Engle, State Farm, Florida Law, and Punitive Damages: Was the $145 Billion Punitive Award Truly Excessive

Harold C. Reeder

Copyright ©2006 by the authors.  Nova Law Review is produced by The Berkeley Electronic Press (bepress). https://nsuworks.nova.edu/nlr
ENGLE, STATE FARM, FLORIDA LAW, AND PUNITIVE DAMAGES: WAS THE $145 BILLION PUNITIVE AWARD TRULY EXCESSIVE?

HAROLD C. REEDER

I. STATE FARM AND ITS AFTERMATH .......................................................... 59
II. ENGLE IV AND THE THIRD DISTRICT .................................................. 69
III. FLORIDA’S HIGHEST COURT IN ENGLE ........................................ 75
IV. STATE FARM’S APPLICABILITY TO ENGLE ........................................ 80
   A. The First Guide Post ................................................................. 82
      1. Most Reprehensibility Factors Appear Present ................. 83
      2. Other Courts Found Most Reprehensibility ................. 84
      3. State Farm Deficiencies Not Present .................... 84
   B. The Second Guide Post ........................................................... 85
      1. Engle Involved Mass Tort Class ................................. 86
      2. This Was Engle’s Trial Plan .................................... 87
      3. Florida’s Lawsuit Against Big Tobacco ................... 89
      4. Third District’s Prior Broin Case ......................... 91
      5. Possible Solution to “Overkill” Problem? ............ 93
      6. Jenkins Shows No Federal Infirmitiy ..................... 95
      7. Class Reps Were Awarded Compensatories .......... 96
      8. State Farm’s Impact Seems Questionable .......... 96
      9. Individualized Entitlement to Punitive Damages? .... 97
     10. Individualized Proof of Punitive Damages? ......... 99
     12. Calculation Could Have Been Deferred .............. 102
   C. The Third Guide Post ............................................................. 103
      1. Punitive Awards in Individual Cases ................. 104
      2. Possible Civil and Criminal Sanctions .......... 108

* Harold C. Reeder received his B.S. from Florida State University and his J.D. from Cleveland-Marshall College of Law, Cleveland State University. He is a member of both the Ohio and Florida Bars. Mr. Reeder practices law in Cleveland, Ohio and has an interest in selected public interest law issues such as tobacco. He is author of *The ‘Law of Tobacco’ Is a Major Contributing Factor That Hampers Effective Resolution to the Country’s Tobacco Problem*, 6 FLA. COASTAL L. REV. 17 (2004), and Lindsey v. Tacoma-Pierce County Health Department: Cipollone Revisited, Billboards, State Law Tort Damages Actions, Federal Preemption and the Federal Cigarette Labeling and Advertising Act, 24 SEATTLE U. L. REV. 763 (2001), and several other articles on tobacco. Mr. Reeder wishes to acknowledge the invaluable support and encouragement of his wife, Linda L. Bickerstaff, Esq., his greatest inspiration.
In 2000, a Florida jury awarded a history-making $145 billion in punitive damages against the tobacco industry in a class action suit brought on behalf of Florida smokers. The judgment, however, was reversed in its entirety, including the class certification, three years later by Florida's Third District Court of Appeal in Liggett Group, Inc. v. Engle (Engle IV). This year, the Supreme Court of Florida upheld the Third District's reversal of the $145 billion punitive damages award although it rejected much of the Third District's decision in that case.

While Engle IV presented a number of intriguing issues, one is especially noteworthy because of the United States Supreme Court's ruling in State Farm Mutual Auto Insurance Co. v. Campbell (State Farm I) that was made the month before the Third District rendered its decision. In State Farm I, which ironically involved a $145 million punitive award, the Court reiterated its previous position that excessive punitive damage awards can run afoul of the United States Constitution and provided further guidance for courts to determine when this occurs. In State Farm I, the Court did the latter by elaborating more on the appropriate ratio between any award of punitive damages and that of the compensatory damages.

After the United States Supreme Court rendered its decision in State Farm I, it was unclear how that case would affect Engle IV since there had been no total award of compensatory damages to the class to which the $145 billion punitive award could be compared. However, for both the Third District and the Supreme Court of Florida, that fact alone rendered the punitive

3. Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856, slip op. at 2 (Fla. July 6, 2006). Please note that at the time this article was going to print that this opinion by the Supreme Court of Florida was not final due to a rehearing motion which had been filed but not determined.
5. Id. at 417–19.
6. Id. at 424–28.
The two courts further held that the punitive award was unconstitutionally excessive as a matter of law. 8

Whether the punitive award in Engle IV was violative of State Farm I and/or unconstitutionally excessive under either federal or Florida law warrants examination.

I. STATE FARM AND ITS AFTERMATH

The State Farm I case arose out of an automobile accident that occurred in Utah. 9 A state jury in Utah found Curtis Campbell liable for causing a multi-car accident in which one driver died and another was left permanently disabled, awarding damages against him of more than $185,000. 10 Thereafter, Campbell and his wife sued their insurance company—which allegedly had refused to settle and insisted on going to trial—for "bad faith, fraud, and intentional infliction of emotional distress." 11 Another Utah jury then "awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages." 12

After the verdict against the insurance company, the trial court reduced the compensatory award to $1 million and the punitive award to $25 million. 13 The Supreme Court of Utah, however, reinstated the full $145 million punitive award after both parties appealed. 14 The insurance company then appealed to the United States Supreme Court which reversed the judgment of the Supreme Court of Utah and remanded the case back to that court "for further proceedings not inconsistent with [its] opinion." 15

The United States Supreme Court's opinion in State Farm I would begin by announcing that the issue in that case concerned "the measure[ment] of punishment, by means of punitive damages [that] a State may impose upon a defendant in a civil case." 16 The Court noted that while

---

7. Engle IV, 853 So. 2d at 451; Engle VI, No. SC03-1856, slip op. at 3.
8. Engle IV, 853 So. 2d at 458; Engle VI, No. SC03-1856, slip op. at 3.
10. Id. at 413.
11. Id. at 414.
12. Id. at 415.
13. Id.
15. Id. at 429.
16. Id. at 412. Punitive or exemplary damages are damages which may be awarded to the plaintiff over and above compensatory damages, where the wrong done to [plaintiff] was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other
"[c]ompensatory damages 'are [only] intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct,' . . . punitive damages serve a broader function [than compensatory damages as] they are aimed at deterrence and retribution."17 Further, "[w]hile States possess discretion over the imposition of punitive damages," the Court acknowledged, "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."18 The Court explained that "[t]o the extent [a punitive] award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."19

In evaluating whether a punitive award was excessive, the Court in *State Farm I* noted that it had previously instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.20

The Court stated that the first guide post was "'[t]he most important indicium of the reasonableness of a punitive damages award.'"21 According to the Court:

[Courts should] determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated

---

17. State Farm I, 538 U.S. at 416 (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001)).
18. Id. (citing Cooper Indus., Inc., 532 U.S. at 433).
20. Id. at 418 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).
21. Id. at 419 (quoting Gore, 517 U.S. at 575).
actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.\(^2\)

With respect to the second guide post, the Court noted that it had “been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award.”\(^2\) While the Court would “decline again to impose a bright-line ratio which a punitive damages award [could not] exceed,”\(^2\) the Court would make the following observations:

\[\text{Few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In Pacific Mutual Life Insurance Co. v. Haslip,} \text{ in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4 to 1 ratio again in BMW of North America Inc. v. Gore.} \]

The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.\(^2\)

The Court stated that “ratios greater than those [it had] previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’”\(^2\) The Court, however, stated that “[t]he converse [was] also true . . . [meaning that] [w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process

\(22\). State Farm I, 538 U.S. at 419 (citing Gore, 517 U.S. at 576–77). The Court further stated that “[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” Id.

\(23\). Id. at 424 (citing Gore, 517 U.S. at 582).

\(24\). Id. at 425.


\(26\). 517 U.S. at 559.

\(27\). State Farm I, 538 U.S. at 425 (citations omitted).

\(28\). Id. (quoting Gore, 517 U.S. at 582).
guarantee." The Court further emphasized that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."

In reference to the third guide post, "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases,'" the Court noted that it had "also looked to criminal penalties that [might] be imposed [on the defendant]." The Court interjected, however, that "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."

Applying the State Farm I guide posts, the Court found that the case was "neither close nor difficult," and that "[i]t was error [for the Supreme Court of Utah] to reinstate the jury’s $145 million punitive damages award." While the Court did not disagree that the insurance company had engaged in reprehensible conduct—and that an award of punitive damages was proper—the Court clearly disagreed with the degree of reprehensibility and declared that "a more modest punishment" was warranted. The problem as described by the Court was that the case "was used as a platform to expose, and punish, the perceived deficiencies of [the insurance company’s] operations throughout the country," and this resulted in punitive damages being awarded "to punish and deter conduct that bore no relation to the Campbells’ harm." The Court also stated that there was "no doubt that there is a presumption [of unconstitutionality] against an award that has a 145 to 1 ratio." The Court noted that the $1 million compensatory award in the case "for a year and a half of emotional distress" was "substantial," and appeared to "already contain [a] punitive element [in it]."

29. Id.
30. Id. at 427 (citing Gore, 517 U.S. at 585).
31. Id. at 428 (quoting Gore, 517 U.S. at 575).
32. State Farm I, 538 U.S. at 428 (citing Gore, 517 U.S. at 583; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991)). The Court explained that "[t]he existence of a criminal penalty [has a] bearing on the seriousness with which a State views the wrongful action." Id.
33. Id. The Court emphasized that "[p]unitive damages are not a substitute for the criminal process," and "[g]reat care must be taken to avoid the use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed." Id.
34. Id. at 418.
35. State Farm I, 538 U.S. at 418.
36. Id. at 419.
37. Id. at 420.
38. Id. at 422.
39. Id. at 426.
40. State Farm I, 538 U.S. at 426.
... an amount dwarfed by the $145 million punitive damages award.\textsuperscript{41} The Court termed the Supreme Court of Utah’s discussion “about the loss of [the insurance company’s] business license, the disgorgement of profits, and possible imprisonment” as “speculat[ion],” and stated that this was an “insufficient [basis] to justify the award.\textsuperscript{42}

After the Court struck down the $145 million punitive damages award, the Supreme Court of Utah—in a second review—lowered the punitive damages to $9 million.\textsuperscript{43} The Court then declined the opportunity to further review the case despite the defendant’s claim that the 9 to 1 ratio was still too high.\textsuperscript{44}

Immediately after State Farm I was rendered, there was some doubt as to its applicability since it was a case involving economic injury, and not personal injury or products liability.\textsuperscript{45} That doubt would not last long; within a month of the decision, the Court vacated a number of other punitive damage awards in state cases and remanded the cases back to the state courts for reconsideration in light of the principles set forth in State Farm.\textsuperscript{46}

One such case involved a plaintiff in an Oregon state court, who was seriously injured by a drug and sued the drug manufacturer as well as the doctor who prescribed it.\textsuperscript{47} The doctor made a cross-claim against the drug manufacturer for negligence and fraud, alleging that the manufacturer “failed to provide adequate information concerning [the drug]."\textsuperscript{48} The jury returned verdicts in favor of both the plaintiff and the doctor against the drug manufacturer, awarding the plaintiff more than $5 million in compensatory damages plus $35 million in punitive damages and the doctor $500,000 in comp-

\textsuperscript{41} Id. at 428 (citation omitted).

\textsuperscript{42} Id. The Court again reiterated that the Supreme Court of Utah’s “references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct.” Id.


\textsuperscript{45} See Paul J. Martinek, $145 Million Punitive Award Unconstitutional, LAW. WKLY. U.S.A., Apr. 14, 2003, at 1. “Because State Farm [I] did not involve a personal injury, [one defense lawyer] suspec[ed] that some courts might argue that the rationale doesn’t apply to product liability cases and other suits involving physical harm.” Id. at 27 (quoting Andrew Frey).

\textsuperscript{46} See Bocci v. Key Pharms., Inc. (Bocci IV), 76 P.3d 669, 672 (Or. Ct. App. 2003); see generally Romo v. Ford Motor Co. (Romo I), 122 Cal. Rptr. 2d 139 (Ct. App. 2002); Sand Hill Energy, Inc. v. Ford Motor Co. (Sand Hill I), 83 S.W.3d 483 (Ky. 2002).

\textsuperscript{47} See Bocci IV, 76 P.3d at 671.

\textsuperscript{48} Id.
compensatory damages plus $22.5 million in punitive damages.\(^{49}\) After the drug manufacturer appealed, the company settled with the plaintiff, but continued to challenge the punitive damages awarded to the doctor.\(^{50}\) On appeal, the manufacturer claimed that "an award of $22.5 million in punitive damages [was] excessive in relation to the $500,000 that the jury awarded [the doctor] for compensatory damages."\(^{51}\) After two reviews by an Oregon intermediate appellate court, the $22.5 million punitive damages award was upheld in its entirety.\(^{52}\) The United States Supreme Court, however, vacated and remanded the case based on *State Farm* and the state appellate court was required to review the issue for a third time.\(^{53}\) On the third review, the state appellate court required the doctor to accept a punitive damages award of $3.5 million, a 7 to 1 ratio of punitive to compensatory damages, or face a new trial.\(^{54}\)

Two other state cases where the United States Supreme Court vacated the punitive damages award and ordered that they be reconsidered in light of *State Farm* involved the automaker Ford Motor Company.\(^{55}\) In one case, a California jury awarded $290 million in punitive damages against the automaker in a sport-utility vehicle rollover accident that killed three individu-

---

49. *Id.*

50. *Id.* at 672.

51. *Id.*

52. *See* Bocci v. Key Pharms., Inc. (*Bocci II*), 22 P.3d 758 (Or. 2001); Bocci v. Key Pharms., Inc. (*Bocci I*), 974 P.2d 758 (Or. Ct. App. 1999). In the first appeal, an equally divided appeals court affirmed the judgment in favor of the doctor. *See* Bocci *I*, 974 P.2d at 774 (en banc). The Supreme Court of Oregon, however, vacated the decision and remanded the case for reconsideration in light of its findings in *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 483–84 (Or. 2001), where it had stated that a punitive award is "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution where it is not within the range that a rational juror could award. *Bocci II*, 22 P.3d at 759. After remand, the appeals court considered *Parrott* as well as *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), in its second review and again affirmed the punitive award. *See* Bocci v. Key Pharms., Inc. (*Bocci III*), 35 P.3d 1106, 1108, 1111 (Or. Ct. App. 2001). According to the appellate court, the drug manufacturer had only "argued that the total punitive damage award of $57 million in favor of [the plaintiff] and [the doctor] was excessive . . . ." *Id.* at 1108. While the ratio of punitive to compensatory damages would be 45 to 1 if the damages were viewed separately and apart from the damages to the plaintiff, when they are considered collectively, the ratio of the punitive damages award to the compensatory damages award would only be approximately 10 to 1. *See id.* at 1111 n.3; *Bocci IV*, 76 P.3d at 675. The appellate court "concluded that, evaluated in their entirety, the punitive damages were not excessive" and the Supreme Court of Oregon would later decline further review. *See* Bocci *IV*, 76 P.3d at 672 (citing *Bocci III*, 35 P.3d at 1111).


54. *Bocci IV*, 76 P.3d at 676.

als.\(^56\) In the other, the Supreme Court of Kentucky found that the automaker should pay $15 million in punitive damages to the family of a miner killed when a Ford pickup truck slipped into reverse and crushed him, although the jury had actually awarded $20 million in such damages.\(^57\) While the punitive damages award in the California case exceeded the single-digit ratio of punitive to compensatory damages,\(^58\) the United States Supreme Court discarded the already reduced punitive award in the Kentucky case\(^59\) even though there was only a 5 to 1 ratio in that case.\(^60\) After the California case was remanded, the state appellate court 'conditionally affirm[ed] the punitive damages portion of the judgment . . . conditioned upon plaintiffs' acceptance of reduction of the punitive damages portion of the judgment [from $290 million] to $23,723,287,'\(^61\) resulting in a reduction of almost 92%. After its case was returned, the Supreme Court of Kentucky vacated the punitive damages award and remanded the case back to the trial court "for a new determination of the amount of punitive damages."\(^62\)

The United States Supreme Court's actions shortly after \textit{State Farm} quickly made clear that its guidelines on punitive damages were applicable to both personal injury and product liability cases.\(^63\) They also demonstrated that the Supreme Court had placed itself in a position to monitor punitive

\(^{56}\) Romo v. Ford Motor Co. (\textit{Romo I}), 122 Cal. Rptr. 2d 139, 146 (Ct. App. 2002).

\(^{57}\) Sand Hill Energy, Inc. v. Ford Motor Co. (\textit{Sand Hill I}), 83 S.W.3d 483, 496 (Ky. 2002).

\(^{58}\) \textit{Romo I}, 122 Cal. Rptr. 2d at 146. While the jury in the California case found that the plaintiffs' total compensatory damages were $6,226,793.00, it also found that one of the plaintiffs had been 10% at fault. \textit{Id.} Consequently, the trial court reduced the compensatory award to $4,935,709.10. \textit{Id.} Depending upon which of these figures ($6,226,793.00 or $4,935,709.10) is used to calculate the ratio, it is either 47 to 1 or 59 to 1. \textit{Id.}

\(^{59}\) \textit{Sand Hill II}, 538 U.S. at 1028.

\(^{60}\) \textit{Sand Hill I}, 83 S.W.3d at 497. There was a $3 million compensatory award in that case. \textit{Id.}

\(^{61}\) Romo v. Ford Motor Co. (\textit{Romo III}), 6 Cal. Rptr. 3d 793, 797 (Ct. App. 2003). If the plaintiffs declined such acceptance, the punitive damages judgment would be reversed and a new trial would be had on the issue. \textit{Id.} at 813.

\(^{62}\) Sand Hill Energy, Inc. v. Smith (\textit{Sand Hill III}), 142 S.W.3d 153, 168 (Ky. 2004). Although the Supreme Court of Kentucky had rejected the automaker's challenge to the jury instructions as they related to punitive damages in its earlier opinion, it now found that those instructions had been insufficient "in light of \textit{State Farm}." \textit{Id.} at 155–56 (quoting Ford Motor Co. v. Estate of Smith (\textit{Sand Hill II}), 538 U.S. at 1028). According to the court, \textit{State Farm} necessitated instructions that "set[] forth the purpose of punitive damages and provide[d] a safeguard from extraterritorial punishment" and that the trial court's jury instructions had failed to do the latter. \textit{Id.} at 166.

damages whether they are awarded in federal or state court. Further, as the Kentucky case demonstrates, the Court appears willing to exercise this jurisdiction even where the punitive award does not exceed a single-digit ratio of punitives to compensatories.

