Expediency Over Due Process – The New Normal for Unpopular Mass Tort Defendants?

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"Few issues are of more concern to American businesses . . . than those affecting their fundamental right to defend themselves when they are sued."[1] Yet that right has been seriously eroded in a series of recent rulings by the Florida Supreme Court and U.S. Court of Appeals for the Eleventh Circuit in tobacco litigation in Florida, where countless plaintiffs have been relieved of the burden of proving fundamental elements of their causes of action.

Plaintiffs in those jurisdictions may now rely on a novel form of preclusion that jettisons the fundamental safeguard against the arbitrary deprivation of property—that the elements of plaintiffs' claims must have been "actually litigated and resolved" in their favor in the prior case. These decisions pose a grave risk of unjustified liability being sought against any product manufacturer subject to suit in state and federal court in Florida, in violation of the company's due process rights under the U.S. Constitution.

This new preclusion doctrine took root in the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1269 (Fla. 2006). In that case, the court decertified a class action of some 700,000 tobacco plaintiffs but at the same time held that certain jury findings in Phase I of the class trial "will have *res judicata* effect in" subsequent trials commenced by individual class members. *Burkhart v. R.J. Reynolds Tobacco Company*, No. 14-14708 (11th Cir. March 7, 2018) at *5. A spate of decisions in the Florida state court and federal courts followed, culminating in seminal decisions cementing the new doctrine in the Florida Supreme Court, *Phillip Morris USA, Inc., v. Douglas*, 110 So. 3d 419 (Fla. 2013), and Eleventh Circuit, *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1175 (11th Cir. 2017)(en banc), *cert. denied*, 138 S. Ct. 636 (2018).

To explain how this disturbing development in preclusion law was reached, we begin with a history of the *Engle* litigation. We follow that with a discussion of the due process implications of the *Douglas*/*Graham* preclusion doctrine. Last, we discuss how mass tort litigation in particular may change if the *Douglas*/*Graham* doctrine is followed in other jurisdictions, and spotlight some of the issues defense counsel will need to consider when defending class action and consolidated litigation in which a trial on "common issues" is contemplated.

I. The *Engle* Litigation

[1] Brief of the Chamber of Commerce of the United States of America, et al., as *Amici Curiae* in Support of Reversal on Rehearing *En Banc, Graham v. R.J. Reynolds Tobacco Co., et al*, (No. 13-14590-U)(11th Cir. 2016)(hereinafter "Chamber Brief").

In 1994, six plaintiffs suffering from lung diseases sued this country's major cigarette manufacturers for strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotional distress. *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1281 (11th Cir. 2013). The plaintiffs brought their suit as a class action on behalf of all Florida citizens and residents who claimed injury from "the addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla Dist. Ct. App. 1996). The Florida trial court certified the class and divided up the case into three phases.

In the first phase ("Phase I"), after a year-long trial, a jury decided purported "common issues relating exclusively to defendants' conduct and the general health effects of smoking," such as causation, fraudulent concealment, and the class's entitlement to punitive damages. *Phillip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 428 (Fla 2013) (quoting *Engle v. Liggett Grp., Inc.*, 945 So 2d 1246, 1277 (Fla 2006)(per curiam). During the Phase I trial, the *Engle* class broadly alleged that all cigarettes are defective, and that the sale of all cigarettes is negligent, because cigarettes are addictive and cause disease. But, significantly, the class also advanced narrower, brand-specific theories of defect and negligence, e.g., that "some" cigarettes had specific defects such as the filter's breathing air holes being too close to the smoker's lips so that they were covered by the smoker, or that "some" filters used glass fibers, or that ammonia "sometimes" was used to increase nicotine levels. The arguments made to support the class's fraudulent-concealment and conspiracy claims were similarly diverse and wide-ranging. Some pertained to the health risks of smoking, others to smoking's addictiveness, and still others were limited to certain cigarette designs and brands, such as "light" and "low tar" cigarettes.

