class action was historic for being the first class action to reach trial against the tobacco industry, plaintiffs had still failed to bring a successful class action suit against the tobacco industry for the majority of those injured by the industry's products—the smokers. However, Mr. Rosenblatt was not finished and followed the certification of *Broin* with the certification of a case of much greater proportion.

B. *Certification of the* Engle *class*

Engle v. R.J. Reynolds Tobacco Co. was filed on May 5, 1994, and sought damages on behalf of all citizens of the United States injured

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133. 641 So. 2d at 889.

134. *See* Kelder & Daynard, *supra* note 117, at 72.

135. While technically it could be argued that the flight attendants assumed the risk, as they knew passengers smoked and could have found another job but chose not to, this argument probably would not hold much weight with a jury. *See* Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 475-76 (1998).

136. *See* Broin v. Phillip Morris Cos., 641 So. 2d 888, 892 (Fla. 3d DCA 1994).

137. *See* Cupp, *supra* note 135, at 475.

138. *See* Dagan & White, *supra* note 1, at 362 n.34. The settlement established a foundation to study tobacco-related disease and its treatment. *See id.* While the individual class members can still bring suit individually, any claims of punitive damages are prevented by the settlement. *See id.*

by their addiction to cigarettes.[139] The primary assertion in the *Engle* complaint was that the tobacco industry intentionally manipulated the nicotine levels in their cigarettes and concealed all information about the addictive nature of the drug.[140] To compensate the class for injuries caused by the addictive nature of nicotine and the concealment of this information, the complaint sought $200 billion in damages.[141] Remarkably, *Engle* overcame the great hurdle of previous class actions filed on behalf of injured smokers when Circuit Judge Harold Solomon certified the nationwide class.[142]

The decision to certify the class was immediately appealed by the tobacco industry. Despite the tobacco industry's arguments concerning the nonviability of class certification and the precedent set by *Castano* and its progeny, with only one major modification, the Third District Court of Appeal affirmed class certification.[143] The Third District Court modified the order certifying a nationwide class by reducing it to "manageable proportions" and restricting the class to Florida citizens and residents.[144] The Third District Court advised, however, that "certain individual issues [would] have to be tried as to each class member, principally the issue of damages . . . ."[145] Thus, the Third District Court, in its original opinion, concluded that while "the basic issues of liability common to all members of the class [would] clearly predominate over the individual issues" and thus allow for class certification, the issue of damages could not be decided as a class but must instead be tried individually after the determination of the basic issues of liability for the class.[146]

C. *Application of the Original* Engle *Trial Plan*

Once the class was certified, a trial plan had to be devised that would enable the trial of a class action comprising possibly 500,000 Floridians. The original trial judge, Judge Allen Postman, devised a

139. *See* Kelder & Daynard, *supra* note 117, at 73.

140. *See id.*

141. *See* Kearns, *supra* note 17, at 1356.

142. *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. 3d DCA 1996).

143. *See id.*

144. *Id.* at 42. The court stated that it did not feel there was anything "inherently wrong about certifying a national class in a state court," as it had done in *Broin*. *Id.* However, it felt that where "the class contains so many members from so many different states and territories that it threatens to overwhelm the resources of a state court, it is settled that such a broad-based class is totally unmanageable and cannot be certified." *Id.* The class consists of "[a]ll Florida citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." Kelder & Daynard, *supra* note 117, at 73.

145. R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d at 41.

146. *Id.*

three-phase trial plan to accomplish this purpose.[147] In Phase I, the plaintiffs would have to prove that the tobacco industry caused injuries to the class by manipulating the nicotine level in its cigarettes and that the industry misled the public about the addictive nature of nicotine.[148] The jury would also have to determine if the actions of the tobacco industry permitted punitive damages and, if so, how they would be calculated.[149] In Phase II, the representative class members would have to prove actual damages, and the jury would assess the amount of compensatory damages required to compensate these representative class members for their injuries.[150] Finally, Phase III of the trial would consist of individual trials for the other class members to determine whether they were entitled to compensatory damages.[151] However, after establishing the trial plan, Judge Postman was forced to withdraw from the case for health reasons and Judge Robert Kaye, the same judge who heard *Broin*, took over.[152] The case was then ready to proceed to trial.

After three months of voir dire, a jury of six, with ten alternates, was selected, and Phase I of the trial began on October 19, 1998.[153] Nearly nine months later, the jury returned its verdict for Phase I on July 7, 1999.[154] The jury found the following: 1) smoking cigarettes causes several types of disease and medical conditions; 2) cigarettes containing nicotine are addictive; 3) the tobacco industry's products were defective and unreasonably dangerous; 4) the tobacco industry made false statements of material fact with the intention of misleading smokers; 5) the tobacco industry concealed material information concerning the health effects and addictive nature of smoking; 6) the tobacco companies entered into an agreement to misrepresent and conceal information on the health effects of smoking and its addictive nature; 7) the products sold by the tobacco industry were not reasonably fit for the use intended and did not conform to representa-

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147. *See* Milo Geyelin, *Jury Selection Set to Begin Today in Class Action by Florida Smokers*, WALL ST. J., July 6, 1998, at A19.

148. *See id.*

149. *See id.* Judge Postman's plan was to have the jury set a ratio of compensatory damages to punitive damages in order to determine the amount of punitive damages to which each class member would be entitled following individual trials on damages. *See* Engle *Defendant's Pursue Efforts to Remove Judge at County, Appellate Levels*, MEALEY'S LITIG. REP.: TOBACCO, Sept. 2, 1999, at 53 [hereinafter, *Efforts to Remove Judge*].

150. *See* Geyelin, *supra* note 147. The representative class members would then be entitled to the appropriate amount of punitive damages as determined by the ratio set by the jury during Phase I.

151. *See id.* Again, punitive damages would be determined by the ratio set in Phase I. Of course, if the jury found that the tobacco industry was not liable in Phase I, the trial would never proceed to Phases II and III.

152. *See id.*

153. *See* Jenny Staletovich, *$200 Million Suit Against Tobacco Opens Combatively*, PALM BCH. POST, Oct. 20, 1998, at A1.