Shortly after State Farm, some predicted that the tobacco industry would become a big beneficiary of the Court’s punitive damages ruling. Engle is not the only example in which this is true. In Henley v. Philip Morris Inc (Henley I), a California jury awarded $1.5 million in compensatory damages and $50 million in punitive damages to a smoker who developed lung cancer. The trial judge, however, ordered a new trial on the issue of punitive damages, unless the smoker consented to a reduction of such damages to $25 million. The “[smoker] consented to the reduction.” The cigarette manufacturer, against whom the award had been rendered, appealed claiming that the $25 million punitive award was still unconstitutionally excessive. Initially, the California Court of Appeals for the First District upheld the damage award but the Supreme Court of California ordered its reconsideration in light of State Farm. On remand, the court of appeals found that while the cigarette manufacturer’s conduct in that case “supports a substantial award . . . and warrants some-
thing approaching the maximum punishment consistent with constitutional principles," the $25 million in punitives could not be sustained in light of the relatively small $1.5 million compensatory. Consequently, the court of appeals reduced the punitive award to $9 million, a sum it found "permissible and appropriate on [the] record" explaining as follows:

In light of [State Farm] we do not believe the 17 to 1 ratio reflected in the present judgment can withstand scrutiny. As we read that case, a double-digit ratio will be justified rarely, and perhaps never in a case where the plaintiff has recovered an ample award of compensatory damages. Indeed, where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is "close to the line." Nonetheless we believe a higher ratio (6 to 1) is justified here by the extraordinarily reprehensible conduct of which plaintiff was a direct victim.... [This smoker's] injuries were not merely economic, but physical, and nothing done by [the cigarette manufacturer] mitigated or ameliorated them in any respect.

Despite the fact that the jury's original $50 million punitive award had been reduced by more than four-fifths to $9 million, the cigarette manufacturer later sought further review from the Supreme Court of California, as well as the United States Supreme Court; both declined to disturb the award.

In another tobacco case, Williams v. Philip Morris Inc. (Williams III), an Oregon state court jury awarded the family of a smoker, who died of lung cancer, $821,485.80 in compensatory damages and $79.5 million in punitive damages. The trial judge thereafter reduced the compensatory damages to

75. Id. at 70. The California Court of Appeals explained its rationale as follows: The record reflects that defendant touted to children what it knew to be a cumulatively toxic substance, while doing everything it could to prevent them and other addicts and prospective addicts from appreciating the true nature and effects of that product. The result of this conduct was that millions of youngsters, including [this smoker], were persuaded to participate in a habit that was likely to, and did, bring many of them to early illness and death.

Id.

76. See id. at 72.

77. See Henley II, 9 Cal. Rptr. 3d at 69.

78. Id. at 73 (citation omitted).

79. See Philip Morris Inc. v. Henley (Henley IV), 544 U.S. 920 (2005); Henley v. Philip Morris USA (Henley III), 97 P.3d 814 (Cal. 2004); Henley v. Philip Morris Inc. (Henley II), 9 Cal. Rptr. 3d 29, 38 (Ct. App. 2004).


81. Id. at 130.
$521,485.80 and the punitive damages award to $32 million.\textsuperscript{82} The state appeals court, however, reinstated the full $79.5 million punitive damages award.\textsuperscript{83} The United States Supreme Court vacated the judgment of the state appellate court and returned the case back to the appeals court to reconsider in light of the \textit{State Farm} ruling.\textsuperscript{84} Despite the United States Supreme Court’s admonition and its subsequent consideration of \textit{State Farm},\textsuperscript{85} the appeals court reinstated the total $79.5 million punitive award, specifically finding that the second guide post was met despite an acknowledgement that the punitive award amounted to “a 96 to 1 ratio between the compensatory and punitive damages.”\textsuperscript{86} In making this determination, the court relied on two United States Supreme Court decisions decided prior to \textit{State Farm}, which had indicated that it is appropriate to consider the potential harm, as well as the actual harm caused by the defendant’s conduct.\textsuperscript{87} The appeals court concluded that while the jury found actual harm to the smoker of $821,485.80 in damages, “[the cigarette manufacturer] inflicted potential harm on the members of the public in Oregon.”\textsuperscript{88} The Supreme Court of Oregon, which had earlier declined to accept jurisdiction in this case, allowed review this time.\textsuperscript{89} While it disagreed with the intermediate appellate court regarding the second guide post and specifically stated that it was not met, Oregon’s highest court, nevertheless, affirmed the appellate court’s decision upholding the award in its entirety because it was supported by the other two guide posts.\textsuperscript{90} The United States Supreme Court granted the \textit{Williams} cigarette manufacturer’s petition for certiorari, and whether that punitive award will survive the nation’s high court’s third intervention remains to be seen.\textsuperscript{91}

\textsuperscript{82.} \textit{Id.}

\textsuperscript{83.} \textit{Id.} The family of the smoker apparently only appealed the reduction of the punitive damage award. \textit{Williams v. Philip Morris Inc. (Williams I)}, 48 P.3d 824, 829 (Or. Ct. App. 2002). The decision by the Oregon appeals court was said to “mark[] the first time a jury’s award of punitive damages against a tobacco company [had] been upheld in its entirety.” Milo Geyelin, \textit{Court Reinstates Tobacco Ruling}, \textit{WALL ST. J.}, June 6, 2002, at A3.

\textsuperscript{84.} Philip Morris USA Inc. v. Williams (\textit{Williams II}), 540 U.S. 801, 801 (2003).

\textsuperscript{85.} \textit{Id.} The Oregon appellate court would perform a complete analysis based on the \textit{Gore} guide posts as refined by \textit{State Farm}. See \textit{Williams III}, 92 P.3d at 142–46.

\textsuperscript{86.} \textit{Williams III}, 92 P.3d at 144.

\textsuperscript{87.} \textit{Id.}

\textsuperscript{88.} \textit{Id.; see BMW of N. Am., Inc. v. Gore}, 517 U.S. 559, 568 (1996); \textit{see also TXO Prod. Corp. v. Alliance Res. Corp.}, 509 U.S. 443, 460 (1993). The court further stated that even if the punitive award was deemed to exceed a single digit ratio, the “unique facts in [that] case” would justify it. \textit{Williams III}, 92 P.3d at 145.

\textsuperscript{89.} Williams v. Philip Morris Inc. (\textit{Williams IV}), 104 P.3d 601, 601 (Or. 2004).

\textsuperscript{90.} Williams v. Philip Morris Inc. (\textit{Williams I}), 127 P.3d 1165, 1181–82 (Or. 2006).

\textsuperscript{91.} Petition for a Writ of Certiorari at 1, Philip Morris USA v. Williams, No. 05-1256 (Or. Mar. 30, 2006).
II. **Engle IV and the Third District**

*Engle* was a class action lawsuit brought on behalf of a “class of smokers and their survivors” seeking damages for alleged smoking related injuries. The defendants included the “major domestic cigarette companies and two industry organizations” (hereinafter “tobacco defendants”). The six named plaintiffs were individuals who were smokers. “All six [named plaintiffs] alleged [that] they were unable to stop smoking because they were addicted to nicotine and, as a result, developed medical problems ranging from cancer and heart disease to colds and sore throats.”

The six named plaintiffs brought the class action for personal injuries against the tobacco defendants seeking damages for injuries caused by smoking. In their complaint, they asserted claims of “strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotion distress.” “They sought over $100 billion in compensatory damages” as well as over “$100 billion in punitive damages” on behalf of themselves and their class. The trial court initially certified a class of smokers and their survivors “as a nationwide class action.” On appeal, however, the Third District Court of Appeal “reduced the class to include Florida smokers only.” After the case was remanded, the trial court issued its trial plan with respect to the case.

---

93. *Id.* The companies were: Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co. and Lorillard Inc. (collectively, “Lorillard”), and Liggett Group Inc. and Brooke Group Holding Inc. (collectively, “Liggett”). *Id.* at 441 n.1. The two industry organizations were the Council for Tobacco Research-U.S.A., Inc. and the Tobacco Institute, Inc. *Id.*
94. *Id.* at 440.
95. *Engle IV*, 853 So. 2d at 440.
96. *Id.*
97. *Id.* at 441.
98. *Id.*
99. *Id.* The class was defined by the trial court as follows: “All United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.” *Engle IV*, 853 So. 2d at 441.
100. *Id.* (citing R.J. Reynolds Tobacco Co. v. Engle (*Engle I*), 672 So. 2d 39, 42 (Fla. 3d Dist. Ct. App. 1996)).
101. *Id.* The trial court issued the trial plan and “refused the [tobacco] defendants’ request to decertify the class,” after which the tobacco “defendants sought review of both orders before the Third District,” but their appeal was dismissed. Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 *Wake Forest L. Rev.* 871, 873 (2001) (discussing R.J. Reynolds Tobacco Co. v. Engle (*Engle II*), 711 So. 2d 553 (Fla. 3d Dist. Ct. App. 1998)).
The trial plan provided for the trial proceedings to be divided into three phases:\textsuperscript{102}

Phase 1 consisted of a year-long trial on liability and entitlement to punitive damages [with] the jury considering common issues relating exclusively to defendants' conduct and the general health effects of smoking. At the conclusion of Phase 1, the jury rendered a verdict for the class on all counts. In Phase 2, the jury determined that the three [named plaintiffs] were entitled to compensatory damages . . . totaling . . . $12.7 million.\textsuperscript{103}

The jury also determined in Phase 2 that the entire class was entitled to punitive damages totaling $145 billion.\textsuperscript{104} In Phase 3, a new jury was supposed to decide the "individual liability and compensatory damages claims for each class member" after which, "[t]he trial court [was to] then divide the $145 billion punitive award equally among the successful class members."\textsuperscript{105} However, Phase 3 was interrupted because the tobacco defendants appealed after the verdicts in Phase 2.\textsuperscript{106}

In the appeal after the Phase 2 verdicts, the Third District reversed the entire judgment as well as the trial court order certifying the class.\textsuperscript{107} Although the appellate court had previously approved the class certification,\textsuperscript{108}

\textsuperscript{102.} Engle \textit{IV}, 853 So. 2d at 441–42. 
\textsuperscript{103.} Id. at 441. 
\textsuperscript{104.} Id. 
\textsuperscript{105.} Id. at 442. After the punitive damages verdict was rendered, but before entry of judgment, the tobacco defendants temporarily removed the case to federal court. Engle v. R.J. Reynolds Tobacco Co. (\textit{Engle III}), 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000). The removal occurred after a health care plan—Southeastern Iron Workers Health Care Plan—filed a "Motion to Intervene seeking permission to assert subrogation claims under Florida law on behalf of itself and similarly situated funds and insurers for reimbursement from damages recovered by any beneficiary or insured who is a member of the Engle class." \textit{Id.} The tobacco defendants thereafter removed the case on the basis that these subrogation claims implicated the Federal Employment Retirement Income Security Act, otherwise known as ERISA. \textit{Id.} The district court would remand the case finding "that a nonparty's mere motion to intervene cannot furnish a basis for removal." \textit{Id.} at 1363. 
\textsuperscript{106.} Engle \textit{IV}, 853 So. 2d. at 442. After the verdicts in Phase 2, the tobacco defendants filed several post-verdict motions; however, the trial court, in an Omnibus Order, denied the motions, except in minor respects, and upheld the verdicts. \textit{Id.} at 441–42. Further, in the Omnibus Order the trial court would order "immediate payment to the individual plaintiffs," as well as direct the tobacco "defendants to immediately pay the $145 billion in punitive damages into the court registry for the benefit of the entire class." \textit{Id.} at 442. The defendants then appealed the Omnibus Order. \textit{Id.} 
\textsuperscript{107.} Id. at 470. 
\textsuperscript{108.} Engle \textit{IV}, 853 So. 2d at 441. As noted, the Third District had modified the class from a nationwide class to include Florida smokers only. \textit{Id.}
the court found that the class was improperly certified stating "that the plaintiff's smokers' claims are uniquely individualized and cannot satisfy the 'predominance' and 'superiority' requirements imposed by Florida's class action rules." The Third District made a number of other rulings against the plaintiffs in reference to the damage award, as well as with respect to other aspects of the case:

• The court held that the punitive damage award was barred by the tobacco settlement between the cigarette makers and the states under the doctrine of res judicata.

• Additionally, the court held that the trial court erred "by instructing the jury not to consider the "tobacco settlement between the cigarette manufacturers and the states, as well as the specific agreement between the State of Florida and the cigarette makers "with regard to the issue of punishment and deterrence."

109. Id. at 444 (citing Barnes v. Am. Tobacco Co., 161 F.3d 127, 149 (3d Cir. 1998)). The court emphasized that Rule 1.220(d)(1) of the Florida Rules of Civil Procedure permits class certification orders to be "altered or amended at any time before entry of a judgment." Id. at 442. The court noted that since "[c]lass-certification orders necessarily precede substantial development of the issues and facts . . . a court is required to reassess its class rulings as the case develops." Id. Additionally, the Third District would note that "since [its] affirmation of certification in 1996, virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper." Engle IV, 853 So. 2d at 443-44 (citations omitted). According to the court, "Phase 2 of the trial conclusively established that individualized issues of liability, affirmative defenses, and damages, outweighed any 'common issues' in this case, and that class representation [was] not superior." Id. at 445. Specifically, the court stated that Phase 2 showed that "each claimant will have to prove that his or her illness not only was caused by smoking, but was also proximately caused by defendants' alleged misconduct." Id. at 446. The court also stated that this is "evidenced by the fact that affirmative defenses and damages must be litigated individually." Id. at 447. The court further pointed to individualized choice-of-law problems. Id. at 447-49.

110. Engle IV, 853 So. 2d at 467-68. The court would explain its rationale as follows:

The claims for punitive damages in the Florida v. American Tobacco Co. case and in this action are based on the same . . . alleged misconduct and the same public interest. The plaintiffs, as private parties, do not have a "right" to punitive damages; punitive damages are awarded solely as a matter of public rights or interests, in order to serve the public policy of punishment and deterrence. Accordingly, as a matter of law, Florida's settlement and release, and the res judicata effect of the resulting final judgment, preclude the plaintiffs' punitive damage claims here. Id. at 468 (citations omitted).

111. Id. The Third District stated that the tobacco settlement "clearly qualifies as evidence relevant to punishment and deterrence" and that "[t]he defendants were entitled to have the jury consider the [tobacco settlements] as potential mitigating factors in determining the need for further punishment and deterrence, especially with regard to claims for the same alleged misconduct." Id. at 469. The court found that "[t]he trial court erred in providing the jury with an instruction that removed a disputed issue from the jury's consideration." Id. at 470. According to the court, "[t]his error effectively precluded the defendants from presenting
Also, the court found that neither the punitive award nor the compensatory damage award, as it related to one of the tobacco defendants, was supported by the evidence and, according to the court, was "[p]roof of a 'runaway jury.'"\textsuperscript{111}

The court found that "[p]laintiffs’ counsel [made] improper race-based appeals [to the jury] for nullification [that] caused irreparable prejudice and require[d] reversal" because such conduct "incited" the "predominantly African-American jury" "to disregard the law because the defendants [were] tobacco companies."\textsuperscript{113}

Moreover, the court referenced other purported misconduct by plaintiffs’ counsel, saying that "plaintiffs’ counsel repeatedly made legally improper arguments to the jury regarding the payment of any [punitive] award,"\textsuperscript{114} "referred to matters outside the evidence,\textsuperscript{115} made derogatory personal remarks about opposing counsel,\textsuperscript{116} and expressed his personal opinion to the jury about the case,\textsuperscript{117} as well as to some of the defense witnesses.\textsuperscript{118}

\begin{itemize}
\item Crucial mitigation evidence in the form of the [tobacco settlements] to support the argument that they had already received heavy financial obligations and binding deterrent measures for precisely the same conduct.\textsuperscript{112} Engle IV, 853 So. 2d at 470. For the court, "[t]he resulting prejudice [was] clearly evidenced by the astronomically excessive punitive damages award."\textsuperscript{112} Id.
\item The court would explain that while "[t]he Phase 1 verdict found all defendants liable . . . in the first part of Phase 2, the jury allocated zero fault to [this one tobacco defendant] with respect to the non-punitive counts."\textsuperscript{113} Id. The tobacco defendant, however, would be "held jointly and severally liable for 100% of the compensatory damages award to each of the three named plaintiffs."\textsuperscript{113} Id. Additionally, the tobacco defendant had to pay $790 million dollars in punitive damages. Engle IV, 853 So. 2d at 467 n.47. Apparently, none of the three named plaintiffs in Phase 2 had ever used this tobacco defendant’s cigarettes, which explains the allocation of zero fault to it in Phase 2. Id. at 467. For the appellate court, this meant that the jury found the tobacco defendant liable because of "[m]ere participation in the tobacco industry."\textsuperscript{113} Id.
\item Id. at 458–59, 461.
\item Id. at 463. The court indicated that "plaintiffs [sic] counsel repeatedly . . . urg[ed] the jury to assume [that] any award would be payable in installments over decades into the future," thereby, "ensur[ing] there would be no realistic check on the jury entering a bankrupting award." Engle IV, 853 So. 2d at 463–64.
\item Id. at 464. Apparently, one example is plaintiffs’ counsel telling "the jury the defendants’ CEO witnesses lied to him under oath during their depositions."\textsuperscript{115} Id. at 465.
\item Id. at 464. The court claimed that "[p]laintiffs’ counsel maligned a defense attorney by name, calling the attorney’s argument to the jury a fraud.”\textsuperscript{116} Id.
\item Engle IV, 853 So. 2d at 464. The court complained that plaintiffs’ counsel “expressed his personal opinions about the merits of the case stating the defendants’ position made him grit his teeth and say to himself: ‘Can anyone buy this?’”\textsuperscript{117} Id. Plaintiffs’ counsel also purportedly stated that the “defendants had engaged in the ‘longest running con in the history of the world,’ and [that] ‘our kids and grandchildren’ will ask ‘how did you let them get away with it?’”\textsuperscript{117} Id. at 465.
\end{itemize}
The court would indicate, in a footnote, that “none of the three plaintiffs presented a proper claim within the class action [during Phase 2].” 119

In addition to the above, the Third District would further hold that the $145 billion punitive damage award was unconstitutionally “excessive as a matter of law” 120 and that, in fact, the award had been improper because it “precluded the constitutionally required comparison of punitive damages and compensatory damages.” 121

The Third District would specifically state that the $145 billion punitive award was excessive under both Florida and federal law. 122 The court would cite to Florida law for the proposition “that punitive damages may not be assessed in an amount which will financially destroy or bankrupt a defendant.” 123 The court emphasized that “[the [cigarette makers] established that their combined net worth was no more than $8.3 billion” and that “[the] $145 billion verdict [was] roughly 18 times . . . [that] net worth.” 124 The court also

118. Id. at 464–65. According to the court:

Plaintiffs’ counsel . . . repeatedly expressed his personal opinions about the defendants’ witnesses, making such comments as: “I wanted to punch” one witness; that another witness “wouldn’t know science if he fell on science;” that he was sure another witness “was ashamed to give this answer, but he gave it . . . under oath;” and that as to another witness, “I figured, well, this guy hasn’t been prepped on the subject [by counsel], so maybe I’ll get an honest answer.”