Over the defendants' objection, the class sought and secured a Phase I jury form that asked the jury to make only generalized findings on each of its claims. After deliberations, the jury's answers resolved questions of causation, i.e., whether smoking cigarettes caused 20 specific diseases and whether the nicotine in cigarettes is addictive. *Engle*, 945 So. 2d at 1277. In addition to these findings, the jury made a series of findings with respect to the tobacco companies' conduct, including that the defendants placed cigarettes on the market that were defective and unreasonably dangerous, and that the defendants concealed or omitted material information not otherwise known or available regarding the health effects or addictive nature of smoking cigarettes (or both). The jury further "made nonspecific findings in favor of the plaintiffs" on "fraud and misrepresentation" and "intentional infliction of emotional distress." *Id*. at 1255. Finally, the jury found that the tobacco companies' conduct entitled the class to punitive damages. *Id*. at 1262.

In the second phase ("Phase II"), the jury concluded that the tobacco companies were liable to three of the class's representatives and awarded compensatory damages of $12.7 million. *Walker*, 734 F.3d at 1282. The jury also set a $145 billion punitive damages award on behalf of the entire class.

The third phase ("Phase III") would have asked new juries to "decide specific causation and damages for the remaining class members in Phase III." *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1175 (11th Cir. 2017)(en banc), cert. denied, 138 S. Ct. 636 (2018). Before

Phase III began, however, the tobacco companies appealed the judgments in both of the first two phases of the trial. *Id*. at 1178. The Florida Supreme Court affirmed in part and reversed in part. *Engle*, 945 So. 2d at 1254. It decertified the class action, concluding that certification was impossible with respect to the upcoming third phase of the trial, which involved questions of liability to individual plaintiffs "because individualized issues such as legal causation, comparative fault, and damages predominate." *Id*. at 1245, 1268. The Court, however, "retained" the jury's Phase I findings as to the tobacco companies' conduct "other than those on the fraud and intentional infliction of emotional distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature." *Graham*, 857 F.3d at 1178 (quotations and alterations omitted)(quoting *Engle*, 945 So. 2d at 1269). The Court explained that going forward, individual plaintiffs could pursue "individual damages actions" on their own. *Engle*, 945 So. 2d at 1269. When they do so, the Court explained, those "retained findings" from the first two phases of the trial "will have *res judicata* effect in those trials." *Id*. The Court accordingly vacated the class-wide punitive damages finding the jury awarded in Phase II. *Id*. at 1276.

The *Engle* Progeny Suits

Thousands of individual lawsuits followed. These suits—known commonly as "*Engle* progeny" suits—presented the Florida Supreme Court with a new question arising from its decision to give preclusive effect to the *Engle* jury's Phase I findings. *Burkhart*, at *5. The question concerned the "extent to which smokers could rely on the approved findings from Phase I to establish certain elements of their claims." *Id*., quoting *Graham*, 857 F.3d at 1178. The Court resolved this question in *Phillip Morris USA, Inc., v. Douglas*, 110 So. 3d 419 (Fla. 2013). The *Douglas* court recognized that because the *Engle* class's multiple theories of liability "included brand-specific defects" that applied to only some cigarettes, the *Engle* findings would be "useless in individual actions" to show what the *Engle* jury had "actually decided," as the Florida preclusion law required. *Id*. at 423, 433. It nevertheless held that because the Phase I findings were "common to all class members and will not change from case to case" they were sufficient to "conclusively establish" the conduct elements of the plaintiffs' individual claims. *Id*. at 428-30. The Court also held that giving preclusive effect to the Phase I findings did not violate the tobacco companies' due process rights under the federal Constitution. *Douglas*, 110 So. 2d at 430.