154. *See* Kearns, *supra* note 17, at 1357.

tions of fact made by the tobacco industry; 8) the tobacco industry failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise; 9) the tobacco industry engaged in extreme and outrageous conduct with the intent to inflict severe emotional distress; and most importantly, 10) the egregious conduct of the tobacco industry permitted punitive damages.[155] After the jury found that the tobacco industry's actions rose to a level that permits punitive damages, the case was supposed to proceed to the determination of the ratio that would be used in figuring the amount of punitive damages in each class member's individual trial. Instead, Judge Kaye made the decision to amend the operating trial plan.[156]

D. The Amended Engle *Trial Plan*

Judge Kaye entered his supplemental trial plan and radically altered the procedure by which punitive damages would be assessed. Instead of following the plan as set by Judge Postman and instructing the jury to set a ratio by which punitive damages would be entered, Judge Kaye's plan would instruct the jury to award punitive damages, if it found punitive damages were warranted, in one lump sum.[157] The punitive damages issue would be tried as part of Phase II but would be bifurcated from the assessment of compensatory damages to the representative class members.[158] Thus, according to Judge Kaye's trial plan, the issue of punitive damages would be completed at the close of Phase II and individual trials on punitive damages would be unnecessary.[159]

While Judge Kaye admitted that his amended trial plan was contrary to the plan devised by his predecessor, he felt that "there [were] far less legal issues and problems" with a plan to assess punitive damages in one lump sum than in a plan that determined punitive damages under a ratio because of the unique circumstances in *Engle*.[160] Judge Kaye stated that the assessment of punitive damages in one lump sum was superior to the previous plan because "a punitive defendant will know what its overall obligation is at the close of

155. *See* Verdict Form for Phase I, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. 11th. Cir. Ct. June 17, 1999) (on file with author).

156. *See Efforts to Remove Judge*, *supra* note 149, at 9.

157. *See id.*

158. *See id.*

159. *See id.*

160. *Id.* (quoting Judge Kaye). Recall that in Phase I of the original trial plan, the jury was to determine how punitive damages would be calculated if it found that punitive damages were warranted. *See supra* Part III.C. The jury w as to set a ratio of punitive damages to compensatory damages. Once compensatory damages were calculated for each individual class member in each individual trial, punitive damages would be set according to the ratio. Judge Kaye was uncomfortable with the ratio method as that would cause punitive damages to vary according to compensatory damages, even though the tobacco industry's behavior "was the same [toward] each class member." *Id.*

phase two; and the plaintiff class will also know what the total lump sum punitive damage award is that will be divided by the remaining qualified class members."[161] Recognizing that there were numerous legal issues involved in his amended trial plan, Judge Kaye reasoned that it was of greater benefit for the tobacco industry to know the exact amount of punitive damages rather than risk the imposition of an unknown punitive damages award of potentially enormous proportions.[162] Predictably, the tobacco industry disagreed with Judge Kaye's assessment of what was in its best interest and appealed his trial plan to the Third District Court of Appeal prior to the start of Phase II.[163]

The tobacco industry argued that this trial plan violated the general rule that damages are inherently an individual issue and cannot be determined for an entire class, but must instead be tried separately.[164] The industry also argued that it was impossible to assess punitive damages in a lump sum prior to the assessment of compensatory damages for each individual class member as constitutional requirements demand that punitive damages bear a reasonable relationship to actual damages.[165] Initially agreeing with the tobacco industry, the Third District Court quashed Judge Kaye's supplemental trial plan "permitting an aggregate trial on the amount of punitive damages prior to a determination of liability and compensatory damages."[166] However, the plaintiffs asked the court to reconsider its ruling and on September 17, 1999, the Third District Court vacated its previous order and set the issue for oral argument.[167]

The tobacco industry argued that the Third District Court should enforce its mandate of January 31, 1996, in which it stated that the issue of damages would have to be tried separately.[168] Surprisingly,

161. *Id.* (quoting Judge Kaye).

162. *See id.*

163. *See* R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. L. Weekly D2061 (Fla. 3d DCA Sept. 3, 1999).

164. *See Disqualification Denied, Appeal Filed in* Engle*; Punitives Class-Wide; Co-Lead Plaintiff Dies*, MEALEY'S LITIG. REP.: TOBACCO, Aug. 19, 1999, at 8.

165. *See id.* In an amicus brief, Associated Industries of Florida worried that assessment of one lump sum punitive damage award "will remain the same even if the defendants prevailed in virtually all of the subsequent phase three trials of individual compensatory damages." *Efforts to Remove Judge*, *supra* note 149, at 9 (quoting amicus brief).

166. R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. L. Weekly D2061 (Fla. 3d DCA Sept. 3, 1999). Not surprisingly, this opinion was in agreement with the Third District Court's statement in its first *Engle* opinion when it stated that the issue of damages must be tried individually.

167. *See* R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. L. Weekly D2193 (Fla. 3d DCA Sept. 17, 1999).

168. *See* Engle *Court Wants Response to Constitutional Challenge of Lump Sum Punitives*, MEALEY'S LITIG. REP.: TOBACCO, Nov. 4, 1999, at 13 [hereinafter *Challenge of Lump Sum Punitives*]. The tobacco industry was referring to the Third District Court opinion affirming certification of the class, in which it said that the issue of damages would have to

the Third District Court decided not to enforce its previous statement and denied the industry's motion to enforce mandate.[169] However, the court denied the tobacco industry's motion without prejudice to the industry's "right to raise the underlying issues . . . on any appropriate subsequent appeal."[170] Thus, in a time period of just over one month, the Third District Court went from ordering the trial court to vacate its trial plan to refusing to order the trial court to comply with the Third District Court's own opinion on the trial of punitive damages.

The tobacco industry then took its arguments to the Florida Supreme Court and requested a "Petition for Writ of Prohibition and Mandamus or in the Alternative, Request for an Extraordinary Writ Under the All Writs Power."[171] The Supreme Court refused to grant the requested writ, but, like the Third District Court, ruled without prejudice to raise the underlying issues as appropriate in any subsequent direct appeal to the district court.[172] While waiting on the court's ruling, Phase II, involving the assessment of compensatory damages for the three representative class members, began on November 1, 1999.[173]

On April 7, 2000, following the Phase II trial, *Engle* again made history when it became the first class action to assess actual damages against the tobacco industry. The jury found that smoking was the legal cause of the three representative class members' illnesses.[174] The jury went on to assess $2,850,000 in compensatory damages to representative class member Mary Farnan; $5,831,000 in compensatory damages to Frank Amodeo; and a total of $4,023,000 in compensatory damages for the Della Vecchia family.[175] With the first part of Phase II and the appeals on the issue of the assessment of punitive damages completed, the trial court was ready to proceed to the controversial assessment of punitive damages for the entire class.

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be tried separately. *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 41 (Fla. 3d DCA 1996).

169. *See* R.J. Reynolds Tobacco Co. v. Engle, 24 Fla. L. Weekly D2392 (Fla. 3d DCA Oct. 20, 1999).

170. *Id.*

171. R.J. Reynolds Tobacco Co. v. Engle, 751 So. 2d 51 (Fla. 1999).

172. *See id.*

173. *See Challenge of Lump Sum Punitives*, *supra* note 168.

174. *See* Verdict Form for Phase II, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. Apr. 7, 2000) (on file with author).

175. *See id.* The Della Vecchia family included the Estate of Angie Della Vecchia; Ralph Della Vecchia, the husband of Angie Della Vecchia who recovered for loss of companionship, loss of protection, and mental pain and suffering; and James Della Vecchia, the son of Angie Della Vecchia, who recovered for loss of parental companionship, instruction, guidance, and mental pain and suffering. *See id.* It has not yet been determined if this judgment will withstand the tobacco industry appeal.