Id.

119. Engle IV, 853 So. 2d at 453–54 n.23. The appellate court would state that all of the claims of one of the plaintiffs were barred by the statute of limitations. See id. at 454 n.23. The trial court had found that while the statute barred most of this plaintiff’s claims, his fraud claim and its derivative conspiracy claim were not so barred as there was “an exception to the statute of limitations bar in the case of continuing fraud.” Id. The Third District rejected the trial court’s position finding that the case relied on by it did not support such an outcome. Id. With respect to the other two plaintiffs in Phase 2, the appellate court would state that “judgment should have been entered in favor of the defendants as to [them] . . . because their claims did not accrue until years after the cut-off date for class membership.” Id. The appellate court would explain as follows: “By its terms, the class definition includes only those smokers who developed a disease by October 31, 1994. Since [one] was diagnosed in April 1996, and [the other] was diagnosed in February 1997, they [were] clearly excluded from the class . . . .”

Engle IV, 853 So. 2d at 454 n.23.

120. Id. at 458.

121. Id. at 450.

122. Id. at 456.

123. Id. (citing Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982); Lipsig v. Ramlawi, 760 So. 2d 170, 188 (Fla. 3d Dist. Ct. App. 2000); Brooks v. Rios, 707 So. 2d 374, 375 (Fla. 3d Dist. Ct. App. 1998); Hockensmith v. Waxler, 524 So. 2d 714, 715 (Fla. 2d Dist. Ct. App. 1988)). According to the court, it was “acknowledged by even the plaintiffs’ purported experts [in Engle] that the $145 billion punitive award will extract all value from the defendants and put them out of business.” Engle IV, 853 So. 2d at 456.

124. Id. at 456–57.
emphasized that "[t]here [was] no precedential authority for such an award" and that "[n]o Florida decision endorses even a remotely comparable award," as "[t]he largest reported [Florida] awards involved only a fraction of a defendant's net worth." The court would cite to federal law for the proposition that "[f]ederal due process also prohibits 'excessive' punitive awards." Specifically citing State Farm, the Third District would exclaim that "[t]his unprecedented punitive damages award is excessive as a matter of law and, thus, does not promote a valid societal interest." The court would even suggest that since "[p]unitive damages are imposed to benefit society's interests," the $145 billion award would "frustrate the societal interest in protecting all injured claimants' rights to at least recover compensatory damages for their smoking related injuries" since "[s]mokers with viable compensable claims will have no remedy if the bankrupting punitive award . . . [were] upheld." The Third District would also state that the punitive damages award in Engle IV put the ""[c]art before the horse"" where it was made ""without the necessary [prerequisite] finding[] of liability and compensatory damages." While the appellate court would acknowledge that determinations of liability were made in Phase 2, it would apparently find them insufficient to justify the class-wide punitive award, since they related to only three individuals. According to the court, "[t]he defendants [were] entitled to a jury determination, on an individualized basis, as to whether and to what extent each particular class member is entitled to receive punitive damages."
Evidently, any class-wide punitive award rendered—where there was no prior determination of liability and compensatory damages, with respect to the entire class—would be improper for the appeals court.\textsuperscript{132}

III. FLORIDA'S HIGHER COURT IN \textit{ENGLE}

After the Third District would deny a motion to certify the case to the Supreme Court of Florida, as an issue of great public interest, an attorney, in the law firm that had represented the tobacco defendants in the appeal, would be quoted as saying that “[w]e are confident that there is no basis for a claim of conflict,”\textsuperscript{133} which reportedly was the only other route for the plaintiffs in \textit{Engle} to obtain review by the Supreme Court of Florida.\textsuperscript{134} The Supreme Court of Florida, however, would grant the plaintiffs' petition for review,\textsuperscript{135} and two years later issue its opinion.\textsuperscript{136}

In a per curiam opinion, the Supreme Court of Florida would indicate that it granted jurisdiction in \textit{Engle VI}, because the Third District “misapplied” its decision in \textit{Young v. Miami Beach Improvement Co.}\textsuperscript{137} The Court would thereafter reject much of the decision by the Third District, but “approve... [its] reversal of the $145 billion class action punitive damages award.”\textsuperscript{138}

The Supreme Court of Florida held “that the Third District erred in nullifying its previous affirmance of the trial court's certification order,”\textsuperscript{139} al-

\begin{thebibliography}{99}
\bibitem{132} See \textit{id.} at 456 (“The trial plan in the instant case required the defendants to pay punitive damages for supposed injuries to thousands of class members without the necessary prerequisite findings of liability and compensatory damages.”).
\bibitem{133} Laurie Cunningham, \textit{Appeals Court Refuses to Rehear 'Engle' Tobacco Suit}, \textit{DAILY BUS. REV.}, Sept. 24, 2003.
\bibitem{134} For a very comprehensive discussion of the jurisdiction of the Supreme Court of Florida, see generally Harry Lee Anstead, et al., \textit{The Operation and Jurisdiction of the Supreme Court of Florida}, 29 NOVA L. Rev. 431 (2005).
\bibitem{135} \textit{Engle v. Liggett Group, Inc. (Engle IV)}, 873 So. 2d 1222 (Fla. 2004).
\bibitem{136} \textit{Engle v. Liggett Group, Inc. (Engle VI)}, No. SC03-1856 (Fla. July 6, 2006).
\bibitem{137} 46 So. 2d 26 (Fla. 1950) (en banc). \textit{See Engle VI}, No. SC03-1856, slip op. at 1 (referring to \textit{Young}, 46 So. 2d 26). The Third District had relied on \textit{Young} for its ruling that the punitive damages claim was barred by the Florida Tobacco Settlement. \textit{See \textit{Engle IV}}, 853 So. 2d at 468. The Third District would explain the holding in \textit{Young} as follows:

\begin{quote}
[T]he [Supreme Court of Florida] held that a judgment in a suit involving a municipal corporation which resolved “a matter of general interest to all its citizens” was binding even though they were not parties to the suit. The court reasoned that each citizen “is a real, although not a nominal, party to such judgment, and [could not] relitigate any of the questions which were litigated in the original action.” Thus, once a governmental agency resolves a matter of public rights or interests, the same matter cannot thereafter be relitigated by private parties.
\end{quote}

\textit{Id.} (citation omitted).
\bibitem{138} \textit{See Engle VI}, No. SC03-1856, slip op. at 2.
\bibitem{139} \textit{Id.} at 28.
\end{thebibliography}
though it “agree[d] with the Third District that problems with the three-phase trial plan negate the continued viability of th[e] class action.” The Supreme Court of Florida found that Florida Rule of Civil Procedure 1.220(d)(1) did not authorize the Third District to simply change its position and reverse its previous ruling, which upheld the trial certification order, and determined that “under the doctrine of law of the case, the Third District would have been justified in reversing its previous ruling . . . only if it concluded that the prior ruling would have resulted in a clear manifest injustice.” For the Supreme Court of Florida, "no circumstances existed that justified the subsequent . . . reconsideration of the prior Third District decision approving class certification." The Court, however, found “that continued class action treatment for Phase III of the trial plan [was] not feasible because individualized issues such as legal causation, comparative fault, and damages predominate.” Although the Court noted that there were “no Florida cases address[ing] whether it [was] appropriate under [Florida Rule of Civil Procedure] 1.220(d)(4)(A) to certify class treatment for only limited liability issues,” it relied on “several decisions by federal appellate courts applying a similar provision in the Federal Rules of Civil Procedure" as “persuasive authority” for it to do so in Engle VI. The end result was that the Court “decertif[ied] the class, [but] retain[ed] the jury’s Phase I findings, other than those on the fraud and intentional infliction of emotion[al] distress claims, which [it stated] involved highly individualized determinations, and

140. Id. at 32.
141. Id. at 28. According to the Court, the rule only “provide[d] an avenue for reexamining [sic] certification if subsequent discovery shows that circumstances have changed.” Id.
142. Engle VI, No. SC03-1856, slip op. at 29 (citing Fla. Dep’t of Transp. v. Juliano, 801 So. 2d 101, 106 (Fla. 2001)).
143. Id. at 30. In fact, the Court found that the Third District’s opinion on this issue was “flawed” in two respects. Id. One, the Court found that the Third District “ignored the trial court’s pretrial ruling that only Florida law would apply when [the Third District] stated that the ‘choice-of-law analysis in [Engle VI] would require examination of numerous significantly different state laws governing the different plaintiffs’ claims.’” Id. (quoting Liggett Group Inc. v. Engle (Engle IV), 853 So. 2d 434, 449 (Fla. 3d Dist. Ct. App. 2003), app’d in part, quashed in part, rem’d, No. SC03-1856 (Fla. July 6, 2006)). Two, the Supreme Court of Florida stated that “none of the cases from other jurisdictions cited by the Third District... to justify decertification was in the procedural posture of [Engle VI].” Id.
144. Engle VI, No. SC03-1856, slip op. at 32.
145. Id. at 33. The Court noted this rule provides that “[w]hen appropriate... a claim or defense may be brought or maintained on behalf of a class concerning particular issues.” Id. at 32–33 (quoting Fla. R. Civ. P. 1.220(d)(4)(A)).
146. Id. at 33. This was Rule 23(c)(4)(A) of the Federal Rules of Civil Procedure that states “[w]hen appropriate... an action may be brought or maintained as a class action with respect to particular issues.” Fed. R. Civ. P. 23(c)(4)(A).
147. Engle VI, No. SC03-1856, slip op. at 33.
the finding on entitlement to punitive damages question, which [it found to have been] premature.”

The Supreme Court of Florida also held that “reversal [was] not warranted based on the remarks made by the Engle Class’s Counsel,” finding that “under the totality of the circumstances” such comments did not rise to the level of reversible error. Moreover, the Court found that:

a review of the verdicts reveals that each verdict reflected a careful and differentiated analysis as to comparative fault and individual damages and in no way justifie[d] the Third District’s overall conclusion that this was a runaway jury inflamed by race because of the arguments directed to the four of the six members of the jury who were African-American.

148.Id. at 36. The jury findings were as follows:

(1) that cigarettes cause some of the diseases at issue; (2) that nicotine is addictive; (3) that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) that the defendants made a false or misleading statement of material fact with the intention of misleading smokers; (4)(a) that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both; (5) that all of the defendants agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes with the intention that smokers and the public would rely on this information to their detriment; (5)(a) that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment; (6) that all of the defendants sold or supplied cigarettes that were defective; (7) that all of the defendants sold or supplied cigarettes that at the time of the sale or supply did not conform to representations of fact made by the defendants; (8) that all of the defendants were negligent; (9) that all of the defendants engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress; and (10) that all of the defendants’ conduct rose to a level that would permit an award of punitive damages.

Id. at 8 n.4. The court would specifically state that findings 1, 2, 3, 4a, 5, 5a, 6 and 8 could stand and that findings 4 and 9 could not. Id. at 4.

149. Id. at 39. The Court noted that Engle’s “counsel ventured very close to the line of reversible error on a number of occasions in his attempt to counteract opposing counsel’s contentsions that Tobacco acted lawfully and to communicate his message to the jury that ‘legal doesn’t make it right.’” Engle VI, No. SC03-1856, slip op. at 39. The Court, however, found that the context in which the statements were made was “crucial” in evaluating them and emphasized that they had been spread out over a two-year period. Id. at 41. Further, the Court found that some of the comments that supposedly were improper pleas for jury nullification “were not an attempt to tell the jury to ignore the law” but simply “made in response to Tobacco’s preemption defense: that the warnings on the cigarettes were as provided by law” and Tobacco’s position during the trial that cigarettes were a legal product. Id. at 45.

150. Id. at 46. The Court did state that:

[t]here was absolutely no justification for [a] series of remarks [by Engle's counsel], which appear[ed] to compare the tobacco industry with slavery and, [finding that his references to]
Although the Supreme Court of Florida "agree[d] that the [Third District] properly held that all judgments in favor of [one of the three class representatives] were barred by the applicable statute of limitations," it disagreed with the Third District on the issue of whether the other two class representatives were properly included within the class as certified by the trial court. Consequently, it "quash[ed] the [Third District's] reversal of judgment entered in favor of [those two] class representatives . . . [and] order[ed] that the judgments be reinstated."152

The Supreme Court of Florida agreed with the Third District that the judgments against the one tobacco defendant had to be reversed because this defendant "did not manufacture or sell any of the products that allegedly caused injury to the individual plaintiff representatives."153 In contrast to the Third District, however, the Supreme Court appeared not to view this as "proof of a 'runaway jury'"154 but simply an "inconsistency in the verdict."155

The Supreme Court of Florida held "that the Third District erred in applying the doctrine of res judicata to bar the Engle Class's punitive damages claim."156 Specifically, the court explained that

[s]ince the State [of Florida] had no right to pursue [the] type[] of private interests [involved in Engle] on behalf of its citizens, the punitive damages claims settled by the State in the [Florida Settlement Agreement between Florida and the tobacco companies], if any, were distinct from the punitive damages sought by the Engle Class.157

civil rights leaders Rosa Parks and Martin Luther King, appealed to the jury's sense of outrage for the injustices visited upon African-Americans in this country.

Id. at 44.  
151. Engle VI, No. SC03-1856, slip op. at 50–51. The Third District found that the cutoff date for membership to the class was October 31, 1994 when the trial court originally certified the class. However, the Supreme Court of Florida concluded that the proper date was November 21, 1996 when the trial court recertified the class to include only Florida smokers, pursuant to the Third District's direction. Id. at 53.

152. Id. at 50.

153. Id. at 51 (quoting Liggett Group, Inc. v. Engle (Engle IV), 853 So. 2d 434, 466 n.46 (Fla. Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006)).

154. Engle IV, 853 So. 2d at 466.

155. Engle VI, No. SC03-1856, slip op. at 51.

156. Id. at 19.

157. Id. at 17. The Supreme Court of Florida would not address the issue of whether the trial court had erred by instructing the jury not to consider either the Florida Settlement Agreement or the Master Settlement Agreement (between the states and tobacco companies) with regard to the punitive damages issue as the Third District had found. Id. at 3.
Despite its ruling that the Florida Tobacco Settlement did not preclude such award, the Supreme Court of Florida would find three other reasons to discard the $145 billion punitive damages award.\footnote{158. See id. at 2.}

First, the court would hold “that the trial court erred in allowing the jury to consider entitlement to punitive damages during the Phase I trial.”\footnote{159. Engle VI, No. SC03-1856, slip op. at 19–20.} The court acknowledged that “an award of compensatory damages [was] not a prerequisite to a finding of entitlement to punitive damages”\footnote{160. Id. at 70.} since the two types of damages serve different purposes.\footnote{161. Id. at 20. The Supreme Court of Florida would rely on the following language from the United States Supreme Court in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., to explain the differences:}

> The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct. The latter, which have been described as “quasi-criminal,” operate as “private fines” intended to punish the defendant and to deter future wrongdoing. A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

\footnote{Id. (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 432 (2001)).}

> Id. (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 432 (2001)).

\footnote{162. Id. at 21.}

\footnote{163. 538 So. 2d 454 (Fla. 1989).}

\footnote{164. Engle VI, No. SC03-1856, slip op. at 21.}

\footnote{165. Id. at 23.}

\footnote{166. Id.}

Second, the Supreme Court of Florida ruled that “[e]ven if it were not error to determine entitlement to punitive damages in Phase I, it was clear error to allow the jury to go beyond mere entitlement and award class-wide punitive damages when total compensatory damages had not been determined.”\footnote{166. Id.} In so ruling, the court acknowledged that it was deviating somewhat from Florida law, explaining as follows: In the past, we have not discussed whether punitive damages awards must bear some reasonable relation to compensatory damages. For example in Arab Termite & Pest Control of Florida,
Inc. v. Jenkins,"^{167} we stated that punitive damages "are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff." However, we now hold, consistent with United States Supreme Court decisions after Ault that recognize due process limits on punitive damages, that a review of the punitive damages award includes an evaluation of the punitive and compensatory amounts awarded to ensure a reasonable relationship between the two.\(^{168}\)

Third, the court found "[t]he amount awarded [was] also clearly excessive because it would bankrupt some of the defendants."\(^{169}\) In this regard, the court appears to rely on Florida law, not federal law in reaching this conclusion.\(^{170}\) As the court would explain:

> We [\(\ldots\)] conclude that the punitive damages award was clearly excessive under the limitation based on ability to pay established by our precedent because it [was] "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." A comparison of the amounts awarded and the financial worth assigned to each company by the Engle Class's expert clearly demonstrate[d] that the award would result in an unlawful crippling of the defendant companies.\(^{171}\)

**IV. **STATE FARM'S APPLICABILITY TO ENGLE

As described herein, State Farm has, in a short time frame, had quite an impact on state court judgments awarding punitive damages, including the record one in Engle. This is even more remarkable considering that the United States Supreme Court's entry into this area has a relatively short history. Prior to 1996, the United States Supreme Court had never invalidated a state court's punitive damages award as unreasonably large.\(^{172}\) This was true despite the Court having several opportunities.\(^{173}\)

---

167. 409 So. 2d 1039 (Fla. 1982).
168. *Engle VI*, No. SC03-1856, slip op. at 24 (citations omitted).
169. *Id.* at 19.
170. *See id.*
171. *Id.* at 27 n.8 (citations omitted) (emphasis added).
173. *See id.*
The Court held that a punitive award was unconstitutionally excessive for the first time in *BMW of North America, Inc. v. Gore*.\(^{174}\) In *Gore*, the Court refused to sustain a $2 million punitive damages award in an Alabama state case where there was only $4,000 in compensatory damages.\(^{175}\)

It was in *Gore* where the United States Supreme Court first articulated the three guideposts to identify unconstitutionally excessive punitive damage awards.\(^{176}\) The Court also "illuminate[d] 'the character of the standard [to] identify [such] unconstitutionally excessive awards’ of punitive damages’\(^{177}\) explaining as follows:

Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case . . . . Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.\(^{178}\)

Although it was prior to *State Farm*, at least one federal circuit has opined that "[the] guidepost [sic] should neither be treated as an analytical straitjacket nor deployed in the expectation that they will 'draw a bright line marking the limits of a constitutionally acceptable punitive damages award,' [as o]ther pertinent factors may from time to time enter into the equation.”\(^{179}\)

---

174. 517 U.S. 559, 584–86 (1996). In *Gore*, the purchaser of an automobile brought an action against the distributor based on its failure to disclose that the automobile had been repainted after being damaged. *Id.* at 563–64.