In *Walker*, the Eleventh Circuit too held that giving preclusive effect to the jury's Phase I *Engle* findings did not run afoul of the Due Process Clause. 734 F.3d at 1290. It explained that the Constitution required the Court to give full faith and credit to the Florida Supreme Court's decisions in *Engle*, as interpreted by *Douglas*, unless doing so would violate the tobacco companies' due process rights. *Burkhart* at *6. The Court concluded that giving preclusive effect to the *Engle* jury's Phase I findings did not "so deprive the tobacco companies of their right to contest their liability that it violates their constitutional right to due process." *Id.*, citing *Walker*, 734 F.3d at 1290. The Eleventh Circuit reaffirmed this conclusion *en banc* in *Graham*

with respect to the negligence and strict-liability claims brought by the plaintiff in that case. *Id*., citing *Graham*, 857 F.3d at 1174.[2]

The *Graham* Decision

In *Graham*, R.J. Reynolds and Philip Morris challenged a jury verdict in favor of Earl Graham, as personal representative of the estate of his deceased wife, Faye Graham, a member of the *Engle* class. Mr. Graham filed an individual *Engle* action in the district court against R.J. Reynolds, Philip Morris, and other defendants later dismissed. He alleged that his wife developed lung cancer and died because of her addiction to cigarettes manufactured by the defendants, and asserted claims of strict liability, breach of warranty, negligence, fraudulent concealment, and conspiracy to fraudulently conceal.

The case was litigated pursuant to the *Engle* framework articulated in *Douglas*. Although Earl Graham alleged in his complaint all of the torts for which *Engle* had retained findings, he was never required to identify any proscribed conduct other than the sale of cigarettes. Accordingly, the jury was not asked to find that the cigarettes Faye Graham smoked were defective or that the tobacco companies were negligent. *Graham v. R.J. Reynolds Tobacco Co*., 782 F.3d 1261, 1273 (11th Cir. 2015), *reh'g en banc granted, op. vacated*, 811 F.3d 434 (11th Cir. 2016). Rather, the district court treated those findings as having already been established. *Id*. For the claims of negligence and strict liability, the jury was asked to determine only whether Faye Graham was a member of the *Engle* class and whether smoking cigarettes manufactured by the defendants "was a legal cause" of Faye Graham's injuries. *Id*. The district court instructed the jury that, to find legal causation, Graham's addition to cigarettes must have "directly and in natural and continuous sequence produced or contributed substantially to producing" her injuries.

The jury found for Graham on the claims of strict liability and negligence. It awarded Graham $2.75 million in damages and determined that Faye Graham was 70 percent at fault, R.J. Reynolds was 20 percent at fault, and Philip Morris was 10 percent at fault. *Id*. at 1273-74. The district court entered judgment against R.J. Reynolds for $550,000 and against Philip Morris for $275,000. *Id*. at 1274. The district court denied the tobacco companies' motion for judgment as a matter of law. *Id*.

A panel of the Eleventh Circuit reversed the judgment of the district court, holding that the *Engle* findings of strict liability and negligence were preempted by federal law. The Court later granted a petition for rehearing en banc filed by *Graham* and vacated the panel opinion. *Graham*, 811 F.3d at 434-35. In addition to the preemption issue, the Court allowed the parties to brief whether giving effect to the jury's findings in *Engle* would "violate the companies' rights under the due Process Clause of the Fourteenth Amendment to the United States Constitution notwithstanding the panel's holding in *Walker*." In the period between the district court's judgment and the Court's grant of the petition for rehearing en banc, the Florida Supreme Court ruled that federal law does not preempt "state tort" actions against the tobacco companies and that, even if federal law preempted a ban on the sale of cigarettes, the *Engle* Phase I findings do

[2] The *Graham* court did not, however, decide whether giving preclusive effect to *Engle* progeny plaintiffs' fraudulent concealment and conspiracy claims violates due process, because the jury in *Graham* found for the plaintiff on her negligence and strict-liability claims only. 857 F.3d at 1180.

"not amount to . . . a ban" that might conflict with federal law. *R.J. Reynolds Tobacco Co. v. Marotta*, No. SC16-218, 2017 WL 1282111, at *9 (Fla. Apr.6, 2017).