The trial on the assessment of punitive damages began on May 22, 2000, and proceeded for two months.[176] After hearing from a multitude of witnesses, the case was given to the jury to decide how much the tobacco industry had to pay in punitive damages. After deliberating for less than five hours, the jury returned its verdict and ordered the tobacco industry to pay $144.8 billion.[177] While this verdict was below the $200 billion requested by the plaintiffs, it was still a stunning victory. However, there is great concern that the award of punitive damages in *Engle* may be an exercise in futility that will be overturned on appeal as the *Engle* trial plan appears to be contrary to both federal constitutional and Florida law.

The trial plan allowed the jury to award punitive damages to all of the class members without a finding of liability to individual plaintiffs for their alleged injuries.[178] The only finding of liability prior to the award of punitive damages was a finding of general liability to the class. Thus, if the award of punitive damages survives appeal, each individual class member that proves he or she was injured will be entitled to an equal portion of the punitive damages award. Assuming that each of the estimated 500,000 class members is able to prove injury, each will be entitled to $290,000 in punitive damages. Each qualified class member will be entitled to the same amount of punitive damages no matter the amount of compensatory damages awarded. In other words, the amount of punitive damages awarded to any individual class member will bear no relationship to the amount of actual damages awarded. Instead, the amount of punitive damages each class member recovers will only be dependent on the number of class members that obtain a finding of liability in their individual trials, as the lump sum punitive damages award is to be divided equally amongst the class.

The possibility of such an award not only raised the concern of the tobacco companies, the State of Florida and the Attorney General of the State of Florida also became concerned. The Florida Legislature responded by creating a new Florida law that would assist the tobacco industry by staying the execution of a large punitive damages award during the process of any appeal.[179] The Attorney General,

176. *See Tobacco Industry Wins a Round in Court*, MIAMI BUS. DAILY REV., May 23, 2000, at A3.

177. *See* Levin, *supra* note 3.

178. *See supra* Part III.C.

179. *See* Act effective May 9, 2000, ch. 00-128, § 4, 2000 Fla. Laws (to be codified at FLA. STAT. § 768.733). The Act created a new law that changed the amount of the bond, required in a certified class action, to stay the execution of judgment entered for punitive damages while the award was on appeal. *See id.* Under the new law, the bond required to stay execution of judgment is capped at $100 million. *See id.* Prior to this new law, the tobacco industry would have had to post a bond in the amount of the entire award, $144.8 billion, plus "twice the statutory rate of interest" on the total judgment. FLA. R. APP. P. 9.310. The statutory rate of interest is set by the Comptroller of the State of Florida each

Robert Butterworth, went even further than trying to protect the tobacco industry's ability to appeal and joined with the tobacco companies in claiming that the trial plan was contrary to the law of Florida and to the tobacco industry's due process rights under the U.S. Constitution.[180] Attorney General Butterworth went so far as to propose legislation that would prevent the type of trial plan that was put in place in *Engle*.[181]

Certainly the Attorney General is incorrect, and the trial court did not decide on a trial plan that will be overturned on appeal. Yet, although the Supreme Court of Florida and the Third District Court of Appeal refused to order the trial court to vacate its current trial plan, neither court expressly approved the current plan. The courts simply denied the tobacco industry's request to enforce the statement of the Third District Court that damages would have to be tried individually. Thus, the issue of the assessment of damages will be before these two courts again, and quite possibly, could end up in front of the U.S. Supreme Court on a constitutional challenge. The question then becomes, based upon federal constitutional and Florida law, what is the likely outcome of the pending appeal of this enormous punitive damages award?

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year and was set at 10% per annum in 2000. *See* FLA. STAT. § 55.03 (2000). Thus, in order to stay execution of judgment pending appeal, the tobacco industry would have had to post a bond in the amount of $144.8 billion plus 20% interest. Note that the statutory rate of interest has been set at 10% since 1995, however, the Comptroller raised it to 11% for 2001. *See* Statutory Interest Rates Pursuant to s. 55.03, *Florida Statutes*, http://www.dbf.state.fl.us/interest.html (last visited May 1, 2001).

180. *See* 00-21 Fla. Op. Att'y Gen. 1 (2000) (finding that "an award of compensatory damages is a prerequisite to an award of punitive damages where an actual damage is an essential element of the underlying tort"); U.S. Const. amend. XIV, §1.

181. *See id.* The opinion of Attorney General Butterworth was provided upon the request of Toni Jennings, President, The Florida Senate, and John E. Thrasher, President, The Florida House of Representatives. *See id.* Attorney General Butterworth recommended that the Florida Legislature enact a new law in the event that the legislature found it necessary "to codify the common law regarding the imposition of compensatory and punitive damages." *Id.* The proposed legislation would create Section 768.726, *Florida Statutes*, and read as follows:

> (1) No punitive damages may be awarded in any civil action, including a class action, unless the compensatory damages stage of the trial has been completed as to all plaintiffs covered thereby or in the action, whether named parties or represented class members, prior to the determination of punitive damages, except in cases where actual damages are not an element of the underlying cause of action. Any punitive damage determination rendered or judgment entered contrary to the provisions of this subsection is null and void.
>
> (2) This section shall apply to all cases and causes of action, regardless of the date of filing, pending on or after the effective date of this act.

Id. at 12-13. The proposed legislation was not passed during the 2000 session of the Florida Legislature.

IV. THE FEDERAL CONSTITUTIONAL AND FLORIDA STANDARDS FOR THE ASSESSMENT OF PUNITIVE DAMAGES

A. *The Federal Constitutional Standard for the Assessment of Punitive Damages*

Punitive damages are designed to accomplish two purposes: punishment and deterrence.[182] Recently, in light of a concern over the perceived rapid expansion in the amount of punitive damages awards, a new area of constitutional law has developed concerning the assessment of punitive damages.[183] This new area of constitutional law is particularly concerned with limitations that the Due Process Clause of the Fourteenth Amendment places on the procedure of assessing punitive damages and their amount.[184]

The fundamental purpose of the Due Process Clause is to guarantee fairness in the legal system.[185] The idea that the assessment of punitive damages must comply with due process originated in a concurring opinion authored by Justice O'Connor in 1988.[186] In this opinion, Justice O'Connor wrote that the exercise by juries of "wholly standardless discretion" in establishing punishments appears to violate the strictures of due process.[187] Shortly after this opinion was issued, defendants began to challenge punitive damages on both procedural and substantive due process violations.[188] As these challenges became more prevalent, it became clear the Supreme Court would soon be forced to define the boundaries of this alleged due process right.

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182. *See* James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 422 (1995).

183. *See* Douglas G. Harkin, BMW of North America, Inc. v. Gore*: A Trial Judge's Guide to Jury Instructions and Judicial Review of Punitive Damage Awards*, 60 MONT. L. REV. 367, 368 (1999).