175. *Id.* at 578, 582. The jury had actually assessed $4 million in punitive damages but the Supreme Court of Alabama would reduce it to $2 million because it “found that the jury improperly computed the amount of punitive damages by multiplying [plaintiff’s] compensatory damages by the number of similar [acts] in other jurisdictions,” not just Alabama. *Id.* at 567.

176. See *id.* at 574–85.


178. *Id.* (citations omitted).

The fact that Engle was a class action certainly should have been a relevant consideration in determining whether the punitive award was impermissibly excessive. However, not one of the cases cited by either the Third District or the Supreme Court of Florida involved punitive damages in the context of a class action, and those courts seem to largely ignore that distinction. Moreover, since Engle was a mass tort action involving personal injuries, that fact, too, should have entered into any equation in reviewing that punitive award relative to the Gore guide posts. As one legal scholar would observe around the time the Engle verdict was rendered, "virtually no mass tort case... had been tried to a jury."

The Third District would not engage in any analysis of the punitive award utilizing the Supreme Court's guide posts, but simply cited to State Farm for the proposition that the punitive award was excessive as a matter of law. The Supreme Court of Florida would also not engage in such analysis, although it would rely on Gore's second guide post for its conclusion that "compensatory damages must be determined" before any award of punitive damages. As noted, State Farm I mandates that a court evaluate a punitive damages award in light of Gore's three guide posts. Applying those guide posts to Engle, it is not at all clear that they would prohibit the imposition of the historic punitive damages awarded in that case.

A. The First Guide Post

The United States Supreme Court in State Farm I repeated its statement in Gore that, "the most important indicium of the reasonableness of a pun-
The punitive damages award is the degree of reprehensibility of the defendant's [mis]conduct." Thereafter, the Court again described the five factors relevant to this guide post. One factor was whether "the harm caused was physical as opposed to economic." A second was whether "the target . . . had [a] financial vulnerability." A third was whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others." A fourth was whether "the conduct involved repeated actions or was an isolated incident." A fifth was whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." There should be little debate about the reprehensibility guide post and the fact that it was met.

1. Most Reprehensibility Factors Appear Present

The Court in *State Farm I* indicated that "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award." However, arguably almost all of the relevant factors are present in *Engle*. The named plaintiffs, and their class in *Engle*, clearly alleged physical, rather than merely economic injury. The conduct of the tobacco defendants in *Engle* could certainly be said to "evince[] an indifference to or a reckless disregard [for] the health [and] safety of others," if they knowingly sold the named plaintiffs, and their class, a dangerous product. The situation in *Engle* definitely was not about an isolated incident. Instead, it dealt with a repeated pattern of conduct on the part of the defendants’ companies—selling cigarettes—that occurred over many years. This is not a situation where the harm caused

---

187. Id. at 419 (quoting *Gore*, 517 U.S. at 575).
188. Id.
189. Id. (citing *Gore*, 517 U.S. at 576).
190. Id. (citing *Gore*, 517 U.S. at 576).
192. Id. (citing *Gore*, 517 U.S. at 576–77).
193. Id. (citing *Gore*, 517 U.S. at 576).
194. Id. The Court also stated that "the absence of all of them renders any award suspect."
196. See *State Farm I*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576); *Engle IV*, 853 So. 2d at 440.
197. Id.
198. See *Engle IV*, 853 So. 2d at 440–41.
199. Id.
200. See id.
could simply be considered a mere accident, and the jury verdict in Engle seems to strongly suggest that the tobacco defendants engaged in deceit.\textsuperscript{201}

2. Other Courts Found Most Reprehensibility

Additionally, the courts that have reviewed the awarding of punitive damages in individual tobacco cases have found the reprehensibility guide post met in those cases.\textsuperscript{202} There appears to be no reason why Engle should be any different.

3. State Farm Deficiencies Not Present

Moreover, the punitive award in Engle does not appear to suffer from the same alleged deficiencies, in reference to the first guide post, as the one in State Farm.\textsuperscript{203} In State Farm, the plaintiffs purportedly “reli\[ed\] upon dissimilar and out-of-state conduct evidence”\textsuperscript{204} that provided “scant evidence of repeated misconduct of the sort that injured them.”\textsuperscript{205} Consequently, according to the United States Supreme Court, this resulted in a punitive damages award “that bore no relation to the [plaintiffs’] harm.”\textsuperscript{206} “In [State Farm], because the [plaintiffs] . . . show\[ed\] no conduct by [the defendant] similar to that which harmed them, the conduct that harmed them

\begin{footnotesize}
\begin{enumerate}
\item See id. at 450. As noted, during Phase 1 of the trial proceedings, the jury would answer questions related to each legal theory alleged, which included claims for fraud and conspiracy to commit fraud. See id. at 441, 450.
\item See Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638, 677 (Ct. App. 2005) (“Utilizing the five factors listed in State Farm, all show a high degree of reprehensibility and weigh in favor of the jury’s conclusion that a substantial punitive award was appropriate in this case.”); Henley v. Philip Morris Inc. (Henley II), 9 Cal. Rptr. 3d 29, 71 (Ct. App. 2004) (“It . . . appears that all five of the subfactors in [State Farm], point to a high degree of reprehensibility.”) (emphasis in original); Williams v. Philip Morris Inc. (Williams III), 92 P.3d 126, 145 (Or. Ct. App. 2004) (“[I]t is difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public than what occurred in this case.”); see also Burton v. R.J. Reynolds Tobacco Co., 205 F. Supp. 2d 1253, 1262 (D. Kan. 2002) (federal district judge “find[ing] that all of [the] factors [relating to reprehensibility] point to a conclusion that [the tobacco manufacturer’s] conduct was highly blameworthy and deserving of significant punishment,” in imposing a punitive damage award of $15 million for an injured individual smoker).
\item See State Farm I, 538 U.S. at 420.
\item Id.
\item Id. at 423.
\item Id. at 422.
\end{enumerate}
\end{footnotesize}
[was] the only conduct relevant to the reprehensibility analysis." While the court in State Farm "[did] not suggest there was error in awarding punitive damages [in that case] based upon [the defendant's] conduct toward the [plaintiffs], a more modest punishment," based solely upon that conduct, was warranted. In Engle, there is absolutely no indication in the opinion of either the Third District Court of Appeal or the Supreme Court of Florida that the plaintiffs in that case improperly used "dissimilar and out-of-state conduct evidence" in securing their punitive damages award. Furthermore, while the United States Supreme Court in State Farm found that the punitive damage award in that case could not "be justified on the grounds that [the defendant] was a recidivist," the same is certainly not true in Engle.

B. The Second Guide Post

Although the Third District Court of Appeal in Engle was not referring to the second guide post—"the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"—in particular, it would stress that it was not possible to calculate the ratio between the punitive and compensatory damages in that case at the time the punitive award was rendered. The Supreme Court of Florida would agree and specifically state that the second guide post was "determinative" in regard to the excessiveness issue. The fact that it might not have been possible to calculate the actual ratio between punitive and compensatory damages in Engle at the

207. Id. at 424.
209. Id. at 420; see Liggett Group, Inc. v. Engle (Engle IV), 853 So. 2d 434, 456–58 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006).
211. See Engle IV, 853 So. 2d at 451–58, 468–69. As the United States Supreme Court explained, "a recidivist may be punished more severely than a first offender [because] . . . repeated misconduct is more reprehensible than an individual instance of malfeasance." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996).
212. State Farm I, 538 U.S. at 418.
213. See Engle IV, 853 So. 2d at 451. As noted, the Supreme Court in State Farm had stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process," and, in fact, "an award of more than four times the . . . compensatory damages might be close to the line of constitutional impropriety." State Farm I, 538 U.S. at 425 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991)).
time the jury returned the $145 billion punitive award may be true. That fact alone, however, hardly seems a sufficient basis to discard such award for a number of reasons.

1. Engle Involved Mass Tort Class

As noted earlier, the fact that Engle was a class action was certainly a relevant factor that needed to be taken into consideration. By definition, "[t]he class action is a representative action in which certain named parties sue or are sued as representatives of a larger group of persons." In most instances, "non-party members of the class need not be brought personally before the [c]ourt." Also noted earlier was the fact that Engle was not just a class action, it was one in the mass tort context. The Supreme Court of Florida case, Ault v. Lohr, which the court in Engle would state requires "a finding of liability . . . before entitlement to punitive damages [could] be determined, and that liability [was] more than a breach of duty," was not a class action. How such liability is to be established in the class suit is unclear. State Farm also was not a class action, and in that case, the United States Supreme Court also did not attempt to suggest how the ratio guide post was to be applied in the context of a class action. The teachings in both Ault and State Farm clearly were designed to apply to the traditional one-on-one mode of litigation and not specifically to class actions. While a class action should not alter the fact that liability must still be found and compensatory damages be determined, the reality that a class action is involved, as well as the nature of the case, cannot be simply ignored either.

215. See Engle IV, 853 So. 2d at 451.
216. See supra note 180 and accompanying text.
219. See Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 NW. U. L. REV. 469, 539 (1994) (federal district court judge maintaining that "in mass tort cases . . . the traditional one-on-one adversarial model of litigation does not apply [and that while] [j]ustice does hold true scales . . . it is not blind, nor should it be.").
220. 538 So. 2d 454 (Fla. 1989).
221. Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856, slip. op. at 21 (Fla. July 6, 2006).
222. See Ault, 538 So. 2d at 455.
224. See id. at 424–25
225. See supra note 219 and accompanying text.
226. See Engle VI, No. SC03-1856, slip. op. at 21.
This, however, seems to be what occurred in *Engle*. If *Ault* requires all of the nonparty members of the class to be brought before the court at one time to establish liability, is this a class action and, further, is this even possible? Similarly, if *State Farm* requires that the amount of compensatory damages for all nonparty members be determined before punitive damages can be awarded to the class as a whole, will this, in reality, foreclose the possibility of punitive damages from ever being awarded in a class action? Obviously, since the Supreme Court of Florida issued the ruling in *Ault*, it was in the best position to explain how its holding in that case was to be applied to the class context. The fact that it did not attempt to do so is most troubling. While the Supreme Court of Florida may not have been in the same position to reconcile *State Farm* as it was with *Ault*, it is important to understand that its conclusion—that the ratio guide post precluded the punitive award—was based not on the fact that it found that the ratio guide post was not met, but simply because the ratio calculation could not be performed at the time the award was rendered. Whether *State Farm* demands such an outcome in any case (not just a class action) seems far from certain but if it does, then this ratio guide post is far and away the most important guide post, despite the repeated pronouncement by the United States Supreme Court in *State Farm* that the first guide post, reprehensibility, is the most important.

2. This Was *Engle*'s Trial Plan

The trial plan in *Engle* specifically was designed to determine the punitive damages before determining the compensatory damages owed to the

---

229. *See supra* note 212–13 and accompanying text.
230. As noted earlier, one federal circuit court has stated that the guide posts are not to “be treated as an analytical straitjacket.” *See supra* note 179 and accompanying text. If the ratios are supposedly not “binding” and only “instructive,” how can the inability to perform the ratio be conclusive that a punitive award must be discarded? *See State Farm I*, 538 U.S. at 425–26. The courts clearly have not totally discarded punitive damages simply because there were no civil or criminal sanctions to which such awards could be compared in accordance with *Gore’s* third guide post. *See Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 683 (Ct. App. 2005) (upholding punitive award despite finding no “convincing analogous civil or criminal penalties that could be imposed for comparable misconduct”); *Williams v. Philip Morris Inc. (Williams III)*, 92 P.3d 126, 145 (Or. Ct. App. 2004) (upholding punitive award despite finding “that [the state of] Oregon [did] not provide civil sanctions for [the] defendant’s conduct and that the criminal statutes that plaintiff [had] mentioned were not truly comparable”).
class as a whole. In the past, trial plans had been approved where punitive damages were determined before compensatory damages. Further, separating out common issues as to all class members for the jury to first determine, as was done during Phase 1 of the trial in Engle, is nothing new. While the Third District would acknowledge that it had approved the class certification, it would emphasize that the trial court had made its trial plan after such approval. Notwithstanding such a disclaimer by the Third District, the trial plan in Engle would seem to have been within the trial court’s inherent power under Florida law to control and manage the process of litigation before it. Florida courts have the “inherent power to do all things that are reasonably necessary for the administration of justice within the scope of [their] jurisdiction, subject to valid existing laws and constitutional provisions.” Moreover, there does not appear to be any Florida authority that existed prior to Engle’s $145 billion punitive award suggesting that punitive


233. See, e.g., Watson v. Shell Oil Co., 979 F.2d 1014, 1018, 1023 (5th Cir. 1992) (holding that trial plan in mass-tort class action was not invalid on the ground that the plan called for the jury to determine punitive damage liability and then to determine compensatory damages for the class members); Spencer Williams, Mass Tort Class Actions: Going, Going, Gone? 98 F.R.D. 323, 332–33 (1983) (federal district court judge recommending trial plan in mass tort case very similar to the one adopted by the trial court in Engle).

234. See, e.g., In re Copley Pharm., Inc., 161 F.R.D. 456, 464 (D. Wyo. 1995); see also Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 184, 186 (4th Cir. 1993) (affirming conditional class certification in an asbestos-related property damage case of a nationwide class to determine common issues relating to the characteristics of the asbestos products at issue, the defendants’ knowledge of asbestos health hazards, and whether the defendants’ conduct justified a punitive damages award).

235. See Engle IV, 853 So. 2d at 441.

236. Rose v. Palm Beach County, 361 So. 2d 135, 137 (Fla. 1978). See also Moossun v. Orlando Reg’l Health Care, 826 So. 2d 945, 954 (Fla. 2002) (Lewis, J., dissenting). As the Supreme Court of Florida has explained: “Inherent power has to do with the incidents of litigation, control of the court’s process and procedure, control of the conduct of its officers and the preservation of order and decorum with reference to its proceedings.” In re Petition of Fla. Bar, 61 So. 2d 646, 647 (Fla. 1952). In addition, the Florida Rules of Civil Procedure, particularly Rules 1.200, 1.220, 1.270, 1.280 and 1.380, contain numerous express grants of authority that supplement a Florida court’s inherent power to manage litigation. Further, the Third District in Engle IV cited to the Manual for Complex Litigation, which serves as an important judicial reference for complex litigation in state and federal court. Engle IV, 853 So. 2d at 455 n.24 (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.27 (1995)). The Manual encourages an active role by the judiciary in developing an effective trial plan as well as recognizes “[t]he need for special judicial management of mass torts.” MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.13, 22.1 (2004).
damages in a multi-stage class action could only be made after all of the compensatory damages were determined. 237

3. Florida’s Lawsuit Against Big Tobacco

Although technically the State of Florida’s lawsuit against the tobacco companies seeking reimbursement for Medicaid expenditures may not have been a class action, the Supreme Court of Florida’s decision in *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 238 related...

---

237. *Engle IV*, 853 So. 2d at 451. The Third District cited to a Florida attorney general opinion stating that “[i]n the absence of any determination of the extent of compensatory damages, the court lacks a standard by which it can judge whether an assessment of punitive damages is reasonable or is ‘grossly excessive.’” *Id.* (quoting 00-21 Fla. Op. Att’y Gen. 76, 78 (2000)). This opinion, however, was not only issued after the *Engle* punitive award was rendered, but in direct response to it. 00-21 Fla. Op. Att’y Gen. 76 (2000). The Florida attorney general, of course, had brought Florida’s lawsuit against the tobacco makers resulting in the Florida Tobacco Settlement. Could that fact have played a role in the position he would take? At least one critic of the States’ settlement with the cigarette makers has opined that it has resulted in the states becoming “full partners with the tobacco industry.” Timothy E. Brooks, Editorial, *Tobacco Settlement: First Step or Misstep? Tobacco Industry Is the Winner*, THE PLAIN DEALER, Dec. 11, 1998, at 17B; see also Editorial, *Addicted to Tobacco*, WALL ST. J., Apr. 4, 2003, at A8. One could argue that this was later illustrated when thirty-seven states and United States territories would sign an amicus brief asking the trial court in an Illinois case to reduce the appeal bond for a cigarette manufacturer who had been found liable for $10.1 billion in a class action. Christina Cheddar Berk, *Altria Backed on Appeal Bond*, WALL ST. J., Apr. 8, 2003, at B4. The cigarette manufacturer had apparently warned that requiring it to post the bond might cause it to seek bankruptcy protection and suspend payments to the state governments under the 1998 tobacco settlement. See Gordon Fairclough & Vanessa O’Connell, *Altria’s CEO Faces a Pack of Problems*, WALL ST. J., Apr. 14, 2003, at B1. The states appear to have been clearly concerned that the manufacturer’s payments to them under the tobacco settlement were at risk. Could the Florida Attorney General have had similar concerns about the *Engle* punitive award’s impact on the Florida Tobacco Settlement?