The *en banc* panel in *Graham* held that the tobacco defendants' due process rights were not violated by giving preclusive effect to the Phase I jury findings of negligence and strict liability by the *Engle* jury in individual actions by *Engle* class members in the *Engle* class action trial. Despite recognizing that "the *Engle* Court defined a novel notion of res judicata," the panel concluded that neither "the substance of that doctrine or its application in [the *Graham* trial] was so unfair as to violate the constitutional guarantee of due process." *Graham*, 857 F.3d at 1185. [3]

Graham, like *Walker* before it, however, did not address an issue that would emerge in later-decided *Engle* progeny cases: whether the *Engle* jury findings on intentional concealment claims would survive a due process challenge. In its pre-*Graham* and post-*Graham* briefing, the tobacco defendants argued that an intentional concealment claim—depending as it must on a specific statement or omission by a specific defendant—presents due process issues that did not necessarily arise with a class-wide negligence or strict liability claim. Relying largely on the Supreme Court's opinion in *Fayerweather v. Ritch*, 195 U.S. 276 (1904), defendants argued that, to satisfy due process, a court may only give issue-preclusive effect to an earlier jury's findings if that jury "actually decided" the matter that is at issue in the second proceeding. The *Graham* Majority agreed, noting "[w]e will assume, without deciding, that the 'actually decided' requirement is a fundamental requirement of due process under *Fayerweather* . . ." *Graham*, 857 F.3d at 1181. Acting on that assumption, the Majority reviewed the Engle proceedings and announced it was "satisfied that the Engle jury actually decided common elements of the negligence and strict liability of [the *Graham* defendants]." *Id*.

The Eleventh Circuit Extends *Graham* to Fraudulent-Concealment and Conspiracy-to-Conceal Claims

The *Graham* preclusion doctrine was expanded in two subsequent *Engle* progeny cases decided this year: *Burkhart v. R.J. Reynolds Tobacco Company*, No 14-14708 (11th Cir. March 7, 2018) and *Searcy v. R.J. Reynolds Tobacco Company*, No. 13-15258 (11th Cir. September 5, 2018). Among the many issues on appeal in *Burkhart* and *Searcy* was whether giving preclusive effect to the *Engle* jury's findings of concealment and conspiracy-to-conceal violates due process. Those questions remained open because neither *Walker* nor *Graham* faced the question

[3] The *Graham* opinion includes a scathing dissent by Judge Gerald Bard Tjoflat that consumes more than 200 pages and retraces the tortured history of the *Engle* litigation through the various layers of the Florida state court system. He emphasizes that the *Engle* Phase I jury form "did not require the jury to reveal the theory or theories on which it premised its tortious-conduct findings" and that "the defendants were never afforded an opportunity to be heard on whether the[] unreasonably dangerous product defect(s) or negligent conduct" found by the *Engle* jury caused harm to any specific progeny plaintiff. *Graham*, 857 F.3d at 1194, 1201 (Tjoflat, J., dissenting). Summing up the entire history of the *Engle* progeny decisions, he writes: "Unfortunately, the one theme that remains constant throughout—with a few exceptions—is that *Engle*-progeny courts have rested their thumbs on the scales to the detriment of the unpopular *Engle* defendants." *Id*. at 1194.

whether the *Engle* jury findings on intentional concealment claims would survive a due process challenge.[4]

In response to supplemental briefing requested by the Court in *Searcy*, the defendants, relying on *Graham*, argued that the Court should likewise review the *Engle* record to determine whether the concealment found by the *Engle* jury to have occurred class-wide among all the defendants was necessarily the same concealment or misrepresentation on which the plaintiff in *Searcy* relied on in deciding to continue to smoke. Defendants insisted that having undertaken this review, the Court would find it impossible to conclude, based on the unspecified concealment found class-wide by the *Engle* jury, that the latter necessarily decided that the particular concealment asserted by the *Searcy* plaintiff occurred.