184. *See* Stephanie L. Nagel, BMW v. Gore*: The United States Supreme Court Overturns an Award of Punitive Damages as Violative of the Due Process Clause of the Constitution*, 71 TUL. L. REV. 1025, 1028 (1997). Attempts to create a new branch of constitutional law on the issue of punitive damages as it concerns the Eighth Amendment's Excessive Fines Clause was snuffed out by the Supreme Court in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). In *Browning-Ferris*, the Court ruled that the Eighth Amendment prohibition on excessive fines is not applicable to civil suits between private parties. *See id.* at 264.

185. *See* Nagel, *supra* note 184, at 1028.

186. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part).

187. *Id.*

188. The arguments in these two types of challenges were quite different. In a procedural due process challenge, the defendant would typically challenge either the instructions given to the jury or the process of reviewing the award of punitive damages. *See* Nagel, *supra* note 184, at 1028. In a substantive due process challenge, the defendant would challenge the amount of the punitive damages award as excessive, arguing that it thus constituted a taking of property without due process of law. *See id.*

The definition of due process rights involved in the assessment of punitive damages began in 1991 when the Court issued its first majority opinion on the issue in *Pacific Mutual Life Insurance Co. v. Haslip*.[189] In *Haslip*, the defendant appealed an award of punitive damages that was more than four times the amount of compensatory damages.[190] In particular, the defendant challenged the process of awarding punitive damages in Alabama, the forum state, as violative of its procedural due process rights by claiming the award was "the product of unbridled jury discretion."[191] Wanting to resolve the "long-enduring debate" on the assessment of punitive damages, the Court granted certiorari to review both the process of assessing punitive damages and the constitutionality of the amount of punitive damages award.[192]

The Court began by reviewing the common law method of assessing punitive damages. Under the common law method, the jury was instructed on the "need to deter similar wrongful conduct" prior to deciding on an amount of punitive damages.[193] If the jury chose to enter an award of punitive damages, the award was then reviewed by the "trial and appellate courts to ensure that it [was] reasonable."[194] After reviewing the common law method, the Court reasoned that this method was sufficient to protect the defendant's procedural due process rights because "[p]unitive damages have long been a part of traditional state tort law," and the common law method is not "so inherently unfair as to deny due process and be per se unconstitutional."[195] However, the Court warned that just "because punitive damages [had] been recognized for so long" did not mean that they were always constitutional.[196]

The greatest concern of the Court in *Haslip*, however, was not the common law method of assessing punitive damages but, instead, the limitation of jury discretion, as it felt that unlimited jury discretion could lead to "extreme results that jar one's constitutional sensibilities."[197] As such, the Court wanted to establish a postverdict review standard for a reviewing court to determine whether a jury's award was reasonable. In setting this standard, the Court refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable," and instead, simply stated that "general concerns of reasonableness and adequate guidance

189. 499 U.S. 1 (1991).
190. *See id.* at 23.
191. *Id.* at 7.
192. *Id.* at 7-8.
193. *Id.* at 15.
194. *Id.*
195. *Id.* at 15, 17.
196. *Id.* at 18.
197. *Id.*

from the court . . . properly enter into the constitutional calculus."[198] Based on this vague standard of reasonableness and guidance, the Court set out to determine whether the process of awarding punitive damages in Alabama provided the defendant with sufficient protection against unbridled jury discretion.

Specifically, the Court analyzed the instructions given to the jury and the process of review by the trial and appellate courts. Beginning with the jury instructions, the Court found that the instructions given to the jury on awarding punitive damages cannot give the jury unlimited discretion.[199] To limit the jury's discretion, the Court approved the instructions used by the trial court in *Haslip* which instructed the jury "not to compensate the plaintiff for any injury" and confined the award of punitive damages to "deterrence and retribution," and further instructed the jury to "take into consideration the character and degree of the wrong."[200] Because of these three limitations on the jury's discretion, the *Haslip* jury instructions sufficiently protected the defendant's procedural due process rights because they "reasonably accommodated [the defendant's] interest in rational decisionmaking and [the state's] interest in meaningful individualized assessment of appropriate deterrence and retribution."[201]

As far as the review process was concerned, the Court ruled that the postverdict review process in Alabama was adequate because it "[made] certain that the punitive damages [were] reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."[202] The Court noted that the Alabama Supreme Court had previously set forth specific standards which assured that the punitive damages were in proportion to the severity of the offense.[203] With these procedural protections in place, the Court found that the defendant in *Haslip* had received all of the

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198. *Id.*

199. *See id.* at 19-20.

200. *Id.* at 19.

201. *Id.* at 20.

202. *Id.* at 21.

203. *See id.* at 22. The standards set forth for the appellate court to consider on review were:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 21-22.

due process protections to which it was entitled and affirmed the award of punitive damages.[204]

Thus, after *Haslip*, defendants had a clear procedural due process right to ensure that fact-finders did not have unlimited discretion in their assessment of punitive damages. To limit discretion, reasonable constraints had to be placed on a jury's discretion, using both the jury instructions and the postverdict review process. With these limitations in place, the Court was satisfied that reviewing courts could sufficiently determine "whether a particular award [was] greater than reasonably necessary to punish and deter."[205]

While the *Haslip* opinion dealt mainly with the procedural due process rights involved in the assessment of punitive damages, the Court also made a statement on the substantive limit of punitive damages. The Court noted that a punitive damages award greater than four times the compensatory damages award "may be close to the line" of impropriety.[206] This comment led many to believe that the Court would limit the amount of punitive damages to an amount of four to five times the amount of actual damages.[207] However, the Court's next case on this issue, *TXO Production Corp. v. Alliance Resources Corp.*,[208] proved this belief to be incorrect.

In *TXO*, the Court was again faced with the issue of the due process rights involved in the assessment of punitive damages. While at the conclusion of *TXO* the Court would maintain the *Haslip* standard on limiting the discretion of the jury, the Court added to the *Haslip* standard regarding the postverdict review of a punitive damages award.[209] *TXO* involved an award of punitive damages that was 526 times the amount of compensatory damages.[210] The defendant, TXO Production Corporation (TXO), argued that a punitive damage award of this magnitude "[was] so excessive that it must be deemed an arbitrary deprivation of property without due process of law."[211] In light of *Haslip*, in which the Court stated that a punitive damages award four times the amount of compensatory damages was close to being constitutionally improper, TXO argued that a punitive damages award of 526 times compensatory damages was improper.[212] However, following its statement in *Haslip* that a bright line mathemati-

204. *See id.* at 23-24.
205. *Id.* at 22.
206. *Id.* at 23.
207. *See* Harkin, *supra* note 183, at 376.
208. 509 U.S. 443 (1993).
209. *See id.*
210. *See id.* at 453.
211. *Id.*
212. *See id.*

cal rule could not be established, the Court refused to overturn the award of punitive damages.[213]

The Court began its review of the punitive damages award by again placing primary importance on a defendant's procedural due process rights in the assessment of punitive damages.[214] The Court went so far as to state that "[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity."[215] The Court further noted that there are "persuasive reasons for suggesting that the presumption should be irrebuttable."[216] Thus, great credence was to be given to the verdict of the jury, and so long as fair procedures were followed, the Court felt that reviewing courts should rarely overturn an award of punitive damages.