238. 678 So. 2d 1239 (Fla. 1996). Medicaid is “[a] form of public assistance sponsored jointly by the federal and state governments providing medical aid [including nursing home care] for people whose income falls below a certain level.” BLACK’S LAW DICTIONARY 981 (6th ed. 1990). The intended role of Medicaid is to “be the payor of last resort.” *See, e.g.*, FLA. STAT. § 409.910(1) (2006) (“It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients.”); Shweiri v. Commonwealth, 622 N.E.2d 612, 614 (Mass. 1993) (“[T]he ultimate goal of Medicaid is that the program ‘be the payor of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program.’”). Consequently, Medicaid requires states to take all reasonable measures to ascertain the legal liability of third parties to pay for care or services available under Medicaid and, where legal liability is found, to seek reimbursement for such assistance. *See* 42 U.S.C. § 1396a(a)(25) (1994).
ing to that lawsuit cannot be ignored. Shortly before Florida brought its suit, the Florida Legislature amended Florida’s Medicaid Third-Party Liability Act, making it easier for the State to file and prove any recoupment claims.\textsuperscript{239} Prior to the amendment, Florida was limited to recovering Medicaid expenses using the traditional method of subrogation, meaning that since it would be standing in the shoes of the injured party, it would be subject to any defenses that the defendant would have against the injured party.\textsuperscript{240} The amended legislation created a new cause of action that was independent of any right or claim of a Medicaid recipient.\textsuperscript{241} It was also unusual in that it appeared to allow the State to proceed under any theory of recovery.\textsuperscript{242} The amended legislation also provided the State with certain additional advantages: 1) It allowed the State to bring a lawsuit that is very similar to a class action;\textsuperscript{243} 2) it allowed the State to pursue such action against a third party, or aggregate third parties without identifying each individual member of the class;\textsuperscript{244} 3) it prevented such third parties from asserting defenses such as assumption of risk and comparative fault;\textsuperscript{245} 4) it allowed the State to pursue its claim under both the market share liability theory,\textsuperscript{246} as well as the joint and several liability theory;\textsuperscript{247} 5) it allowed the State to use statistical analysis in proving its case against third parties;\textsuperscript{248} and 6) it allowed the State to sue on claims that had already been extinguished by the passage of time, by abolishing the statute of repose defense in such suits.\textsuperscript{249} The Supreme Court of Florida ruled on a facial challenge to the constitutionality of the Medicaid Third-Party Liability Act in \textit{Agency for Health Care Administration}, and largely upheld the Act.\textsuperscript{250} The court ruled that the State could properly bring an action under the Act’s statutory author-

\textsuperscript{239} See FLA. STAT. § 409.910(6)(a) n.5 (1995).
\textsuperscript{240} See \textit{Agency for Health Care Admin.}, 678 So. 2d at 1244 (discussing the history of the 1994 amendment to the Medicaid Third-Party Liability Act). See also Philip C. Patterson & Jennifer M. Philpott, Note, \textit{In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation}, 66 BROOK. L. REV. 549, 561 (2000).
\textsuperscript{241} See FLA. STAT. § 409.910(6)(a) (1995); \textit{Agency for Health Care Admin.}, 678 So. 2d at 1248, 1250.
\textsuperscript{242} See FLA. STAT. § 409.910(9) (1995). “Common-law theories of recovery shall be liberally construed to accomplish this intent.” \textit{Id}.
\textsuperscript{243} See id. § 409.910(9).
\textsuperscript{244} Id. § 409.910(9)(a).
\textsuperscript{245} See id. § 409.910(1).
\textsuperscript{246} FLA. STAT. § 409.910(9)(b).
\textsuperscript{247} Id. § 409.910(1) (1995).
\textsuperscript{248} Id. § 409.910(9).
\textsuperscript{249} Id. § 409.910(12)(h).
\textsuperscript{250} See Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc., 678 So. 2d 1239, 1256–57 (Fla. 1996).
ity, but that the Act only applied to causes of action that accrued after the effective date of the amendments to the Act.\textsuperscript{251} The court also held that the elimination of affirmative defenses under the Act was not facially unconstitutional as a violation of due process,\textsuperscript{252} since new causes of action do not have to offer defendants all of the usual defenses and there is no absolute prohibition against the elimination of all affirmative defenses.\textsuperscript{253} The court further upheld the joinder of claims in order to promote judicial efficiency,\textsuperscript{254} as well as the use of statistical evidence to prove causation.\textsuperscript{255} The court, however, did find that the provision granting the State authority to pursue an action without identifying individual Medicaid recipients must be stricken as encroaching on due process rights.\textsuperscript{256} In addition, the court modified the State's abolition of the statute of repose such that Florida could not resurrect a claim that was already time barred when the Act was amended.\textsuperscript{257} Furthermore, the court held that the State must use either a theory of market share liability or joint and several liability, but not both.\textsuperscript{258} Clearly, the Supreme Court of Florida would allow the State of Florida a good deal of flexibility in presenting its case against Big Tobacco.\textsuperscript{259}

4. Third District's Prior *Broin* Case

The Third District's prior decision in *Broin v. Philip Morris Co.*,\textsuperscript{260} established the background for what would occur in *Engle*, although it did not involve an award of punitive damages.\textsuperscript{261} In *Broin*, a class action was brought against tobacco companies, and the class was represented by the same plaintiffs' counsel as in *Engle IV*.\textsuperscript{262} The class in *Broin*, however, did not consist of smokers, but of nonsmoking flight attendants that were allegedly injured by secondhand smoke.\textsuperscript{263} After the trial court granted the to-

\begin{itemize}
\item \textsuperscript{251} See id. at 1250.
\item \textsuperscript{252} Id. at 1251.
\item \textsuperscript{253} See id.
\item \textsuperscript{254} See id. at 1255.
\item \textsuperscript{255} See Agency for Health Care Admin., 678 So. 2d. at 1250.
\item \textsuperscript{256} Id. at 1254.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Id. at 1255–56.
\item \textsuperscript{259} See id.
\item \textsuperscript{260} 641 So. 2d 888 (Fla. 3rd Dist. Ct. App. 1994).
\item \textsuperscript{261} See id. at 889.
\item \textsuperscript{262} Compare id. at 889, with Liggett Group Inc. v. Engle (Engle IV), 853 So. 2d 434, 440 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006).
\item \textsuperscript{263} *Broin*, 641 So. 2d at 889.
\end{itemize}
bacco companies' motion to dismiss the class' allegations, the Third District reversed and remanded the case with an order to reinstate them.\textsuperscript{264} In so doing, the Third District found that the case raised common issues as to all class members and listed the following as examples:

(1) How much exposure to secondhand smoke causes disease?

(2) Whether and when the tobacco industry knew that exposure to secondhand smoke caused injury?

(3) Whether studies conducted by the tobacco industry provide information about the dangers of secondhand smoke?

(4) Whether the tobacco industry misrepresented data on secondhand smoking hazards and conspired to distort such information?

(5) Whether the tobacco industry has a duty to warn nonsmokers that exposure to passive cigarette smoke could cause serious health problems?\textsuperscript{265}

The Third District also made certain other key rulings in \textit{Broin}: 1) that "[P]laintiffs' legal claims need not be completely identical;"\textsuperscript{266} 2) that "[d]ifferences among the class members as to applicable statutes of limitations [did] not require dismissal of [the] class action;,"\textsuperscript{267} 3) that even though different choice of law provisions might govern, that did not defeat class certification;\textsuperscript{268} and 4) that "[e]ntitlement to different amounts of damages [was] not fatal to [the] class action."\textsuperscript{269} Upon remand, the trial commenced\textsuperscript{270} and the parties eventually reached a settlement.\textsuperscript{271} The Supreme

\textsuperscript{264.} Id. at 892.
\textsuperscript{265.} Id. at 890. The Third District noted "that the common issues [were] potentially dispositive of the case. If defendants prevail[ed] on [those] issues, the individual claims [would] be rendered moot." \textit{Id.}
\textsuperscript{266.} \textit{Id.}
\textsuperscript{267.} \textit{Broin}, 641 So. 2d at 891.
\textsuperscript{268.} \textit{Id.} at 891 n.2.
\textsuperscript{269.} \textit{Id.} at 891. The court noted that subclasses could be utilized to address many of these items if they presented a problem. \textit{See id.} at 891 n.2.
\textsuperscript{270.} One observer noted that \textit{Broin} "was historic for being the first class action to reach trial against the tobacco industry." Brian H. Barr, Note, Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers, 28 FlA. St. U. L. Rev. 787, 805 (2001).
\textsuperscript{271.} Ramos v. Philip Morris Cos., Inc., 743 So. 2d 24, 27 (Fla. 3d. Dist. Ct. App. 1999). Under the settlement agreement the tobacco makers agreed, \textit{inter alia}, to "support Federal legislation that would impose a smoking ban on all international flights . . . and establish a
Court of Florida’s criticism of the Third District’s change in position regarding class certification seems even more justified in light of Broin.\textsuperscript{272}

5. Possible Solution to “Overkill” Problem?

The Supreme Court of Florida has specifically rejected the argument that punitive damages should be barred in mass tort cases to prevent “overkill,” which presumably would result from “multiple punitive damage awards against a single defendant for the same course of conduct.”\textsuperscript{273} It seems that there is not any reason to take a different position with respect to an award of punitive damages in a class action. In fact, many have endorsed class actions as a solution to the problems resulting from multiple punitive damages awards.\textsuperscript{274} Some have even gone further and suggested use of a $300 million settlement fund to endow a foundation to sponsor scientific research for early detection and cure of diseases of flight attendants caused by cigarette smoke.” \textit{Id.} The individual class members would not be entitled to any monies under the terms of the settlement agreement, but would “retain the right to bring individual claims for compensatory damages [and not punitive damages which were waived] on any theory of liability other than fraud, misrepresentation, or any other willful or intentional conduct.” \textit{Id.}

\textsuperscript{272.} See Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856, slip op. at 31 (Fla. July 6, 2006). “Invalidating the completed class action proceedings on manageability and superiority grounds after a trial has occurred does not accord with common sense or logic.” \textit{Id.}

\textsuperscript{273.} W.R. Grace & Co. v. Waters, 638 So. 2d 502, 504 (Fla. 1994). The term “overkill” was first used by the Second Circuit in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). According to one California appellate court, “every appellate court in the nation to consider the argument that punitive damages should be barred in mass tort cases to prevent ‘overkill’ has rejected the idea.” Stevens v. Owens-Corning Fiberglas Corp., 57 Cal. Rptr. 2d 525, 541–42 (Ct. App. 1996). Moreover, the Supreme Court of Kentucky observed “the [United States] Supreme Court has been afforded numerous opportunities to address the issue [of duplicative punitive damages in the context of a mass tort] and, to date, has declined to do so.” Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 413 (Ky. 1998). It would be noted that in addition to “overkill”, the term “windfall” describes another problem with adjudicating punitive damage awards in individual suits. Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 59 (1979) (Blackman, J., concurring). It refers to the arbitrariness of such awards, since juries are usually accorded “broad discretion both as to the imposition and amount of such damages.” \textit{Id.} at 50. It also refers to the situation in which giving punitive awards to early plaintiffs will risk the possibility that later plaintiffs will not be able to obtain compensatory damages from that same defendant. \textit{See} Dunn v. HOVIC, 1 F.3d 1371, 1394–95 (3d Cir. 1993) (Weis, J., dissenting) (noting that the dispensing of punitive damages has resulted in the “increased . . . likelihood that future claimants will not be able to recover for their injuries”).

\textsuperscript{274.} Both the American Bar Association and the American Law Institute have endorsed class action lawsuits as the best solution to the multiple punitive damages problem. \textit{See} 2 AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL
“mandatory class action” on the issue of punitive damages in mass tort cases. 275

275. See In re Exxon Valdez (Exxon Valdez I), 229 F. 3d 790, 795–96 (9th Cir. 2000). According to the Ninth Circuit, “[m]andatory class actions avoid the unfairness that results when a few plaintiffs—who win the race to the courthouse—bankrupt a defendant early in the litigation process. They also avoid the possible unfairness of punishing a defendant over and over again for the same tortious conduct.” Id.; see also Elizabeth J. Cabraser & Thomas M. Sobol, Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims, 74 Tul. L. Rev. 2005, 2031 (2000) (“The certification of a mandatory class with respect to punitive damages claims [will] insure[] defendants that the ultimate award . . . will . . . be proportional to the course of conduct at issue . . . [and that it] will be distributed equitably among the affected class.”); Jerry J. Phillips, Multiple Punitive Damage Awards, 39 Vill. L. Rev. 433, 446 (1994) (“[O]nly . . . the mandatory class action, provides a vehicle with which to control multiple punitive damage awards.”); Briggs L. Tobin, Comment, The “Limited Generosity” Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts, 38 Emory L.J. 457, 465 (1989).

A class action approach to the adjudication of mass-tort punitive damage claims both preserves the benefits underlying the doctrine of punitive damages and solves the problems caused by individual adjudication of these claims . . . [but] the class must be a
6. Jenkins Shows No Federal Infirmitry

The trial court plan in Engle does not appear to suffer from any type of constitutional infirmity under federal law as well. Although Jenkins v. Raymark Industries, Inc. was decided prior to State Farm, the Fifth Circuit rejected the argument that under either federal or Texas law, punitive damages could not be determined separately from actual damages in a class action. The case involved a class of plaintiffs with asbestos-related claims who brought an action against thirteen different defendants. The Federal Appeals Court refused to accept the defendants' argument that the culpability of their conduct needed to be evaluated relative to each plaintiff, explaining as follows:

The purpose of punitive damages is not to compensate the victim but to create a deterrence to the defendant, and to protect the public interest. The focus is on the defendant's conduct, rather than on the plaintiff's. While no plaintiff may receive an award of punitive damages without proving that he suffered actual damages, the allocation need not be made concurrently with an evaluation of the defendant's conduct. The relative timing of these assessments is not critical.
7. Class Reps Were Awarded Compensatories

Prior to State Farm, federal law also did not appear to prohibit an award of punitive damages in a class action where representative class members were awarded compensatory damages with such punitive damages. The Sixth Circuit made its position clear in Sterling v. Velsicol Chemical Corp.\(^{281}\) that, "[a trial] court need not defer its award of punitive damages prior to determining compensatory damages for the entire class . . . [s]o long as the court determines the defendant's liability and awards representative class members compensatory damages."\(^{282}\) If so, was there a problem in Engle where representative class members were awarded compensatory damages along with the award of punitive damages?

8. State Farm's Impact Seems Questionable

To suggest that State Farm prohibits a class claim for punitive damages seems most questionable. As noted, State Farm was not a class action nor did the United States Supreme Court even attempt to address how its teachings were to be applied in that context. Further, at least one court has already rejected the argument that State Farm precludes a class claim for punitive damages.\(^{283}\) In Dukes v. Wal-Mart Stores, Inc.,\(^{284}\) the federal district court rejected such contention explaining as follows:

[Defendant] also argues that [p]laintiffs' class claim for punitive damages is foreclosed by the Supreme Court's recent decision in State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003). Nothing in State Farm, however, supports this supposition. In State Farm the Court held that a punitive damage award in an individual action improperly punished the defendant for conduct that "bore no relation to the [plaintiff's] harm." Id. at 422, 123 S.Ct. 1513. Specifically, it found that the jury improperly considered conduct by [the defen-
that occurred in other states and did not directly affect the plaintiff. Id. at 422–23, 123 S.Ct. 1513. As such, it underscored the basic proposition that a “defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” Id. at 423, 123 S.Ct. 1513. Such a principle is not, as [defendant] suggests, incompatible with the recovery of punitive damages in a class action.

First, courts can ensure that any award of punitive damages to the class is based solely on evidence of conduct that was directed toward the class. Second, as [p]laintiffs propose here, courts can limit recovery of any punitive damages to those class members who actually recover an award of [damages], and thus can demonstrate that they were in fact personally harmed by the defendant’s conduct. Finally, courts also can ensure that any punitive damage award is allocated among the . . . class in reasonable proportion to individual [damages] awards. Accordingly, this Court is satisfied that procedures exist that permit [p]laintiffs’ punitive damage claim to be managed in a manner fully consistent with the principles of State Farm.

9. Individualized Entitlement to Punitive Damages?

In Engle IV, the Third District’s pronouncement that “[t]he defendants [were] entitled to a jury determination, on an individualized basis, as to whether and to what extent each particular class member [was] entitled to receive punitive damages” is most questionable. Although the Supreme Court of Florida would not specifically state this, some undoubtedly will say that its action in discarding the punitive award suggests as such. This might
be a legitimate argument if referring to compensatory damages. However, does it apply to punitive damages? As the Fifth Circuit in *Jenkins* had stated, punitive damages are not meant to compensate the victim; they are designed to vindicate the public interest. Awarding punitive damages to private citizens is justified as a necessary incentive to accomplish the goals of punishing a defendant who has engaged in outrageous conduct, and deterring that defendant—as well as others—from engaging in such misconduct in the future. The fact that courts have recognized the legitimacy of certifying a class solely for punitive—and not compensatory—damages is

287. See Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319–21 (5th Cir. 1998) (rejecting district court’s trial plan as inconsistent with state law because it did not entail an individual inquiry into each member’s actual damages).

288. Again, wouldn’t this defeat one of the primary benefits of bringing a class action, if the Third District is correct and individual determinations were required? See Maenner v. St. Paul Fire & Marine Ins. Co., 127 F.R.D. 488, 491 (W.D. Mich. 1989) (“Defendants’ proposal . . . that all issues of liability and damages be tried together . . . would effectively defeat the class-action treatment of this case.”).

289. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir. 1986). This is true under Florida law as well since the “[award of] punitive damages is for the public benefit or collective good . . . [and] will reflect not the wrong done to any single individual but the wrongfulness of the conduct as a whole.” Cohen v. Office Depot, Inc., 184 F.3d 1292, 1295 (11th Cir. 1999) (citing Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986)); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1358–59 (11th Cir. 1996)); see also Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982). Punitive damages are to be determined “entirely aside from the measure of compensation for the injured plaintiff.” *Id.*

290. See State Farm Mut. Auto. Ins. Co. v. Campbell (*State Farm 1*), 538 U.S. 408, 416 (2003). “Compensatory damages are ‘intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct’ while “punitive damages serve a broader function . . . aimed at deterrence and retribution.” *Id.* (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001)). Punitive damages “are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); *Engle IV*, 853 So. 2d at 468 (“The plaintiffs, as private parties, do not have a ‘right’ to punitive damages; punitive damages are awarded solely as a matter of public rights or interests, in order to serve the public policy of punishment and deterrence.”).


https://nsuworks.nova.edu/nlr/vol31/iss1/4
clearly reflective of the fact that such individual determinations are not considered to be required with respect to them. \(^{292}\)

10. Individualized Proof of Punitive Damages?

Tenth, it is also clear that courts have approved various methods of determining compensatory damages on the basis of class-wide, as opposed to individualized, proof of damages. \(^{293}\) In so doing, the courts rejected the determinations where plaintiffs claimed to have suffered damages as a result of exposure to herbicides manufactured by the defendant).