While the tobacco companies were briefing these due process deprivation points in *Searcy*, the Eleventh Circuit was reviewing and deciding another *Engle* progeny case, *Burkhart*, in which the plaintiff also prevailed at trial on fraudulent concealment and conspiracy-to-conceal claims. Following *Engle*, the *Burkhart* trial court's instructions to the jury on the fraudulent concealment and conspiracy claims simply asked the jury to determine whether the plaintiff "relied on [defendants'] concealment in continuing to smoke." *Id*. at *8.

On appeal, the tobacco defendants argued that by giving preclusive effect to the *Engle* jury's findings of concealment and conspiracy, the district court denied defendants due process, for many of the same reasons advanced in *Searcy*. The Court rejected these arguments, noting that the rationale it had employed in *Walker* and *Graham* "applies equally to the Florida Supreme Court's similar grant of preclusive weight to *Engle* progeny plaintiffs' concealment and conspiracy claims." In both of those cases, the Court reasoned, "the due process question depended upon an analysis of the defendant's opportunity to be heard in *Engle*" and because the "concealment and conspiracy claims were litigated alongside the negligence and strict-liability claims in Engle" the defendants "had the opportunity to argue the conduct elements of the concealment and conspiracy claims brought against them."

The Court did not specifically address the defendants' contention that if it had reviewed the *Engle* record (as it did in *Graham*) with respect to plaintiffs' negligence and strict liability claims, it would have been impossible to determine if the *Burkhart* plaintiff's concealment and conspiracy to conceal claims were "actually decided" by the *Engle* jury. In effect, the Eleventh Circuit's "actually decided" standard applied in *Graham* became a much less rigorous "opportunity to be heard" standard in *Burkhart*.

II. Due Process Implications of the *Douglas*/*Graham* Preclusion Doctrine

The Supreme Court has long held that due process protections apply to the use of preclusion doctrines, whether in state or federal court. *Fayerweather*, 195 U.S. at 297-98. This is true for both *claim* preclusion (preventing re-litigation of the same claim by the same parties in subsequent proceedings following a final judgment) and *issue* preclusion (which prevents the re-litigation of the same issue in later litigation against the same party). Chamber Brief at 11. And

[4] Concealment claims likewise were not before the Florida Supreme Court in *Douglas*, the seminal Florida case that accorded preclusive effect to the *Engle* findings. *Philip Morris USA, Inc. v. Douglas*, 110 So.3d 419 (Fla.2013).

this rule applies equally in the class action context. "As with individual litigation, a 'class judgment . . . will be conclusive on the issues actually and necessarily litigated and decided.'" Id., citing 7AA Charles Alan Wright, et al., *Federal Practice and Procedure* § 1789 (3d ed. 2005)(emphasis added).

With respect to issue preclusion, it is well settled that preclusive effect may only be accorded to issues "actually litigated and resolved in a valid court determination essential to the prior judgment," a requirement of due process. *Id., citing Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Indeed, courts have held that "an *absolute* due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the *identical issue* was actually litigated, *directly* determined, and essential to the judgment in the prior action." *Id., quoting Cooper v. North Olmsted*, 795 F.2d 1265, 1268 (6th Cir. 1986)(emphasis added).

The *Douglas* court discarded the requirement that the precise issues be actually and necessarily decided to have preclusive effect. Chamber Brief at 14. Despite correctly concluding that the Phase I findings in *Engle* were "useless in individual actions," 110 So. 3d at 433, the Court nevertheless "retained" certain Phase I findings and instructed progeny courts to give those findings res judicata effect. In doing so, the Court claimed it had intended to allow class members to simply "*assume[*]" "injury as a result of the *Engle* defendants' conduct." *Id*. at 430 (emphasis added). "Thus, regardless of the tort a class member alleged, she only needed to prove that she was injured as a result of 'smoking cigarettes' manufactured by [a defendant]' to recover." *Graham*, 857 F.3d at 1193 (Tjoflat, J., dissenting). In effect, the *Douglas* Court "proscribed the very act of selling cigarettes, albeit under color of traditional tort law. So long as a defendant's sale of cigarettes caused a plaintiff's injury—that is, so long as a plaintiff was injured by smoking cigarettes—the plaintiff had no need to identify, for example, the defendant's negligent conduct or unreasonably dangerous product defect." *Id*.