In response to the defendant's argument that a punitive damages award of 526 times the amount of compensatory damages must be excessive, the Court found that the ratio of compensatory to punitive damages was not the controlling factor in determining whether an award was excessive.[217] While the Court felt that punitive damages must bear some relation to compensatory damages, it found that this comparison was just one of many factors to consider when determining an award's reasonableness.[218] Instead, the Court reasoned it was more appropriate to look at both the conduct of the defendant and the "disparity between the punitive award and the potential harm" in order to determine if a punitive award was excessive.[219] In light of the malicious conduct and bad faith of the defendant in *TXO* and the potential harm to the plaintiffs, the Court approved an award of 526 times compensatory damages as not being "so 'grossly excessive' as to be beyond the power of the State to allow."[220]

Thus, following *TXO*, the due process rights involved in the assessment of punitive damages became clearer. The reviewing court must first determine if the process of assessing punitive damages violated the defendant's due process rights.[221] If the court determined that the procedures were fair, it must then look at the award itself to determine whether the award is grossly excessive and therefore unconstitutional.[222] In determining whether the award is excessive, the

213. *See id.* at 458.
214. *See id.*
215. *Id.* at 457.
216. *Id.* (citing J. Scalia's concurrence in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 24-40 (1991)).
217. *See id.* at 459-60.
218. *See id.*
219. *Id.* at 462.
220. *Id.*
221. *See id.* at 458.
222. *See id.* at 462.

reviewing court should look not only at a comparison between the amount of punitive damages and the amount of compensatory damages, but also at the actions of the defendant and the potential harm that could result from the defendant's conduct.[223] However, the Court made it very clear that so long as proper procedures were followed, the verdict of the jury was to be given great respect.[224]

The Court then shifted away from giving great credence to the verdict of the jury in *BMW of North America, Inc. v. Gore*.[225] To start, the process of assessing punitive damages was not at issue in *BMW*, as both sides conceded that the process used met the standard established in *Haslip*.[226] The sole issue before the Court was whether a punitive damage award of $2 million, in light of a compensatory award in the amount of $4000, violated substantive due process as grossly excessive.[227]

The Court started by stating the general rule that "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to [the state's interest in punishing reprehensible conduct] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[228] To determine whether a punitive damage award crosses into "the zone of arbitrariness," the Court explained that the following three guideposts should be considered: 1) the reprehensibility of the actions of the defendant; 2) the difference between the actual harm or potential harm and the amount of punitive damages; and 3) the amount of governmental penalties or sanctions authorized for similar conduct as compared to the amount of punitive damages.[229]

Starting with the first guidepost, the Court found that the degree of reprehensibility of the defendant's actions was perhaps "the most important indicium of the reasonableness of a punitive damages award" as the award "should reflect 'the enormity of [the] offense.'"[230] To assist other courts in determining the enormity of the offense, the Court set out a range for reprehensible acts. For instance, the Court stated that nonviolent crimes are less reprehensible than violent crimes; deceit is worse than pure negligence; and pure economic harm is less reprehensible than conduct that is a danger to human

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223. *See id.* at 460.
224. *See id.* at 457.
225. 517 U.S. 559 (1996).
226. *See id.* at 565; *see also* Bruce J. McKee, *The Implications of* BMW v. Gore *for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 181 (1996).
227. *See* McKee, *supra* note 226, at 183-84. This punitive damage award was 500 times the amount of compensatory damages.
228. *BMW*, 517 U.S. at 568.
229. *Id.* at 575-85.
230. *Id.* at 575.

health and safety.[231] Through this loose assortment, the Court supplied reviewing courts with a general idea of the degrees of reprehensibility. The Court also took particular notice of aggravating factors like, "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," that would support a large punitive damage award.[232] After determining that the actions of the defendant in *BMW* were not of a high degree of reprehensibility, the Court moved to a discussion of the second guidepost.[233]

According to the Court, the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff."[234] While this test essentially compares the amount of compensatory damages awarded to the amount of punitive damages awarded, the test is not as easy as a simple comparison. Restating *TXO*, the Court explained that the "harm likely to result from the defendant's conduct" must also be considered when comparing actual harm to the punitive damages award.[235] While the Court continued its refusal to draw a "mathematical bright line . . . that would fit every case," the Court found that a punitive damage award of 500 times compensatory damages was excessive as the defendant's conduct in *BMW* was not sufficiently reprehensible.[236]

The Court then established the third guidepost for determining whether an award of punitive damages is excessive: government sanctions for comparable misconduct.[237] This guidepost considers the criminal and civil penalties that are available to punish similar conduct.[238] Believing it appropriate to give "'substantial deference' to legislative judgments concerning appropriate sanctions," the Court compared an award of punitive damages to other potential sanctions.[239] If the punitive damage award were significantly larger than an available civil penalty, there would be good reason to find the award excessive as the legislature had not deemed the particular conduct to be extremely reprehensible.

BMW is the most recent statement by the Supreme Court on the due process rights involved in the assessment of punitive damages. While the *BMW* test is certainly not the easiest to apply, the Court has at least given reviewing courts a standard to follow. A court reviewing an award of punitive damages is required to first determine

231. *See id.* at 576.
232. *Id.* at 579.
233. *See id.* at 580.
234. *Id.*
235. *Id.* at 581.
236. *Id.* at 583.
237. *See id.*
238. *See id.*
239. *Id.* at 583-84.

the reprehensibility of a defendant's actions.[240] Based on the existing degree of reprehensibility, the court should then proceed to compare the amount of punitive damages to the potential harm caused to the plaintiff.[241] Obviously, as a defendant moves up the scale of reprehensibility, the defendant becomes eligible for a higher ratio of punitive damages to compensatory damages. The Court should then compare the award to applicable civil or criminal sanctions.[242] Giving great deference to the judgment of the legislature, if the punitive damage award greatly exceeds the punishment provided by the legislature, the reviewing court should reduce the award to a satisfactory level.[243]

It is also clear that the Supreme Court no longer requires a reviewing court to give great deference to the judgment of the jury. For whatever reason, the jury in *BMW* felt that the defendant needed to be assessed a large amount of punitive damages in order to be properly punished. However, while it was conceded that the process of assessing punitive damages was fair, the Court, who did not hear all of the evidence presented to the jury, proceeded to reverse the jury's award of punitive damages.[244]

B. Florida Law on the Assessment of Punitive Damages

While the Supreme Court has placed primary importance on the reprehensibility of a defendant's actions in determining whether an award of punitive damages is excessive, the Florida Legislature has taken a different approach. A new Florida law provides an exact formula based upon the ratio of punitive damages to compensatory damages for determining whether a punitive damages award is excessive.[245] Under this new law, punitive damages are limited to either three times the amount of compensatory damages awarded to each claimant or $500,000, whichever is greater.[246] Thus, Florida courts have been ordered by the Florida Legislature to look solely at the ratio of compensatory damages to punitive damages, rather than taking into consideration the reprehensibility of the defendant's conduct, to determine whether an award is excessive. The only exception to the ratio imposed by the Florida Legislature is that punitive damages can be assessed at four times compensatory damages if the actions of the defendant were "motivated solely by unreasonable finan-

