



## ELEVENTH CIRCUIT DIMINISHES DUE-PROCESS RIGHTS OF DEFENDANTS IN POST-ENGLE TOBACCO LITIGATION

by Geoffrey M. Wyatt and Jordan M. Schwartz

On May 18, 2017, the US Court of Appeals for the Eleventh Circuit, sitting *en banc* in *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017), once again upheld Florida’s novel form of issue preclusion applicable to “*Engle* progeny” cases—suits brought by individuals who were members of the class of cigarette smokers that was decertified by the Florida Supreme Court in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). The preclusion rule that has been applied in *Engle*-progeny cases bars defendants from litigating breach of duty or general causation in subsequent individual cases, even though the class was decertified without the entry of any classwide final judgment and despite the fact that the *Engle* jury did not make issue-specific findings as to the facts underlying breach of duty or causation.

In *Graham*, the *en banc* Eleventh Circuit held that this preclusion doctrine does not contravene due process. In so doing, the court of appeals declined to overrule *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), in which a panel of the same court had previously determined that federal courts must defer to the Florida Supreme Court as a matter of full faith and credit. The procedural shortcut invented by the Florida Supreme Court and once again endorsed by the Eleventh Circuit runs counter to the fundamental rule that a plaintiff must prove each of the elements of his or her claims. The holding cannot be squared with bedrock due-process principles and bodes ill for defendants subject to the *sui generis Engle* preclusion doctrine in future cases.

### Background

The seeds of the Florida Supreme Court’s novel preclusion doctrine were planted in the *Engle* decision. 945 So. 2d at 1269. That ruling decertified a class action encompassing 700,000 plaintiffs but paradoxically held that certain jury findings reached in the initial phase of the class trial would “have res judicata effect in” subsequent trials brought by individual class members. *Ibid.* This pronouncement led to confusion among courts attempting to give preclusive effect to *Engle*. The *Engle* trial involved many defendants, many products, and a lengthy class period, and the *Engle* plaintiffs asserted many theories as to why particular products were defective. Although there was no classwide final judgment, the jury rendered a general verdict that the defendants “place[d] cigarettes on the market that were defective and unreasonably dangerous.” *Engle* Phase I Verdict

---

**Geoffrey M. Wyatt** is Counsel, and **Jordan M. Schwartz** is an Associate, with Skadden, Arps, Slate, Meagher & Flom LLP in the firm’s Washington, DC office.

Form at 2-3. The jury did not specify whether it had found for plaintiffs on all theories, or just some of the theories, or only one of them.

Because it was not possible to determine which particular issues the *Engle* jury decided in reaching its general verdict, most plaintiffs bringing individual suits following *Engle* could not satisfy the traditional test for issue preclusion. Claim preclusion was also unworkable since no claim was actually decided and there was no final judgment, as the Florida Supreme Court expressly recognized in *Engle*. 945 So. 2d at 1263.

The Florida Supreme Court attempted to cut through these longstanding limitations on the use of preclusion doctrines in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), by adopting a new preclusion theory and concluding that *res judicata* could operate to foreclose litigation of any theory that was or could have been decided by the *Engle* jury. And in the subsequent decision in *Walker*, a panel of the Eleventh Circuit described the approach taken by *Douglas* as “unorthodox and inconsistent with the federal common law,” but nevertheless determined that federal courts must defer to *Douglas* as a matter of full faith and credit. *Walker*, 734 F.3d at 1289. In so doing, the *Walker* panel resolved that “[w]e cannot say that the procedures, however novel, adopted by the Supreme Court of Florida to manage thousands of these suits under Florida law violated the federal right of R.J. Reynolds to due process of law.” *Id.* at 1290.

*Graham* was one of the *Engle* follow-on cases, in which a jury awarded the plaintiff \$825,000. A panel of the Eleventh Circuit reversed, reasoning that the only construction of the *Engle* jury findings that could avoid serious due-process problems was one based on the single theory that “all” cigarettes smoked by any progeny plaintiff are defective because they “are addictive and cause disease”—a finding that was squarely preempted by federal law. *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1267-73 (11th Cir. 2015). The plaintiff’s petition for rehearing *en banc* was granted, and the parties were allowed to brief both the preemption and due-process issues.\* The full Eleventh Circuit refused to adopt the panel’s reasoning, reaffirming the circuit’s holding in *Walker* that there was no due-process violation.