\(^{292}\) As one legal scholar would observe shortly after *State Farm I*:

Because the purpose of punitive damages is to punish defendants for egregious conduct and deter similar behavior in the future, the typical punitive damages analysis focuses predominantly on characteristics of the defendant, such as the nature of the defendant’s wrongful conduct, the nature and extent of harm the defendant has caused, and the defendant’s financial condition. Historically, the characteristics of the plaintiff have played a minor role at best. Indeed, in the class action context, a claim for punitive damages might not vary at all—in either the evidence that was presented or in the size of the award—based on the absence or presence of any individual class member. From this vantage point, the claim appears to be collective because the award yields relief to the group, based on the defendant’s conduct to the group, rather than to any particular individual.

Steven S. Gensler, *Diversity Class Actions, Common Relief, and the Rule of Individual Valuation*, 82 OR. L. REV. 295, 312–13 (2003) (citations omitted). Although the scholar noted that *State Farm I* “may alter” the plaintiff’s “minor role” in determining punitive damages, does there really seem to be any justification for this? See id. at 313 n.88. As noted, many have argued that punitive damages in mass tort cases should be subject to class action treatment because of the inherent unfairness that often results in the normal case-by-case method of adjudication when determining such damages. See supra notes 274–75. “A jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.” *Engle v. Liggett Group, Inc. (Engle VI)*, No. SC03-1856, slip op. at 20 (Fla. July 6, 2006) (quoting *Cooper Indus., Inc.*, 532 U.S. at 432); see Christopher J. Willis, *Aggregation of Punitive Damages in Diversity Class Actions: Will the Real Amount in Controversy Please Stand Up?* 30 Loy. L.A. L. REV. 775, 795–99 (1997) (arguing that punitive damages sought for a class of plaintiffs are common and undivided interests justifying aggregation of such damages for purposes of determining the amount-in-controversy requirement for federal diversity jurisdiction).

\(^{293}\) See *Catlett v. Mo. Highway & Transp. Comm’n*, 828 F.2d 1260, 1267 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988); *Segar v. Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984). In *Hilao v. Estate of Marcos*, the Ninth Circuit upheld a jury award of approximately $766 million to a class where a random sample of compensatory damage claims were used to determine such damages. 103 F.3d 767, 772, 787 (9th Cir. 1996). In a case similar to *Engle*, *In re Simon II Litig.*, the district court made various forms of sampled evidence, including statistical proof of both causation and damages, an integral part of its trial plan in a nationwide class action comprising all persons who smoked defendants’ cigarettes and who were diagnosed with certain enumerated diseases within the class period. 211 F.R.D. 86, 99–100, 113 (E.D.N.Y. 2002), vacated, 407 F.3d 125 (2d Cir. 2005). As noted, Florida’s lawsuit against
fendants' argument that they have a right to an individual determination of such damages. The Third District's holding in Engle IV, that the tobacco defendants had a right to an individualized determination with respect to punitive damages, is therefore questionable from this perspective as well. Further, should a wrongdoer be able to avoid punitive damages simply because the harm it caused may have been difficult to prove or value? This is clearly not the case with respect to compensatory damages. Under Florida law, any "difficulty in proving [compensatory] damages or uncertainty as to [their] amount will not prevent recovery" where it is clear that substantial damages were suffered and there is a reasonable basis in evidence for the amount awarded. Other jurisdictions have come to similar conclusions. One rationale is that a wrongdoer is not able to escape liability sim-

the tobacco companies was, in essence, a class action, and both the Florida Legislature and the Supreme Court of Florida approved of the use of statistical evidence being used in that case. See Fla. Stat. § 409.910(9)(b) (1995) (section omitted pursuant to Fla. HB 3077, § 1 (1997)); see Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc., 678 So. 2d 1239, 1256 (Fla. 1996).

294. See Long v. Trans World Airlines, Inc., 761 F. Supp. 1320, 1325 (N.D. Ill. 1991) ("[T]o the extent defendant argues in this case that ... it has an absolute right to individualized determinations of damages, its contention must be rejected as contrary to the case law and to the policies governing class actions."); In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D.N.Y. 1971) ("[T]he court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages.").

295. See Liggett Group, Inc. v. Engle (Engle IV), 853 So. 2d 434, 453 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006) ("The defendants are entitled to a jury determination, on an individualized basis."). Further, would it be constitutionally impermissible to use some method to determine the ratio of compensatories to punitive actions in a class action based on other than individual proof of such damages?


297. Schimpf, 691 So. 2d at 580.

298. Adams, 352 So. 2d at 78.

299. See Bigelow, 327 U.S. at 264; BE&K Constr. Co., 156 F.3d at 770; Sir Speedy, Inc., 957 F.2d at 1038; Broan Mfg. Co., 923 F.2d at 1240; Hoffer Oil Corp., 34 F.2d at 592; Long-Lewis, Inc., 551 So. 2d at 1027; Romer, 449 A.2d at 1100; DeSombre, 118 N.W.2d at 873; Weinglass, 155 A. at 440; Uhrich Millwork, Ltd., 261 P. at 562.
ply because the harm caused is difficult to prove or value. Could that logic have any application to a punitive damage award? Should a wrongdoer be able to avoid a punitive damage award simply because the harm it may have caused was so great that it either was impossible to determine or might take years to ascertain?

11. What Is Really Proper Analysis?

As one federal district court observed, "the proper analysis is not always simply a comparison of punitive damages to the amount of compensatory damages actually awarded by the jury." In Gore, the United States Supreme Court reiterated that "the proper inquiry is 'whether there is a reasonable relationship between the punitive damages awarded and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" Furthermore, the Supreme Court of California, in Simon v. San Paolo U.S. Holding Co., suggested that the Gore inquiry still holds true, even after State Farm I. California's highest court explained that in State Farm I "the [United States Supreme] Court referred to the relationship between punitive damages and both 'the amount of harm' and 'the general damages recovered,' impliedly recognizing that these two are not always identical." The Supreme Court of California also noted in "discussing

300. See Bigelow, 327 U.S. at 264–65; Thompson v. Haynes, 305 F.3d 1369, 1380 (Fed. Cir. 2002); BE&K Constr. Co., 156 F.3d at 770; Whitney v. Citibank, N.A., 782 F.2d 1106, 1118 (2d Cir. 1986).
302. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 581 (1996) (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. at 443, 460 (1993) (emphasis omitted)). In TXO, the jury awarded the plaintiff $19,000 in compensatory damages for slander of title, plus $10 million in punitive damages, roughly 526 times the compensatory damages award. 509 U.S. at 446. Nonetheless, and despite its suggestion just two years earlier in Pacific Mutual Life Insurance Co. v. Haslip that a 4 to 1 ratio was close to the line, the United States Supreme Court affirmed the award, holding that the punitive damages were not so "grossly excessive to be beyond the power of the State to allow." Id. at 462; see also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24 (1991). While the Court acknowledged the "dramatic disparity between the actual [and punitive] damages," it concluded that "in light of the amount of money potentially at stake, the bad faith of [the defendant], the fact that the scheme employed . . . was part of a larger pattern of fraud, trickery, and deceit, and [the defendant's] wealth," the punitive damages award did not violate due process. TXO Prod. Corp., 509 U.S. at 462.
303. 113 P.3d 63 (Cal. 2005).
304. Id. at 71 (discussing State Farm Mut. Auto. Ins. Co. v. Campbell (State Farm I), 538 U.S. 408 (2003)).
305. Id. (citing State Farm I, 538 U.S. at 426).
the second [Gore] 'guide post,' the [nation’s] high [C]ourt [in State Farm I] spoke repeatedly of a proportionality between punitive damages and the harm or 'potential harm' suffered by the plaintiff." According to the Supreme Court of California, "United States Supreme Court precedents [including State Farm I] appear to contemplate, in some circumstances, the use of measures of harm beyond the compensatory damages." As a result, "federal and state courts have, in a variety of factual contexts, considered uncompensated or potential harm as part of the predicate for a punitive damages award." The Supreme Court of California makes a convincing argument that, upon closer analysis, is actually supported by State Farm I, as well as other Supreme Court precedents. In evaluating the excessiveness of a punitive award, the amount of the compensatory damages awarded may not always be indicative of the harm caused; therefore, should courts consider the potential harm as well?

12. Calculation Could Have Been Deferred

Finally, and probably most important, it is clear that a calculation of punitive damages could have been taken after all the compensatory damages

306. Id. (citing State Farm I, 538 U.S. at 418, 424).
307. Id.
308. San Paolo U.S. Holding Co., 113 P.3d at 71; see Gensler, supra note 292, at 342–43. Gensler contends that "State Farm, like the previous decisions, does not specifically identify what figure is to be the denominator in the ratio calculation[s]," while theorizing that it was still possible that the denominator could be "the total harm the defendant caused or intended to cause, or the defendant's total gain from a course of misconduct." Id. (emphasis omitted) (footnote omitted). Furthermore, Catherine M. Sharkey, in a relevant article on punitive damages, argued that even though State Farm I states that:

"[A] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages"...[and] in discussing the relationship "between harm, or potential harm, to the plaintiff and the punitive damages award," the [United States Supreme] Court seems to contemplate explicitly the use of "harm to the people of Utah," at least in cases where such an "adverse effect on the State's general population" could be shown.

310. See In re Exxon Valdez (Exxon Valdez II), 296 F. Supp. 2d 1071, 1076 (D. Alaska 2004). The court opined "that State Farm I, while bringing the [Gore] guideposts into sharper focus, does not change the analysis." Id.
were determined. In fact, after the Phase 2 verdicts, a case involving a sick smoker was allowed to proceed to trial in accordance with the Engle trial plan, after which the jury awarded the smoker $37.5 million in compensatory damages. Although this case was thought to be a possible preview of suits to come, it apparently was the only one. Such individual tobacco cases, however, clearly have been allowed to proceed. Further, is not the ruling by the Supreme Court of Florida in Engle VI in reality allowing such individual tobacco cases to proceed, but simply without the bonus of the punitive damages award already determined.

C. The Third Guide Post

The third guide post is "the disparity between the punitive damages award and the "civil penalties authorized or imposed in comparable

311. See, e.g., Gordon Fairclough, Reynolds Ordered to Pay $15 Million—Scale of Punitive Award Heightens Threat Lawsuits Pose to Tobacco Industry, WALL ST. J., June 24, 2002, at A6 [hereinafter Fairclough, Reynolds Ordered to Pay].
312. See Jay Weaver, Jury Awards Smoker $37.5 Million, MIAMI HERALD, June 12, 2002, at 1A.
313. Fairclough, Reynolds Ordered to Pay, supra note 311.
314. See R.J. Reynolds Tobacco Co. v. Engle (Engle I), 672 So. 2d 39, 42 (Fla. 3d Dist. Ct. App. 1996). This clearly seems to be what the Third District contemplated in its original opinion in Engle I, modifying the order certifying a nationwide class to "manageable proportions" by restricting the class to Florida smokers. Id. In its opinion, the Third District recognized that while "certain individual issues [would] have to be tried as to each class member, principally the issue of damages, the basic issues of liability common to all members of the class [would] clearly predominate over the individual issues." Id. at 41. Incidentally, Broin v. Philip Morris Co. appears to support such an outcome, although it did not involve punitive damages and was a settlement as opposed to a verdict. 641 So. 2d 888 (Fla. 3d Dist. Ct. App. 1994). As noted, while the individual class members in that case were not entitled to any money under the terms of the settlement agreement, they did, however, have the right to bring individual claims. See Philip Morris Inc. v. French, 897 So. 2d 480, 483–84 (Fla. 3d Dist. Ct. App. 2004). A number of class members appear to have instituted their own suits following the settlement in Broin. Id. ("Following the [Broin] settlement, over 3,000 flight attendants brought individual suits against the tobacco defendants for the claims retained by the agreement.").
315. Moreover, if there was true concern that the $145 billion punitive award would "frustrate the societal interest in protecting all injured claimants' rights to at least recover compensatory damages," as claimed by the Third District in Liggett Group Inc. v. Engle (Engle IV), payment of the punitive damage award could have been stayed until the compensatory damages were determined and satisfied. 853 So. 2d 434, 458 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006); see Keene Corp. v. Levin, 623 A.2d 662, 663 (Md. 1993) (noting that trial courts in asbestos litigation had deferred payments of punitive damages "until all Baltimore City plaintiffs' compensatory damages [were] paid").
cases."

The real purpose of this guide post is to determine whether or not the defendant has "fair notice" that the wrongful conduct entailed the resulting punitive award. Prior to the historical award in *Engle* it could be argued that the tobacco defendants in that case had "fair notice" from several different avenues.

1. Punitive Awards in Individual Cases

In *Gore*, it was significant to the United States Supreme Court that at the time the dispute arose between the plaintiff and the defendant, "there [did] not appear to have been any judicial decision in Alabama or elsewhere indicating that [the defendant's conduct] might give rise to such severe punishment." The same is not true for *Engle*. While, prior to the *Engle* verdict, there were no comparable punitive awards in a class action composed of injured smokers as in that case, there were, however, punitive awards in comparable individual civil suits.

In 1998, a Florida jury awarded $450,000 in punitive damages to the family of a deceased smoker who had died of a smoking-related injury. In 1999, a California jury awarded $50 million in punitive damages to an injured smoker—although the award would eventually be reduced to $9 mil-

---


317. *See id. at 417; Gore*, 517 U.S. at 587.


319. *See Lee v. Edwards*, 101 F.3d 805, 812 (2d Cir. 1996) (noting that "it is appropriate for [the court] to examine punitive damage awards in similar cases" in reference to *Gore*'s third guide post); *see also* St. John v. Coisman, 799 So. 2d 1110, 1115 (Fla. 5th Dist. Ct. App. 2001) (stating that "[a]s the United States Supreme Court noted in *Gore*, this last factor is a broad one, which takes into account many circumstances, including fair notice to the defendant that he can expect to be hit with a punitive damage[s] award similar to the one actually imposed"). Unlike civil penalties or criminal sanctions, other punitive awards would appear more valuable because they should provide "'fair notice not only of the conduct that will subject [the defendant] to punishment, but also of the severity of the penalty that a State may impose.'" *State Farm I*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574).

320. Vivian Wakefield, *Verdict Is Heard Worldwide: Tobacco Penalty Boots Cigarette Foes*, FLA. TIMES-UNION, June 12, 1998, at B1. It would be noted that since the family had been awarded $500,000 in compensatory damages, bringing the total verdict to $950,000, the case clearly satisfied *State Farm I* in terms of the ratio between punitive and compensatory damages, since it was less than 1 to 1. *See id.*

321. Henley v. Philip Morris Inc. (*Henley I*), 113 Cal. Rptr. 2d 494, 496 (Ct. App. 2001). This was the *Henley* case discussed earlier.

https://nsuworks.nova.edu/nlr/vol31/iss1/4
lion because of *State Farm I*.\footnote{See supra notes 68–78 and accompanying text.} Later, in 1999, an Oregon jury would award $79.5 million in punitive damages to the family of another smoker who had died of a smoking-related injury.\footnote{This was the *Williams* case discussed earlier. See supra notes 80–91 and accompanying text. Although the Supreme Court of Oregon has upheld the $79.5 million punitive award, even in light of *State Farm I*, as noted, the United States Supreme Court accepted jurisdiction to review this issue, see *Philip Morris USA v. Williams*, No. 05-1256 (Or. Mar. 30, 2006), and it remains to be seen if the entire punitive award will be allowed to stand. Since the compensatory damages in *Williams III* were only $521,485.80, which was stated to be a ratio of punitive damages to compensatory damages of 96 to 1, see 92 P.3d at 130, 144, the United States Supreme Court may still yet find that the $79.5 million punitive award is “unconstitutionally excessive.” *Cf. Williams v. Philip Morris Inc. (Williams V)*, 127 P.3d 1165, 1182 (Or. 2006). Assuming, arguendo, that a minimum ratio of 1 to 1, and a maximum ratio of 10 to 1, and that the $521,485.80 in compensatory damages that were ultimately awarded in that case had to be used, a court could find that an appropriate punitive award would fall somewhere between $500,000 and $5 million.} In 2000, prior to the *Engle* punitive award, another California jury would award $20 million in punitive damages to a sick smoker,\footnote{Whiteley v. Philip Morris Inc., 11 Cal. Rptr. 3d 807, 820 (Ct. App. 2004); Harriet Chiang, $20 Million Jury Award to Smoker, *San Fran. Chron.*, Mar. 28, 2000, at A1.} although the verdict would be reversed on other grounds.\footnote{Whiteley, 11 Cal. Rptr. 3d at 864; *Smoker Cancer Award Returned for Retrial*, WALL ST. J., Apr. 8, 2004 at 1. In *Whiteley*, plaintiffs, husband and wife, filed suit against two cigarette manufacturers after the wife was diagnosed with lung cancer, alleging claims based on various theories of fraud. 11 Cal. Rptr. 3d at 812, 819. After a jury would award the plaintiffs about $1.7 million in compensatory damages, and $20 million in punitive damages, *id.* at 819–20, the two cigarette manufacturers would appeal claiming, inter alia, that they could not “be liable for fraud, negligent design, or other such product liability claims based on conduct occurring from January 1, 1988 to January 1, 1998” because of a former state immunity statute *California Civil Code* § 1714.45. *Id.* at 812–13. The appellate court would agree with the cigarette manufacturers that the immunity statute provided them complete immunity for the ten-year period and find that the trial court erred in refusing to instruct the jury that it could not base liability upon any of their conduct occurring within such period. *Id.* at 812–13. Consequently, the appellate court would reverse the judgment in favor of plaintiffs and remand the case to the trial court for further proceedings in accordance with its opinion. *Id.* at 864. The court mentioned that while it found it unnecessary to address the manufacturers’ challenge to the punitive damages award, it noted that the trial court would “doubtless be guided by” the United States Supreme Court’s decision in *State Farm I*. *Whiteley*, 11 Cal. Rptr. 3d at 864. This seems to suggest that the appeals court believed that *State Farm I* would have required the $20 million punitive damages award, which was approximately twelve times the $1.7 million compensatory damages award, to be reduced. Again, assuming a minimum ratio of 1 to 1 and a maximum ratio of 10 to 1, the punitive award would fall somewhere between $1.7 million to $10.7 million.} Prior to the punitive award in *Engle*, punitive awards of $450,000,\footnote{Wakefield, *supra* note 320.} $50 million,\footnote{Wakefield, supra note 320.} $79.5 million,\footnote{Wakefield, supra note 320.} and $20 million\footnote{Wakefield, supra note 320.} had been rendered against
the cigarette makers. Could these awards have provided “fair notice” to the tobacco defendants in *Engle* that their conduct could subject them to punitive damages? And, if so, did such punitive awards provide them “fair notice” as to the severity of such an award? The former would certainly seem the case even though the $450,000 award was the only award rendered in Florida, the $50 million award was reduced to $9 million, the $79.5 million award may still yet be reduced, and the $20 million award has been com-