240. *See id.* at 575.
241. *See id.* at 580-81.
242. *See id.* at 583.
243. *See id.* at 583-84.
244. *See id.* at 586.
245. *See* FLA. STAT. § 768.73 (2000).
246. *See id.* § 768.73(1)(a)(1)-(2).

cial gain."[247] However, this new law is not applicable to *Engle*, as it did not take effect until October 1, 1999, well after the *Engle* trial plan was entered and the trial began.[248]

The statutory law applicable to *Engle* allows the courts to look at more than just the ratio of compensatory damages to punitive damages. While the statute in effect during *Engle* also includes a ratio of three times compensatory damages, punitive damages in excess of this ratio are only presumed to be excessive.[249] The presumption can be overcome if the "claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact."[250] Thus, the courts can affirm an award of punitive damages that is more than three times compensatory damages if the actions of the defendant are sufficiently reprehensible to overcome the presumption of excessiveness. However, the Florida Legislature specifically excluded class actions from this statutory presumption.[251] Since the Florida Legislature decided not to limit the amount of punitive damages by statute to class actions, any protections against the improper assessment of punitive damages in class actions must be derived from case law.

Florida case law provides two protections against an excessive amount of punitive damages: 1) the award must be related to the defendant's ability to pay, and 2) the award must have some relation to the reprehensibility of the defendant's actions.[252] In contrast to statutory law, Florida case law provides that punitive damages do not have to bear a reasonable relationship to compensatory damages.[253] The Florida Supreme Court reasoned that requiring such a relationship would lead to "an inflexible rule of law that translates into the application of [a] strict mathematical formula."[254] The court was also concerned about the evolution of a strict mathematical rule that would allow an affluent defendant who committed an egregious act, but only caused minimal injury, to escape being properly punished.[255]

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247. *Id.* § 768.73(1)(b). Section 768.73(1)(c), *Florida Statutes*, states that if the fact-finder determines that there was a specific intent to harm, there is no cap on punitive damages.

248. *See* Act effective Oct. 1, 1999, ch. 99-225, § 23, 1999 Fla. Laws 1400, 1416-18 (amending FLA. STAT. §768.73 (1997)).

249. *See* FLA. STAT. §768.73 (1997), *amended by* Act effective Oct. 1, 1999, ch. 99-225, § 23, 1999 Fla. Laws 1400, 1416-18.

250. *Id.*

251. *See id.*

252. *See* Bankers Multiple Life Ins. Co. v. Farish, 464 So. 2d 530, 533 (Fla. 1985); *see also* Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978); Lassitter v. International Union of Operating Eng'rs, 349 So. 2d 622, 626 (Fla. 1977).

253. *See Bankers Multiple Life*, 464 So. 2d at 533.

254. *Lassitter*, 349 So. 2d at 626.

255. *See id.*

In response to this concern, Florida courts have developed a line of case law that allows for punitive damages even if no compensatory damages are awarded. This line of case law culminated in the case of *Ault v. Lohr*,[256] where the Florida Supreme Court was faced with the following question: "[M]ust a compensatory damages award underlie a punitive damages award in a case in which the jury has made express findings against a defendant?"[257]

In *Ault*, the plaintiffs were escaped inmates who, when recaptured, were handcuffed, and a police dog was then ordered to "bite and scratch them."[258] The plaintiffs sued for assault and battery, and the jury awarded one of them $0 in compensatory damages and $5000 in punitive damages.[259] Because of conflicting interpretations by several Florida district courts, the United States Court of Appeals for the Eleventh Circuit, which was trying *Ault*, asked the Florida Supreme Court to clarify a prior opinion.[260] In *McLain v. Pensacola Coach Corp.*,[261] the supreme court had stated that "exemplary or punitive damages are not recoverable in an action of tort unless actual damages are shown."[262] To clarify *McLain*, the court held in *Ault* that a "finding of liability alone will support an award of punitive damages 'even in the absence of financial loss for which compensatory damages would be appropriate.'"[263]

The Florida Supreme Court actually preferred a method of assessing punitive damages based largely on the defendant's ability to pay.[264] However, the court felt that the ability to pay could not be the only factor in determining the amount of punitive damages because affluent defendants could not be charged with a higher award of punitive damages simply because of their increased ability to pay. Further, under this method, an award could not be so large as to bankrupt the defendant.[265] While a punitive damage award "should be painful enough to provide some retribution and deterrence," an award which "bears no relation to the defendant's ability to pay . . . and results in economic castigation" may be found excessive.[266]

The court determined that it was "not an accurate rule of law that the greater a defendant's wealth, the greater must be [the amount of]

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256. 538 So. 2d 454 (Fla. 1989).
257. *Id.* at 454-55.
258. *Id.* at 455.
259. *See id.*
260. *See id.* at 454.
261. 13 So. 2d 221 (Fla. 1943).
262. *Id.* at 222.
263. *Ault*, 538 So. 2d at 456.
264. *See id.*
265. *See* Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978); Lipsig v. Ramlawi, 760 So. 2d 170, 188 (Fla. 3d DCA 2000).
266. Brooks v. Rios, 707 So. 2d 374, 375 (Fla. 3d DCA 1998).

punitive damages."[267] Instead, the court determined that the net worth of the defendant was only one factor to be considered in assessing punitive damages; the reprehensibility of the defendant's actions must also be considered when determining whether an award is excessive.[268] Looking at the size of the award and the actions of the defendant, the court can then review an award and overturn it if the award is a shock to the judicial conscience.[269]

Beyond the above postverdict protections on the amount of punitive damages, the Florida Supreme Court provided one additional protection to defendants in the process of assessing punitive damages. In the case of *W.R. Grace & Co. v. Waters*,[270] the court changed the process of assessing punitive damages in Florida. All trial courts in Florida were ordered to bifurcate trials involving punitive damages when requested by a timely motion.[271] Under this new process, the jury is supposed to determine liability, actual damages, and whether punitive damages are permitted in the first phase of the trial.[272] If the jury finds that punitive damages are indeed permitted, the case proceeds to the second phase where the jury determines whether punitive damages are necessary and in what amount.[273] Such a system protects defendants by "promot[ing] just punishment and deterrence while avoiding prejudice and bias."[274] This system prevents prejudice and bias by allowing defendants to present certain mitigating evidence in the punitive damages phase of the trial, such as prior punitive damages arising out of the same course of conduct, that, if admitted prior to a finding of liability, could cause bias amongst the jury.[275]

To summarize, Florida case law provides that punitive damages do not have to be reasonably related to compensatory damages. In fact, so long as the jury finds the defendant liable, it can award punitive damages even if it declines to award compensatory damages. Instead, the jury is to assess punitive damages based upon the defendant's ability to pay and the reprehensibility of the defendant's actions. If the defendant is found liable, courts are allowed to intervene

267. Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 (Fla. 1985).