The *Graham* case was litigated under the state law set forth in *Douglas*. As noted previously, Earl Graham, as personal representative of the estate of Faye Graham, alleged in his complaint all of the torts for which *Engle* had "retained findings." Yet Graham was never required to identify any proscribed conduct other than the sale of cigarettes. As to both negligence and strict liability, the *Graham* trial court instructed the jury to determine only "whether smoking cigarettes manufactured by [the] Defendant was a legal cause of Faye Graham's death."

The *Burkhart* Court's extension of the *Douglas/Graham* preclusion doctrine to concealment and conspiracy findings is equally in tension with entrenched preclusion law. The panel in *Burkhart* reasoned that giving preclusive effect to the *Engle* jury's concealment and conspiracy findings does not violate due process because the defendants in *Engle* "had a full and fair opportunity to litigate" those claims. But as the tobacco companies pointed out in response to questions posed by the Eleventh Circuit in the *Searcy* appeal,

> . . . the fact that the defendants in *Engle* had an opportunity to litigate an issue obviously does not mean that the *Engle* jury actually decided that issue against them, and centuries of precedent make clear that due process requires an actual decision in a prior proceeding on the issue on which preclusion is sought. Simply put, it is a bedrock due-process

> principle that a party cannot be held liable unless a factfinder has decided every element of the claim against it. If the prior proceeding did not actually decide the relevant grounds for liability, a plaintiff cannot invoke preclusion to establish liability in a subsequent proceeding, regardless of whether the defendant had an "opportunity" to contest liability in the first proceeding.

Defendants/Appellants' Response to the Court's Questions, *Searcy v. R.J. Reynolds Tobacco Company, et al*., No 13-15258 (11th Cir. 2018) at 1-2.

Defendants backed their assertion that the concealment and conspiracy claims were not actually decided in *Engle* with a number of inescapable truths:

- The *Engle* jury rendered what the tobacco plaintiffs have called "general conduct findings." These were, in part, that the *Engle* defendants had "failed to disclose a material fact concerning ***the health effects or addictive nature*** of smoking cigarettes, ***or both***." *Engle*, 945 So. 2d at 1277.

- These findings indicate that the *Engle* jury's conclusion that the tobacco companies had either not told the public that smoking would damage a person's health or had not made public their awareness that cigarette-smoking is an addictive activity, or maybe both. *Searcy* at *13.

- Yet, given the numerous theories of concealment advanced at the *Engle* trial, it is impossible to figure out on which act or acts of concealment the *Engle* jury was focusing when it made the above findings. *Id*.

- Therefore, to be able to apply the *Engle* general concealment finding to a particular concealment theory presented in a progeny case, one has to be able to identify the common act(s) of concealment that the *Engle* jury had in mind in reaching its finding. And ***this is simply not doable***, given the "thousands upon thousands of statements" on which the class's concealment claim rested. *Engle*, 945 So. 2d at 1277.

- Finally, with regard to the "general conduct finding," because it is ***framed in the disjunctive***, the *Engle* jury findings did not establish whether the *Engle* jury actually decided that the defendants concealed material information about the health effects of cigarettes or whether instead the jury decided that it was the concealment of the addictive nature of cigarettes that the jury found tortious. *Id*. (emphasis added)

An additional problem specific to *Searcy* was that, in attempting to prove her own concealment claim, the Searcy plaintiff focused on a very specific theory of concealment: that the tobacco defendants had, though misleading advertisements, misled the public into believing that low-tar or low-nicotine cigarettes were healthier than normal cigarettes, when in fact those "low" cigarettes were just as bad for the smoker as were standard cigarettes. Id. at *15 The defendants noted that the problem with the *Searcy* plaintiff's particular concealment theory is

there is no way to determine whether the *Engle* jury actually bought that argument because its findings give no clue as to what acts of concealment it had actually found. They argued that it simply cannot be determined whether the *Engle* jury actually decided that defendants fraudulently concealed material information about low-tar cigarettes—the concealment theory on which the *Searcy* plaintiff relied. *Id*. at *15.