329. Whiteley, 11 Cal. Rptr. 3d at 820.
331. There does not appear to be any reason why verdicts against cigarette manufacturers in jurisdictions outside of Florida are not relevant for this purpose. Nonetheless, it should be noted that at the time *Engle* was filed, Florida had a statutory presumption of excessiveness of any punitive damage awards exceeding three times the amount of compensatory damages in cases based on negligence, strict liability, products liability, and breach of warranty. See Fla. Stat. § 768.73(1)(a)-(b) (1997) (amended 1999) (although the wording of the statute has since changed, this version was applicable to *Engle*); *Engle IV*, 853 So. 2d at 434. The statutory presumption, however, did not apply to class action suits, and therefore was not an issue in *Engle IV*. § 768.73(1)(a) (1997) (amended 1999). Nevertheless, if *Engle* is to be compared to individual suits where punitive damages were awarded, this statutory presumption must be taken into account. The presumption, however, was hardly conclusive and could be overcome if the claimant demonstrated, by clear and convincing evidence, that the specific circumstances justify the award. § 768.73(1)(b) (1997) (amended 1999). A case illustrating the statutory presumption of excessiveness being overcome by a claimant is *Owens-Corning Fiberglas Corp. v. Ballard*, a decision rendered by the Supreme Court of Florida one year before the *Engle* verdict. 749 So. 2d 483, 483–84 (Fla. 1999). In *Ballard*, Florida’s highest court upheld a $31 million punitive damages award to a claimant in an asbestos case even though it was almost eighteen times the $1.8 million compensatory damages award. Id. at 484–85, 488–89. The court found that the presumption of excessiveness was overcome by clear and convincing evidence that the asbestos manufacturer’s conduct was egregious, and exhibited a flagrant disregard for the safety of persons exposed to asbestos products. Id. at 483, 488–89. This raises another question: Could the verdict in *Engle* be compared with punitive damage awards in asbestos cases? There is a much longer line of decisions awarding punitive damages in asbestos cases than in tobacco litigation. See generally GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW, ch. 20 (1993) (explaining the history of punitive damages in asbestos litigation). It is apparently claimed by some that the “disease processes” in asbestos and tobacco cases are similar, although the warning and liability issues might be different. See Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1181 n.92 (1995). Further, it has been stated that “the asbestos industry [has] engaged in a pattern of deception remarkably similar to that of the tobacco industry.” Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 194 (2000).
332. *Henley II*, 9 Cal. Rptr. 3d at 38, 75.
pletely overturned. The latter would also appear true if one undertook simple arithmetic. Taking the Engle plaintiffs' apparent initial estimate of a class size of 300,000, this would amount to $483,000 per class member based on that $145 billion punitive award. Further, if the plaintiffs' subsequent estimate of a class size of 700,000 is more accurate, this figure would be less than half that amount, or approximately $207,000 per class member. Based on comparable smoking-related verdicts in individual suits, the cigarette makers appear to have no basis to complain about any disparity with respect to the punitive award in Engle.

333. It would seem that the amount of any other punitive damages awarded against a cigarette manufacturer, or an award with which the cigarette manufacturer was threatened, would be relevant in this regard.

334. Engle IV, 853 So. 2d at 443.

335. Id.

336. Although punitive awards are still being challenged in most of the cases, awards rendered after the one in Engle also do not help the cigarette makers' case in regard to any disparity. One punitive award that has survived such a challenge, however, occurred in 2001, the year following Engle IV. See Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638, 645-46 (Ct. App. 2005), cert. denied, 126 S. Ct. 1567, 1567 (2006). In Boeken v. Philip Morris Inc., a California jury awarded a sick smoker over $5.5 million in general damages and $3 billion in punitives, although the punitive award was reduced first to $100 million, and later to $50 million. Id. The $50 million punitive award, which exceeded the 4 to 1 ratio but was less than 10 to 1, stood after the United States Supreme Court declined to intervene. Id.

There were a number of other punitive awards against the cigarette makers following the one in Engle and Boeken. In 2002, an Oregon jury ordered a cigarette maker to pay $150 million in punitives in the case of a smoker who died of a smoking-related injury. Estate of Schwarz v. Philip Morris Inc., 135 P.3d 409, 414 (Or. Ct. App. 2006). Ultimately, the state court of appeals vacated the judgment for punitive damages and remanded for a new trial on the amount of those damages, basing its decision on the trial court's failure to give jury instructions which limited the jury's consideration of out-of-state evidence in apparent violation of the order of State Farm. See generally id. at 427-33. In another case in 2002, a federal district court judge imposed a $15 million punitive award in favor of an injured smoker. See Fairclough, Reynolds Ordered to Pay, supra note 311. In a third case in 2002, a California jury awarded a record $28 billion in punitive damages to an injured smoker, although the award would later be reduced to $28 million. See Philip Morris Hit with Record $28 Billion Punitive Award, LAW. WKLY. U.S., Oct. 14, 2002, at 2; see also Woman with Cancer to Accept Smaller Award, but Appeal, WALL ST. J., Dec. 26, 2002, at A4. In 2003, an Arkansas federal jury rendered a verdict awarding $15 million in punitive damages to the family of a smoker who died of a smoking-related injury, although the award was later nullified by the trial judge. See Linda Satter, Jury: Smoker's Kin Due $19 Million, ARK. DEMOCRAT GAZETTE, May 24, 2003, at 1A; see also Tobacco Brief—Brown & Williamson Tobacco Co.: Judge Eliminates $15 Million in Punitive Damages in Case, WALL ST. J., July 7, 2003, at C11. Also, in 2003, a New York jury awarded the widow of a deceased smoker $8 million in punitive damages. See William Glasbrenner, $8 Million Award to Widow Punishes Tobacco Company, N.Y. TIMES, Jan. 10, 2004, at B1. Although there appears to have been no cases awarding punitive damages against cigarette manufacturers in 2004, another New York jury ordered a cigarette manufacturer to pay $17.1 million in punitive damages to a sick smoker in 2005. See Bob Van Voris, Jury
A related question is whether the tobacco defendants' conduct in *Engle* could have subjected them to any civil sanctions or even possibly criminal punishment. It is important to mention that courts have recognized that there are "common law tort duties that do not lend themselves to a comparison with statutory penalties." Further, as noted earlier, at least theoretically, under Florida law, punitive damages are supposed to apply to wrongdoing not coverable by criminal law. In *St. John v. Coisman*, a Florida appellate court found that "[t]here [was] no comparable criminal or civil statute which punishes false arrest in Florida." In *Williams III*, discussed earlier, the Oregon Appellate Court found "that [the State of] Oregon [did] not provide civil sanctions for [the cigarette manufacturer's] conduct and that the criminal statutes [referenced by the] plaintiff... were not truly comparable." Whether the tobacco defendants in *Engle* had "fair notice," by way of possibly civil and/or criminal sanctions, is not easily answered. It would be noted, however, that the Third District would state that *Engle* involved "the same alleged misconduct" as in the case brought by the State of Florida against the tobacco companies. In that case, *State v. American Awards $18.8 Million to an Individual Smoker*, MIAMI HERALD, Mar. 30, 2005, at 3C. Although it remains to be seen if, and how much, the cigarette makers pay in terms of punitive damages in these cases, *Engle*’s less than a half a million dollars per claimant in punitive damages (assuming a class of 300,000 or more) may wind up being a bargain compared to these cases.

338. See infra notes 396-97.
339. 799 So. 2d 1110 (Fla. 5th Dist. Ct. App. 2001).
340. Id. at 1115.
341. See supra notes 80–91 and accompanying text.
Florida brought suit against the tobacco companies seeking recovery of Medicaid expenditures it had made on behalf of smokers.\textsuperscript{346}

If the Third District is correct that the two cases involved "the same alleged misconduct,"\textsuperscript{347} then Florida's tobacco lawsuit might be relevant to this inquiry.\textsuperscript{348}

Florida's Medicaid Third-Party Liability Act\textsuperscript{349} formed the cornerstone of Florida's litigation against the tobacco makers.\textsuperscript{350} However, other statutory provisions were utilized as well.\textsuperscript{351} Florida asserted that the cigarette manufacturers violated the Florida Deceptive and Unfair Trade Practices Act,\textsuperscript{352} the Florida Drug and Cosmetic Act,\textsuperscript{353} a statute prohibiting the sale of cigarettes to minors,\textsuperscript{354} two Florida misleading advertising statutes,\textsuperscript{355} a Flori-
ida nuisance statute,356 and the Florida Racketeer Influenced and Corrupt Organization Act (RICO).357

While the Medicaid Third-Party Liability Act normally limits Florida to recovery of the monies it paid for medical assistance to Medicaid recipients, it appears to permit a sanction in the form of treble damages “[i]n cases of suspected criminal violations or fraudulent activity,”358 and Florida would seek such a sanction in its suit against the tobacco makers.359 A party who willfully violates Florida’s unfair and deceptive trade practices statute, known as Florida’s “Little FTC Act,”360 may be subject to a civil penalty of up to “$10,000 for each such violation.”361 Similarly, a violation of the Florida Drug and Cosmetic Act can subject a party to a fine of up to “$5,000 per violation per day.”362 One is considered criminally liable under the statute prohibiting the sale of cigarettes to minors.363 Further, a violation of Florida’s misleading advertising statute can lead to a criminal prosecution,364 or a civil action in which punitive damages are specifically authorized.365 A public nuisance charge is a crime under Florida law.366 Additionally, a violation

356. FLA. STAT. § 823.01; Third Amended Complaint, supra note 347, ¶ 186.
357. FLA. STAT. § 895.01 (1995); Third Amended Complaint, supra note 347, ¶¶ 190–237.
359. Third Amended Complaint, supra note 347, ¶ 177.
361. FLA. STAT. § 501.2075. Such party may also be liable for attorney fees as well. Id. Florida sought both the civil penalty and attorney fees under the Florida Deceptive and Unfair Trade Practices Act in its action against the tobacco companies. See Third Amended Complaint, supra note 347, ¶ 188.
362. FLA. STAT. § 499.066(3). Injunctive relief is also possible for violations of this Act. Id. § 499.066(2).
363. Id. § 569.101.
364. Id. § 817.06(2).
365. Id. § 817.41(1), (6). The statute provides in pertinent part as follows:

   (1) It shall be unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.

   (6) Any person prevailing in a civil action for violation of this section shall be awarded costs, including reasonable attorney’s fees, and may be awarded punitive damages in addition to actual damages proven. This provision is in addition to any other remedies prescribed by law.

FLA. STAT. § 817.41(1), (6). Florida courts have specifically recognized that this provision “is penal in character . . . [and] the type of penal statute the violation of which affords civil relief.” Vance v. Indian Hammock Hunt & Riding Club, Ltd., 403 So. 2d 1367, 1369 n.3 (Fla. 4th Dist. Ct. App. 1981) (citing Rosenberg v. Ryder Leasing, Inc., 168 So. 2d 678, 679 (Fla. 3d Dist. Ct. App. 1964)).
366. FLA. STAT. § 823.01.
of the Florida RICO Act is a serious criminal offense.\textsuperscript{367} Punishment could entail criminal sanctions, including imprisonment,\textsuperscript{368} and either: a) a fine of up to $10,000;\textsuperscript{369} or b) in lieu of such fine where the offender derives pecuniary value or "cause[s] personal injury or property damage or other loss, . . . a fine [of up to three] times the gross value gained or [three] times the gross loss caused, whichever is the greater, [may be imposed], plus court costs and the costs of investigation and prosecution, reasonably incurred."\textsuperscript{370} In addition to, or in place of the above, possible civil remedies include: 1) divesting the offender of any interest in the enterprise; 2) imposing restrictions upon the offender's activities; 3) dissolving or reorganizing the organization; 4) suspending or revoking a license or permit granted to the enterprise by a state agency; 5) forfeiting or revoking the charter of a Florida corporation or a foreign corporation organized to do business within the state;\textsuperscript{371} and/or 6) being subject to an action by the state for three times the actual damages the state sustained as a result of the RICO violation.\textsuperscript{372}

If the claims asserted by the State of Florida in its lawsuit against the tobacco makers are any indication, then there were both civil and criminal sanctions to which the tobacco defendants in \textit{Engle} could have been subject.\textsuperscript{373} Further, while the United States Supreme Court in \textit{State Farm I}
found that any claim about possible loss of business, disgorgement of profits, and imprisonment were merely speculative in that case, can the same be said with respect to the tobacco companies that were sued by the State of Florida? Was the threat speculative or real?

3. Florida’s Lawsuit Against Big Tobacco

Speaking of Florida’s tobacco lawsuit raises another interesting question relative to Gore’s third guide post: Did that lawsuit itself provide the tobacco defendants in Engle with “fair notice” that their conduct could entail a substantial punitive award? After the state’s case was brought, the tobacco companies agreed, among other things, to pay Florida more than $11.3 billion. The Third District was probably correct in observing that Engle and Florida’s lawsuit against the cigarette makers involved the same “allegations of misconduct.” However, the Florida Appellate Court appears to have been wrong in trying to suggest that the claims for punitive damages were the same in both cases. In this regard, it is important to understand that section 768.72 of the Florida Statutes “requires a plaintiff to provide the

375. See State v. Am. Tobacco Co., 707 So. 2d 851, 853 (Fla. 4th Dist. Ct. App. 1998). As shown, under the Florida statutes asserted by the state against the tobacco companies, said companies could have been subject to substantial fines, imprisonment, and loss of any business licenses within the state. See supra pp. 52–55. Further, in its lawsuit, Florida clearly sought “disgorgement of any profits earned on the sale of the [tobacco] companies’ products in Florida.” Am. Tobacco Co., 707 So. 2d at 853. Florida appears to recognize the disgorgement theory of damages. See, e.g., Montage Group, Ltd. v. Athle-Tech Computer Sys., Inc., 889 So. 2d 180, 196 & n.15 (Fla. 2d Dist. Ct. App. 2004) (stating that “the remedy of disgorgement was appropriate under the facts of this case”). Whether Florida would be entitled to such remedy under the Florida RICO Act, however, might be questionable. See Philip Morris I, 396 F.3d at 1199 (rejecting the United States’ claim that disgorgement is within the equitable jurisdiction provided for under the Federal RICO Act).
379. See id. at 468 (stating “[t]he claims for punitive damages in the Florida v. American Tobacco Co. case and in this [Engle] action are based on the same alleged facts. The punitive-damage claims in both cases addressed the same alleged misconduct and the same public interest.”).
[trial] court with a reasonable evidentiary basis for punitive damages before the [trial] court may allow a claim for punitive damages to be included in a plaintiff’s complaint."\(^{380}\) As the Supreme Court of Florida noted in *Engle VI* regarding the state’s tobacco lawsuit: “[Florida’s] only claim for punitive damages arose from the alleged violation of [the] Florida statutory provision prohibiting misleading advertising. None of the other statutory provisions alleged to be violated by the [tobacco companies] . . . allowed the recovery of punitive damages.”\(^{381}\) The trial court in *State v. American Tobacco Co.* apparently found that Florida’s Medicaid Third-Party Liability Act provided only a factual basis for recovery of Medicaid costs, not punitive damages.\(^{382}\) It did, however, permit a claim for punitive damages to be asserted under *Florida Statutes* section 817.41, the misleading advertising statute, since this statute specifically authorized awards of such damages for violations of its terms.\(^{383}\)

---

380. Globe Newspaper Co. v. King, 658 So. 2d 518, 520 (Fla. 1995). Section 768.72 of the *Florida Statutes* provides in pertinent part as follows:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure.

*FLA. STAT.* § 768.72 (2006). The Supreme Court of Florida has construed this provision “to create a substantive legal right not to be subject to a punitive damages claim . . . until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages.” *Globe Newspaper Co.*, 658 So. 2d at 519; see also *Wilson v. Edenfield*, 968 F. Supp. 681, 683–84 (M.D. Fla. 1997).

381. See *Engle v. Liggett Group Inc.* (*Engle VI*), No. SC03-1856, slip op. at 17, n.7 ( Fla. July 6, 2006).

382. See *Transcript of the Florida Tobacco Litigation Symposium—Fact, Law, Policy, and Significance*, 25 FLA. ST. U. L. REV. 737, 757 (1998) [hereinafter *Transcript*]. One of the attorneys representing Florida in its lawsuit against the tobacco companies later explained, “[Florida was] limited in [its] punitives to fraud under Chapter 817. The judge had stricken all of [Florida’s] other theories of punitives, believing that [it was] limited to the Medicaid [a]ct.” *Id.* As noted previously, the Medicaid Third-Party Liability Act specifically authorizes the imposition of treble damages in certain instances. See *supra* note 358 and accompanying text. It is also clear that the Florida RICO Act, which was probably Florida’s second most important claim against the tobacco companies, did not authorize punitive damages where triple damages were being sought under it, as Florida would seek in that case. See *FLA. STAT.* § 895.04 (2006); Third Amended Complaint, *supra* note 347, ¶¶ 217, 231, 237.