268. *See id.*

269. *See* Lassitter v. International Union of Operating Eng'rs, 349 So. 2d 622, 627 (Fla. 1977). To be truly shocking, "the amount [of the award must be] so great . . . as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake." *Id.*

270. 638 So. 2d 502 (Fla. 1994).

271. *See id.* at 506.

272. *See id.*

273. *See id.* "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 of others." *Id.* at 503.

274. McKown, *supra* note 182, at 446.

275. *See id.* at 447.

or reverse an award of punitive damages only if the award will either bankrupt the defendant or is so high that it shocks the judicial conscience.

V. APPLICATION OF FEDERAL CONSTITUTIONAL AND FLORIDA LAW TO THE *ENGLE* TRIAL PLAN

Due to the protections and limitations provided by Florida case law and the Due Process Clause of the Fourteenth Amendment, an appeal of the *Engle* jury's landmark award of punitive damages should result in a reversal. While there will be many issues involved in any such appeal, such as the certification of *Engle* as a class action, the method of assessing punitive damages presents one of the best reasons for the appellate courts to reverse this award. Quite simply, the assessment of punitive damages to an entire class of injured Florida smokers prior to any findings of individual liability and individual harm for each class member violates both Florida law and the due process rights of the tobacco industry. While the *Engle* court was clearly concerned about congesting the Florida court system by holding hundreds of thousands of individual trials on the issue of damages, due process cannot be sacrificed for the sake of judicial economy.

As previously discussed in depth, the *Engle* trial court divided the trial into three separate phases. In Phase I, the jury found the tobacco industry liable for damages caused to the *Engle* class, due to the manipulation of nicotine levels and the concealment of relevant facts in order to cause the users of its product to become addicted.[276] The jury also found that the tobacco industry's actions were so egregious that punitive damages were permitted.[277] The trial then proceeded to Phase II. Phase II was bifurcated, and in the first part of the phase, the jury found that the tobacco industry was liable for the injuries caused to three representative class members and assessed compensatory damages.[278] The trial then proceeded to the second part of Phase II and the assessment of punitive damages in one lump sum, for the benefit of the entire class.[279] It is this second part of Phase II that falls short of the legal requirements for the assessment of punitive damages.

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276. *See* Verdict Form for Phase I, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. 11th. Cir. Ct. June 17, 1999) (on file with author).

277. *See id.*

278. *See* Verdict Form for Phase II, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. Apr. 7, 2000) (on file with author).

279. *See* Levin *supra* note 3.

The first concern is clearly that the amount of this award may violate Florida law by bankrupting the tobacco industry.[280] Prior to a change in Florida law, the *Engle* trial plan may have bankrupted the tobacco industry before completing the appellate process, as Florida law would have required the industry to post a bond in the amount of the judgment, $144.8 billion, "plus twice the statutory rate of interest on [the judgment]," in order to obtain a stay of execution of the award.[281] As the tobacco industry would likely not have been able to post a bond in this amount, it would have been forced to appeal the award without obtaining a stay of execution. Thus, because the tobacco industry could not have stayed execution, it likely would have been bankrupted before the case worked its way through the appellate courts. Fortunately for the tobacco industry, the Florida Legislature alleviated this problem with the enactment of a new statute setting the maximum bond at $100 million.[282]

Even though the Florida Legislature alleviated the problem of bankrupting the tobacco industry during the appellate process, the $144.8 billion award may still violate Florida law by bankrupting the tobacco industry once the appellate process is completed.[283] The tobacco industry contended during the punitive damages phase that it had a net worth of approximately $15 billion.[284] If the tobacco industry's contentions are indeed true, enforcement of the $145 billion award would bankrupt the entire industry and violate Florida law. However, even if the tobacco industry can afford to pay the *Engle* judgment, the award should still be overturned on appeal as the process of assessing punitive damages under the *Engle* trial plan violates both Florida law on the assessment of punitive damages and the tobacco industry's due process rights under the Fourteenth Amendment.

In analyzing the process of assessing punitive damages in *Engle*, the reviewing court must determine whether the *Engle* court complied with *Haslip* by placing sufficient limitations on the discretion of the jury.[285] The *Engle* court started by instructing the jury that it could decide not to assess punitive damages.[286] The court then limited

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280. *See* Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978); Lipsig v. Ramlawi, 760 So. 2d 170, 188 (Fla. 3d DCA 2000).

281. FLA. R. APP. P. 9.310. The statutory interest, as discussed previously, is currently set at 11%.

282. *See* Act effective May 9, 2000, ch. 00-128, § 4, 2000 Fla. Laws 128 (to be codified at Fla. Stat. § 768.733).

283. *See Wackenhut*, 359 So. 2d at 436; *Lipsig*, 760 So. 2d at 188.

284. *See* Final Judgment and Amended Omnibus Order, Engle v. RJ Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. Nov. 6, 2000), http://news.findlaw.com/cnn/docs/tobacco/englerjfinaljudorder.pdf; *see also* Levin, *supra* note 3.

285. *See* Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 18 (1991).

286. *See* Jury Instructions for Phase IIB Punitive Damages, Engle v. R.J. Reynolds Tobacco Co., No. 94-8273 (Fla. 11th Cir. Ct. 2000).

the discretion of the jury by instructing that the following eleven factors be considered in assessing punitive damages: 1) the amount of punitive damages should be reasonably related to any harm that resulted or is likely to result from the tobacco industry's actions; 2) the degree of reprehensibility of the industry's actions; 3) the profitability of the industry's actions; 4) the financial condition of the tobacco industry; 5) the costs of litigation; 6) the punishment the tobacco industry will receive from other sources; 7) the hazard caused to the public by the industry's actions; 8) the industry's awareness of the hazard; 9) the number of employees of the industry involved in causing or covering up its actions; 10) the duration of the industry's conduct; and 11) other civil awards against the tobacco industry for the same conduct.[287] As these factors placed reasonable limitations on the jury's discretion, *Engle* clearly meets the standard established in *Haslip*. However, the fact that the *Engle* court complied with *Haslip* does not overcome the failure to protect the due process rights of the tobacco industry under *BMW*.

Based on the guideposts established in *BMW*, the degree of reprehensibility of the tobacco industry's conduct must first be determined.[288] In Phase I of the trial, the jury found the tobacco industry committed numerous reprehensible actions in its attempts to conceal and cover up the hazardous health consequences of smoking cigarettes.[289] While the industry's actions are not on the highest level of the scale of reprehensibility, such as the commission of violent crimes, clearly the tobacco industry's actions are on the upper level of this scale. The industry simply ignored the health and safety of its consumers and affirmatively lied to the users of its products about the negative health effects of smoking. If the degree of reprehensibility had been the only guidepost enunciated by the Court, considering the profit motive behind the industry's actions as an aggravating factor, the $145 billion award of punitive damages would not be considered excessive. However, while the degree of reprehensibility was found to be the most important guidepost, it clearly was not the only guidepost.