III. Implications of the *Douglas/Graham* Preclusion Doctrine on Mass Tort Litigation Defense Strategy

It is arguable that interests of expediency compelled the Florida state and federal courts to abrogate the "actually decided" requirement of preclusion law. More than 9,000 plaintiffs had clogged the Florida courts with *Engle* progeny cases, setting up a protracted period of individual trials. It is reasonable to assume that the Florida Supreme Court and the Eleventh Circuit were aware that should each *Engle* progeny plaintiff be required to prove that the defendants engaged in tortious conduct *relevant to their individual smoking histories,* each trial would be significantly longer than if the Phase I *Engle* "common issues" findings would suffice to establish liability. Something had to give, and the tobacco defendants' due process rights were sacrificed on the altar of expediency.

It would be a mistake for defense counsel to conclude that the *Douglas/Graham* courts' evisceration of the defendants' due process rights was a one-off ruling suited to the unique circumstances of the tobacco litigation. In many ways, the tobacco litigation is no different than class action and MDL litigation against pharmaceutical, chemical and medical device companies, to name just three popular targets. Counsel defending such clients can now see from *Engle* that generalized findings on issues such as design defect, failure to warn, concealment, and corporate conduct could be highly problematic. In contrast, counsel for the tobacco defendants could not have anticipated when trying *Engle* Phase I that the jury's findings would make it nearly impossible for their clients to contest specific causation in the progeny cases that would follow. Yet that is the hand their clients ultimately were dealt.

This raises the question: What can we, as defense lawyers engaged in representing defendants in similarly unpopular industries, do to ensure that our clients are not subject to serial deprivation of their due process rights?

First, we must appreciate the long term potential consequences of trying to reduce case inventories in class and multi-district (MDL) litigation with "common issues" trials, or by bifurcating issues such as general and specific causation. We must not forget to fully account for and think through the ramifications of losing on such issues. What impact might that have? A "teaching moment" of *Engle* is that defense counsel should start considering what their clients will be left with if rulings on broad issues, such as general causation and corporate conduct, do not go well.

Counsel also should consider very carefully whether the results of test cases in MDL bellwether proceedings will be given binding effect in later litigation. Even if the bellwether court does not formally make bellwether results binding, non-bellwether plaintiffs might seek to

give preclusive effect to an issue resolved against the defendant in a bellwether trial. *See, generally*, "Bellwether Trials: A Defense Perspective, Mayer Brown Legal Update, April 15, 2016.[5] As amply demonstrated by *Engle*, the use of so-called "offensive non-mutual issue preclusion" can be fundamentally unfair. The doctrine of issue preclusion can only be used against someone (like the defendant) who was a party to the original judgment, but not against others (such as the non-bellwether plaintiffs). "Issue preclusion therefore can present a heads-I-win, tails-you-lose bet against the defendant." *Id*. at 4. To guard against the threat of unfair issue preclusion or application of res judicata, counsel representing mass tort defendants should consider seeking stipulations from plaintiffs that any issues resolved in the bellwether trials will not be treated as preclusive. Alternatively, counsel should seek an early determination that the results of bellwether trials will not be used in a preclusive manner against any party. *Id.*

To be sure, the Florida tobacco litigation implicates careful consideration of requests to try general issues, including general causation, design defect, adequacy of the warning, and corporate conduct. As in *Engle*, your client might find itself unable to litigate case specific causation once there is a finding of general causation, e.g., that a drug, chemical or medical device can cause a disease. The same admonition would apply when seeking bifurcation or trifurcation of one or more issues. Finally, punitive damages and company conduct are particularly frightening issues to hand to a jury for generalized consideration, because your client may never know what aspect of its conduct the jury found should be punished.

[5] Available at www.mayerbrown.com/bellwether-trials-a-defense-perspective-04-19-2016/.