### Basis for Court’s Decision

The majority opinion, written by Judge William Pryor, explained that, “[b]ased on our review of the *Engle* proceedings, we are satisfied that the *Engle* jury actually decided common elements of the negligence and strict liability of R.J. Reynolds and Philip Morris.” 857 F.3d at 1181. This conclusion rested in large part on the defendants’ admissions that the *Engle* plaintiffs had presented common proof that the *Engle* defendants’ cigarettes were defective because they are addictive and cause disease, in addition to brand-specific evidence. Also, the closing arguments of the parties in Phase I of *Engle* focused on whether “all” cigarettes are defective without regard to differences in the designs of various brands. The court of appeals also found that the first two questions of the Phase I verdict form “are most naturally read to apply to *all* cigarettes manufactured by the tobacco

---

\* Ed. Note: Washington Legal Foundation filed an *amicus* brief in support of the Respondent in the 11th Circuit’s rehearing *en banc* of *Graham v. R.J. Reynolds Tobacco Co.*, <http://www.wlf.org/upload/litigation/briefs/WLFAmicusBrief-Grahamv.RJReynolds-11thCircuit.pdf>.

companies.” *Id.* at 1182. For these reasons, the court concluded that the jury’s factual findings in the common phase in *Engle* were sufficient to establish the elements of breach of duty and general causation as to the *Graham* plaintiff’s claims against R.J. Reynolds and Philip Morris, even if the trial featured brand-specific evidence that did not necessarily apply to those manufacturers.

The Eleventh Circuit also downplayed the Florida Supreme Court’s use of the phrase “res judicata” in *Douglas*—a form of preclusion doctrine that applies in cases involving the same causes of action. The defendants in *Graham* argued that had the Florida Supreme Court determined that the *Engle* jury actually decided the common elements of negligence and strict liability for all class members, the state court would have used the phrase “collateral estoppel” or issue preclusion. After all, as the defendants explained, the “actually decided” requirement is the touchstone of *issue* preclusion, and cannot be evaded by simply substituting one preclusion doctrine for the other. The Eleventh Circuit disagreed, however. Although “[t]he terminology employed by the Florida Supreme Court was unorthodox ... due process” centers on “substance, not ... form.” *Id.* at 1183-84 (internal quotes omitted). Despite “recogniz[ing] that the *Engle* Court defined a novel notion of res judicata,” the court of appeals was unable to conclude that this unconventional form of preclusion doctrine was so unfair as to violate the defendants’ right to due process. *Id.* at 1184-85.

Finally, on the issue of preemption, the majority acknowledged that its construction of the verdict was tantamount to a finding that all cigarettes are inherently defective, but it disagreed that federal law preempted such a conclusion. It concluded that federal law merely required uniform labeling and did not preclude “more stringent regulation generally,” including state law that was equivalent to a ban on cigarette sales. *Id.* at 1188.

In an extensive dissent, Judge Tjoflat rejected the majority’s “false narrative” of the *Engle* litigation and concluded that the defendants were denied the requisite opportunity to be heard on “whether their unreasonably dangerous product defect(s) caused Ms. Graham’s death” for purposes of due process. *Id.* at 1194 (Tjoflat, J., dissenting). Judge Wilson also dissented, as did Judge Julie Carnes in relevant part, both agreeing with Judge Tjoflat that the highly generalized *Engle* jury findings do not satisfy “the minimum procedural requirements of the ... Due Process Clause in order to qualify for ... full faith and credit.” *Id.* at 1314-15 (Wilson, J., dissenting) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982) (alterations original)); see also *id.* at 1191 (Julie Carnes, J., concurring in part and dissenting in part).

## Analysis

The majority opinion improperly endorsed a slackened preclusion standard minted by a state court purely for purposes of expediency and ignored the US Supreme Court’s express instructions that lower courts must be solicitous of “extreme applications” of preclusion that deviate from its traditional use, which “may be inconsistent with” due process—a “federal right that is ‘fundamental in character.’” *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) (citation omitted). As noted above, *res judicata* can only apply where a whole cause of action is brought to a full and complete judgment—a requirement the *Engle* court expressly recognized was not satisfied. Judge Pryor’s *en banc* opinion essentially recognized as much, grounding its affirmance of the district court’s use of

the *Engle* jury findings in *issue preclusion* terms by stressing the conclusion that the *Engle* jury had necessarily determined all cigarettes that were sold during the class period were defective.

But even this bare finding cannot be afforded preclusive effect consistent with due process. Indeed, as the three-judge panel that initially heard the appeal recognized, “it is impossible to discern the extent to which the Phase I findings specifically match up with each of the *Engle* defendants,” which the panel deemed to be the “central problem” in the case. *Graham*, 782 F.3d at 1281. The precise factual conclusions of the *Engle* jury can only be guessed at: for example, while the *Engle* plaintiffs asserted many theories regarding product defect, all that the *Engle* jury found was that each defendant placed cigarettes on the market that were defective and unreasonably dangerous. Thus, there is no basis to conclude that the supposedly “common liability” finding—*i.e.*, that all cigarettes sold during the class period are defective—is actually common across the *Engle* class, which asserted a “litany” of defects, any one or combination of which could have formed the basis of the *Engle* jury’s finding on defect. *Id.* at 1281.

The *en banc* majority failed to grapple with that fundamental problem. Due process requires that the defendants be allowed to litigate the facts concerning whether the particular cigarettes at issue in the case were defectively designed. That question was not necessarily decided by any jury. Instead, under Florida’s “novel notion of *res judicata*,” the issue was deemed established based on the strength of a supposedly common jury verdict that could have been premised on any number of specific defects in any number of other cigarettes. In countenancing this approach to preclusion, the Eleventh Circuit appears to have improperly subordinated federal due-process rights to a judicial policy of according respect to state-court judgments.