In the second guidepost of *BMW*, the Court established that the award of punitive damages must be compared to the actual or potential harm of the defendant's actions.[290] Herein lies the problem with *Engle*. The courts simply cannot perform this part of the *BMW* test. At the time punitive damages were awarded, other than for three representative class members, there has been no showing of actual

287. *See id.*

288. *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996).

289. *See* Verdict Form for Phase I, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. 11th. Cir. Ct. June 17, 1999) (on file with author).

290. *See BMW*, 517 U.S. at 580.

damages to any individual class members. In a class that has been estimated at 500,000 class members, other than blatantly guessing at the total amount of damage caused to the class, the reviewing court simply has no way to compare the punitive damages award to compensatory damages.

Arguably, a court could use the $12.6 million award of compensatory damages to the representative class members to estimate the potential harm caused by the tobacco industry. A court could also work backwards and determine the amount of compensatory damages that would be required to affirm the *Engle* award. Using the affirmed ratio of punitive damages from *TXO*, of 526 times compensatory damages,[291] an estimation of 500,000 *Engle* class members, and the award of $145 billion in punitive damages in *Engle*, a finding of compensatory damages in the amount of approximately $550 for each class member would meet the *TXO* standard. Surely, if all of the estimated 500,000 class members have injuries that were in fact caused by the tobacco industry, this minimal amount of compensatory damages will be met. However, while it is highly likely that this minimal amount of compensatory damages will be easily met, such a comparison prior to the award of compensatory damages is pure guesswork.

Without attempting to extrapolate an acceptable amount of compensatory damages, the courts are left with no "standard by which [they] can judge whether an assessment of punitive damages is reasonable or is 'grossly excessive'."[292] Because the courts cannot compare the actual amount of compensatory damages awarded to the entire *Engle* class to the amount of punitive damages awarded to the class, the courts have no realistic way to determine whether the award is excessive. Since the courts cannot make this determination, the *Engle* trial court's plan for the assessment of punitive damages has prevented the tobacco industry from being afforded all of its due process rights.

The trial plan also violates Florida law by assessing punitive damages prior to a finding of liability as required by the Florida Supreme Court in *Ault*.[293] While the jury found the tobacco industry was liable for the injuries its actions caused, this finding of general liability to the class is not enough to allow for the assessment of punitive damages for the entire class.[294] There has yet to be a determination of

291. The defendant in *TXO* was an asbestos manufacturer and may thus be considered similarly situated to the tobacco companies. The courts should, therefore, have no problem affirming a ratio of this extent.

292. 00-21 Fla. Op. Att'y Gen. 1, 8 (2000).

293. *See* Ault v. Lohr, 538 So. 2d 454, 456 (Fla. 1989).

294. The issue in Phase I of *Engle* was limited to general causation issues. *See* Final Judgment and Amended Omnibus Order, Engle v. RJ Reynolds Tobacco Co., No. 94-08273 (Fla. 11th Cir. Ct. Nov. 6, 2000), http://news.findlaw.com/cnn/docs/tobacco/englerjfinaljud

whether any individual class member, other than the representative class members, was in fact injured or whether a product of the tobacco industry caused his or her injury. The Phase I assessment of liability was not so broad to mean that the tobacco industry is automatically liable for the injuries of those that claim to be members of the class. In fact, the Phase I assessment of liability is much narrower. By finding the industry liable in Phase I, the jury simply determined that the tobacco industry is liable to all class members who later prove in their individual trial that their respective, alleged injuries were caused by the tobacco industry. In other words, during each class member's individual trial, the issue of whether or not the tobacco industry generally caused injury by manipulating nicotine levels and concealing or misrepresenting information will not be at issue. However, each class member will still have to prove that he or she was in fact injured and that the products of the tobacco industry, and not something else, were the cause of his or her injury. Thus, for the purposes of *Ault*, the finding of general liability in Phase I is simply not sufficient to allow for the assessment of punitive damages for the entire class; there must still be a finding of individual liability.

Without a finding of individual liability and actual damages, the *Engle* trial court has allowed a jury to establish a lump sum award of punitive damages without any knowledge of the extent of the injury caused by the tobacco industry. In fact, until the trial of all of the individual cases, it will not be known for sure how many class members exist. While no class member will become entitled to his or her equal share of the punitive damages award until after proving individual liability and actual damages, this is not sufficient to overcome the mandate of *Ault*. *Ault* clearly requires a finding of liability prior to the assessment of punitive damages.[295] In setting up a method that allows a jury to assess punitive damages for an entire class prior to a finding of liability for each member of the class, the *Engle* court has violated Florida law.

VI. CONCLUSION

The proper procedure for the *Engle* trial court to follow would have been to follow the plan as established by the original trial judge. The Third District Court of Appeal, recognizing the problem in calculating damages in class actions, opined that the issue of damages

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order.pdf. There has yet to be a finding of specific causation for any class member except the three representative class members. Without a finding of specific causation, no liability can be attached for harms caused to individual class members. *See Ault*, 538 So. 2d at 456. Thus, by setting punitive damages for all class members without a finding of individual liability, the *Engle* trial plan violates the requirements of *Ault*. *See id.*

295. *See Ault*, 538 So. 2d at 456.

would have to be tried individually. Unfortunately, there is no remedy for the current trial plan other than to wait for the appeal by the tobacco industry.

It seems almost certain that the reviewing court will reverse the award of lump-sum punitive damages and order that the trial court amend the trial plan to include individual trials on the issues of individual causation and both compensatory and punitive damages. This is the only constitutional way to assess punitive damages and ensure that they are not grossly excessive. However, the current trial plan, even if reversed, will not be a total waste of time and money.

The large award of punitive damages is a good indicator of the future of tobacco litigation. If the punitive damage award is in fact reversed on appeal, the industry may be more willing to discuss settlement. After all, the prospect of litigating in the state of Florida, based on recent tobacco litigation in Florida, should not be terribly pleasing to the tobacco industry. It is even possible that breaking the assessment of punitive damages out into individual trials will lead, cumulatively, to a much larger punitive amount than the amount assessed by the *Engle* jury. Further, given the reprehensibility of the actions of the tobacco industry, individual awards of punitive damages stand a better chance of being upheld on appeal, if class members can show they were in fact injured by the tobacco industry.

A punitive award of $145 billion is letting the tobacco industry off lightly. After decades of deceit, disease, and death, the tobacco industry is finally being forced to pay for its transgressions. However, the Florida court system should not lift the blindfold of justice and distort the law to punish the tobacco industry. Unfortunately, even though the tobacco industry has shown disdain for the rights of the people that use its products, the violation of the tobacco industry's rights under both Florida law and federal constitutional law will likely prevent the *Engle* jury from bringing the tobacco industry to justice. Hopefully, with the advent of mounting evidence, the tide of this great legal battle will continue to shift and this will simply be a case of justice delayed and not justice denied.