383. *FLA. STAT.* § 817.41(6) (2006). Section 817.41(6) plainly authorizes awards of punitive damages for violations of its terms. *Id.* For a reading of this provision, see *supra* note 365. As one Florida appellate court explained, this section “creates an entitlement to punitive damages.” *Kraft Gen. Foods, Inc. v. Rosenblum*, 635 So. 2d 106, 109 (Fla. 4th Dist. Ct. App. 1994). The fact that Florida was limited with respect to punitive damages is clearly reflected by its Third Amended Complaint. See Third Amended Complaint, *supra* note 347, ¶ 185. Florida’s only request for punitive damages related to alleged violations of section 817. *Id.*
Punitive damages did not play as big a role in Florida's case against the cigarette makers as one might believe. The threat of such damages was limited solely to Florida proving a violation of its false advertising statute.\footnote{384. See id. ¶ 10.} The $11 billion that the tobacco companies agreed to pay under the Florida Settlement Agreement would therefore appear to be more properly viewed as compensatory—reimbursement to Florida for the cost it incurred through Medicaid for injured smokers—as opposed to punitive in nature.\footnote{385. Settlement Agreement, supra note 377, at 8–10.} If this is correct, the $11 billion figure could have been a barometer of the compensatory damages to which the plaintiffs and their class in \textit{Engle} might have been entitled.\footnote{386. This is true even if the then present day value of the award was said to only be $6 billion. See Transcript, supra note 382, at 757.} However, the \textit{Engle} plaintiffs and their class were not as constrained as Florida was in its lawsuit. Florida was restricted to seeking recovery for those Medicaid costs that had occurred after July 1, 1994, the effective date of the amendment to the Medicaid Third-Party Liability Act.\footnote{387. See \textit{Agency for Health Care Admin. v. Assoc. Indus. of Fla.}, Inc., 678 So. 2d 1239, 1256 (Fla. 1996) (ruling that the State of Florida could properly bring an action under the Act's statutory authority, but that the Act only applied to causes of action that accrued after July 1, 1994, the effective date of the 1994 amendments).} In addition, the trial court had apparently ruled that Florida "could not recover future damages under" this Act.\footnote{388. Transcript, supra note 382, at 756. One of Florida's attorneys explained that this limited Florida's damages under Medicaid to $1.2 billion and meant that the state would have to return to court every couple of years to seek damages against the tobacco companies. \textit{Id.} at 757 (attorney making clear that the Settlement Agreement "settles those future claims that we were going to have to come back time and time again to get"); see Settlement Agreement, supra note 377, at 11–12. To the extent that the monies payable under the Settlement Agreement exceeded the amount then due Florida, it would appear that it primarily represents damages in the form of reimbursement for future Medicaid and other health-related expenses, and not punitive damages. \textit{Id.} at 10.} Obviously, Medicaid payments account for only a fraction of the total medical care costs attributable to smoking, and the plaintiffs and their class in \textit{Engle} would not be limited to Medicaid incurred expenditures.\footnote{389. According to Florida's Governor, the state was "spending over $400 million a year for smoking-related, tobacco-related injuries to [its] Medicaid recipients." See Transcript, supra note 382, at 738.} Further, the plaintiffs and their class in \textit{Engle} would be entitled to seek compensatory damages consisting of more than hospital and medical expenses.\footnote{390. See \textit{FLA. STD. JURY INSTR. (CIV.) 6.2(a)-(f)}.} They would be entitled to seek dam-
ages for items such as pain and suffering, mental anguish, lost earnings, and loss of consortium.\textsuperscript{391}

The tobacco defendants in \textit{Engle} had to know from Florida's lawsuit against them and from the subsequent Florida Tobacco Settlement that they had exposure to a sizeable compensatory award.\textsuperscript{392} Further, even though no actual award of punitive damages was made in \textit{State v. American Tobacco, Co.},\textsuperscript{393} an argument could certainly be made that Florida's lawsuit against the tobacco makers also provided them with fair notice that their conduct might support a large punitive award such as would be rendered in \textit{Engle} as well.\textsuperscript{394}

\textbf{V. Florida Law on Punitive Damages}

Under Florida law, "punitive damages are recoverable in all actions for damages based on [tortious acts] which involve the ingredients of malice, moral turpitude, or wanton and outrageous [conduct]."\textsuperscript{395} To support a claim for punitive damages under Florida law, the plaintiff must allege and prove conduct by the defendant of "a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."\textsuperscript{396}

\textsuperscript{391. Id.}
\textsuperscript{392. Could the same thing not be said about the lawsuits brought by all of the states against the tobacco companies that were filed between 1994 and 1998 which resulted in an unprecedented multibillion-dollar settlement prior to the \textit{Engle I} verdict? For a listing of the state cases brought against the tobacco makers, see Tobacco Lawsuit Summary Chart, http://www.library.ucsf.edu/tobacco/litigation/summary.html (last visited Nov. 1, 2006).
\textsuperscript{393. 707 So. 2d 851 (Fla. 4th Dist. Ct. App. 1998).
\textsuperscript{394. See Philip C. Patterson & Jennifer M. Philpott, Note, \textit{In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation}, 66 BROOK. L. REV. 549, 573 (2000). "The Florida jury's emotional response to the tobacco industry's alleged deception of the public could have belonged to any one of the juries in the state lawsuits." Id.
\textsuperscript{395. 17 FLA. JUR. 2D Damages § 128 (2004).
\textsuperscript{396. Carraway v. Revell, 116 So. 2d 16, 20 n.12 (Fla. 1959) (quoting Cannon v. State, 107 So. 360, 363 (Fla. 1926)).
Florida law also recognizes that punitive damages serve the dual role of deterrence and retribution. Further, Florida law envisions that “[p]unitive damages apply to wrongdoing not covered by the criminal law, where the private injuries inflicted partake of public wrongs.” In fact, the Supreme Court of Florida has stated that punitive damages are “the most satisfactory way to correct evil-doing in areas not covered by the criminal law.”

It is clear under Florida law that it is within the jury’s discretion whether or not to award punitive damages and to determine the amount that should be awarded. Traditionally, punitive damages “are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff.” In determining the amount of punitive damages, the defendant’s wealth has also historically been an important consideration under Florida law.

It has been noted that Florida courts are usually hesitant about disturbing punitive damages verdicts returned by juries. Further, it appears that under Florida law, neither party has any recourse to a jury verdict regarding punitive damages, unless such party can prove either fraud or an improperly influenced jury. As discussed earlier, the Third District Court of Appeal in

397. See Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982).
398. Id. at 1042.
400. Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978).
401. Arab Termite & Pest Control, 409 So. 2d at 1043.
402. Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 533 (Fla. 1985). In this regard, the Supreme Court of Florida has stated that “the greater the defendant’s wealth, the greater it [sic] must be, the punitive damages assessed in order to get his attention regardless of the amount of [actual] damages awarded to the plaintiff.” Id. (quoting Farish v. Bankers Multiple Line Ins. Co., 425 So. 2d 12, 18 (Fla. 4th Dist. Ct. App. 1982)); see also Rinaldi, 314 So. 2d at 763.
403. Lassiter v. Int’l Union of Operating Eng’rs, 349 So. 2d 622, 627 (Fla. 1976). The Supreme Court of Florida has explained as follows:

Although the verdict may be for considerably more or less than in the judgment of the court it ought to have been, still the court should decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake. In order to shock the sense of justice of the judicial mind the verdict must be so excessive or so inadequate so as at least to imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like.

Id.
Engle IV appears to have determined that the jury had been improperly influenced.\footnote{See Liggett Group Inc. v. Engle (Engle IV), 853 So. 2d 434, 467–68 (Fla. 3d Dist. Ct. App. 2003), app'd in part, quashed in part, rem'd, No. SC03-1856 (Fla. July 6, 2006).}

To specifically determine whether a punitive damage award is excessive under Florida law, courts consider the relationship between the amount awarded and the degree of misconduct involved, as well as the defendant's ability to pay the judgment.\footnote{Arab Termite & Pest Control, 409 So. 2d at 1043; see also Louisville & Nashville R.R. Co. v. Hickman, 445 So. 2d 1023, 1028 (Fla. 1st Dist. Ct. App. 1983).} It clearly appears that it was on this second item—the defendant’s ability to pay the judgment—that both the Third District and the Supreme Court of Florida based their conclusions on the fact that the $145 billion punitive damage award in Engle was excessive under Florida law.\footnote{See Engle v. Liggett Group, Inc. (Engle IV), No. SC03-1856, slip op. at 3, 25 (Fla. July 6, 2006); Engle IV, 853 So. 2d at 458.}

Certain observations, however, can be made with respect to their apparent determination in that regard.

First, the trial court in Engle evidently felt that the tobacco defendants could avoid financial ruin by simply raising cigarette prices, since this is how the cigarette makers financed the payments under the tobacco settlement.\footnote{Final Judgment and Amended Omnibus Order, Engle v. R.J. Reynolds Tobacco, No. 94-08273, at 61 (Fla. 11th Cir. Ct. Nov. 6, 2000), available at http://fl1.findlaw.com/news.findlaw.com/cmn/docs/tobacco/englerjfinaljudorder.pdf.} Could there have been any merit to the trial court’s position?

Second, while the combined net worth of all of the tobacco defendants in Engle was supposedly only $8.3 billion, the net worth of just one of these same defendants in the Williams case, discussed earlier, was said to be “over $17 billion,” more than double the purported combined figure in Engle.\footnote{Williams v. Philip Morris Inc. (Williams III), 92 P.3d 126, 145 (Or. Ct. App. 2004); see Engle IV, 853 So. 2d at 456–57.} Is there any merit to claims by plaintiffs that defendants sometimes purposely decrease their net worth in order to avoid a high punitive award?\footnote{See John T. Simpson, Jr., Comment, Discovery of Net Worth in Bifurcated Punitive Damages Cases: A Suggested Approach After Transportation Insurance Co. v. Moriel, 37 S. TEX. L. REV. 193, 223 (1996).}

Third, the Third District’s determination that the tobacco defendants did not have the ability to pay the judgment appears to have been primarily based on the fact that the sum awarded was “roughly 18 times” their purported combined net worth.\footnote{See Engle IV, 853 So. 2d at 457.} However, as the Supreme Court of New Jersey has noted, evidence of “ability to pay . . . does not necessarily equate with net
worth,” because “[d]epending on the facts of a case, a defendant’s income might be a better indicator of the ability to pay.” 412

Fourth, there is no suggestion that the jury in Engle was improperly instructed regarding the issue of the tobacco defendants’ ability to pay a punitive award and/or that such award could not bankrupt them. 413 Assuming that the jury was properly instructed in this regard, under Florida law, the jury is presumed to have followed the instructions given to them, “[a]bsent a finding to the contrary.” 414

Fifth, while evidence of the Florida and Master Settlement Agreements might have been admissible in Engle for the purpose of avoiding or mitigating punitive damages because they may have been relevant to the tobacco defendants’ ability to pay, was the trial court’s apparent instruction to the jury not to consider such evidence 415 a reversible error as found by the Third District? 416 This would not seem to be a sufficient basis for reversing an award of punitive damages under Florida law since this evidence (which is merely mitigation evidence) appears to relate to a matter that is collateral to the main issue. 417

Sixth, while not definitively stating that wealth may not be considered, State Farm has called into question the role of wealth in the punitive damages calculation. 418 Assuming, arguendo, that a defendant’s wealth is not always an appropriate consideration to enhance the amount of punitive dam-

413. See Jury Instructions Phase II B: Punitive Damages, No. 94-8273 CA 22, at 6 (11th Cir. 2000), available at http://www.altria.com/download/pdf/media_engle_jury_instructions.pdf (delineating the financial factors that the jury could use as guidelines in determining the effect a punitive award may have) [hereinafter Engle Jury Instructions]; see generally Engle IV, 853 So. 2d at 456–58 (noting that the court blamed the size of the award on juror passion and prejudice).
414. See Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932, 942 (Fla. 2000); see also Engle Jury Instructions, supra note 413, at 11 (instructing the jury that “[i]t is only a defendant’s current ability to pay a punitive damage award that is relevant, and not whether a defendant can pay using a pay out or an installment plan,” despite the Third District’s later finding that plaintiffs’ counsel made improper comments regarding installment payments); Wranisky v. Dalfö, 801 So. 2d 239, 243 (Fla. 4th Dist. Ct. App. 2001) (reversing case for failure to give jury instructions “that punitive damages should not be allowed to destroy or bankrupt a defendant”).
415. Engle IV, 853 So. 2d at 468–69.
416. Id.; Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856, slip op. at 2 (Fla. July 6, 2006). In its opinion, the Supreme Court of Florida did not address this specific ruling by the Third District. Id.
ages, should this argument cut both ways where a defendant’s wealth, or lack thereof, is not always an appropriate consideration to avoid an otherwise proper punitive damages award. In other words, should the possibility of bankruptcy always be an absolute bar to an award of punitive damages? 419

As shown above, there are a number of questions raised relating to the conclusion by the Third District and Supreme Court of Florida that the Engle punitive damages award was impermissibly excessive, even under Florida law.

VI. CONCLUSION

To argue, as the Third District did, that mass torts, such as those found in Engle, are not proper for a class action is one thing. 420 To suggest, however, that the punitive award in that case was unconstitutionally excessive is wholly another.

As demonstrated herein, an argument could certainly be made that the jury’s punitive award in Engle was not violative of the Gore guide posts as the United States Supreme Court refined them in State Farm, and that the award, therefore, was not unconstitutionally excessive under federal law. The conduct of the tobacco defendants in Engle could certainly be said to be reprehensible. As noted, most of the factors identified by the United States Supreme Court, pertaining to the degree of reprehensibility of a defendant’s conduct, appear to have been present in Engle. 421 Further, the appellate courts that have reviewed the awarding of punitive damages in the individual tobacco cases have not found the first guide post to be an issue. 422 While the second guide post has impacted punitive damages awards since State Farm, reprehensibility is nevertheless supposed to be the most important guide post in determining a punitive damages award’s reasonableness. 423 There also may have been an acceptable ratio of punitives to compensatories to satisfy the second guide post, but neither the Supreme Court of Florida nor the Third District was willing to wait and see. 424 As suggested herein, the contention

419. Welch v. Epstein, 536 S.E.2d 408, 424 (S.C. Ct. App. 2000) (rejecting the proposition “that the law on punitive damages [in South Carolina] has evolved to the point of erecting an irrevocable financial barrier to the imposition of punitive damages if harsh financial realities emanate from the award”) (emphasis added).
420. See Engle IV, 853 So. 2d at 470.
421. See supra notes 194–201 and accompanying text.
422. See supra note 202.
423. See State Farm I, 538 U.S. at 419.
424. As noted, the trial plan called for the jury to determine punitives first and then compensatories for the class, which federal courts have found presents no constitutional infirmity. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir. 1986). The Third District
that it is not possible to complete the ratio guide post at the time the jury returned the $145 billion punitive award does not by itself appear to provide a basis to invalidate such an award. This was a multi-phase class action where the compensatory damages to each member of the class had not yet been determined. Steps should have been taken to ensure that recovery of punitive damages was limited to only those class members who established liability. The analysis under the ratio guide post could have either been estimated based on individual damages awards, deferred until all of the compensatory damages were determined, or some combination thereof. Whether Gore’s second guide post was met or not is simply not clear. Further, it could certainly be argued that the tobacco defendants in that case had fair notice that their conduct might not only subject them to punishment, but to severe punishment because of the punitive awards against them in the cases prior to Engle\textsuperscript{425} and in the unprecedented litigation brought against them by Florida as well as other states. Assuming, \textit{arguendo}, that one believes the cigarette makers were guilty of misconduct, as the jury in Engle apparently did,\textsuperscript{426} the fact that a record setting punitive damages award was rendered in that case really should have surprised no one, especially the cigarette makers.

Moreover, even if Florida law does not allow an award which would force a defendant to file for bankruptcy, should this always be the case? Florida law also says that punitive damages “are to be measured by the enormity of the offense,”\textsuperscript{427} and that it is within the jury’s discretion as to the amount of any punitive damages.\textsuperscript{428} The jury in \textit{Engle} exercised its discretion and rendered an award of $145 billion in punitive damages to injured

\textsuperscript{425} See supra notes 301–316 and accompanying text. From this perspective, is it possible to view the \textit{Engle} punitive award as a proxy for the thousands of Floridians, dead and living, whose lives and health have been or may be immutably scarred by tobacco?

\textsuperscript{426} See supra notes 317–36 and accompanying text.

\textsuperscript{427} Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982). In \textit{Engle VI}, the Supreme Court of Florida seems to be suggesting that post \textit{State Farm} jurisprudence no longer permits this. See Engle v. Liggett Group, Inc. (\textit{Engle VI}), No. SC03-1856, slip op. at 24 (Fla. July 6, 2006). But see Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003) (observing shortly after \textit{State Farm}, that “[the] standard principle of penal theory that ‘the punishment should fit the crime’ in the sense of being proportional to the wrongfulness of the defendant’s action” is still applicable to punitive damages).

\textsuperscript{428} Arab Termite & Pest Control, 409 So. 2d at 1041 (citing Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978)).
Florida smokers and their survivors. While the Engle verdict may have been unprecedented and, by far, the largest ever in U.S. history, it was no ordinary case. It was a mass-tort class action with an estimated class size of between 300,000 and 700,000 plaintiffs that actually went to verdict. The Supreme Court of Florida quite properly did not adopt the Third District’s conclusion that the punitive award in Engle was indicative of an improperly influenced jury, as this jury verdict may very well have been merely reflective of the magnitude of the offense committed in that case.

Tobacco use was and continues to remain the country’s greatest health hazard. It undoubtedly was and continues to be a major issue in Florida, as in every other state. Even if the imposition of the $145 billion punitive

429. Engle IV, 853 So. 2d at 441.
431. Engle IV, 853 So. 2d at 442–43. As noted earlier, no mass-tort case had apparently gone to trial prior to Engle. See Mullenix, Lessons from Abroad, supra note 183, at 20.
433. Id. at 20. Although the punitive award in Engle has been criticized by many because of its size, at least one observer believes that the “punitive award of $145 billion is letting the tobacco industry off lightly.” Brian H. Barr, Note, Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers, 28 FLA. ST. U. L. REV. 787, 829 (2001). Supposedly, the plaintiffs in Dukes, see supra notes 283–85 and accompanying text, are “seek[ing] punitive damages between $450 and $510 billion” in that employment discrimination case, alleging sex discrimination in pay and promotion. Eric S. Dreihand, Willie Sutton Was a Piker, WALL ST. J., Jan. 7, 2006, at A7.
434. See MELISSA ALBUQUERQUE ET AL., U.S. DEP’T OF HEALTH & HUMAN SERV., TOBACCO CONTROL STATE HIGHLIGHTS 2002: IMPACT AND OPPORTUNITY 7 (2002), http://www.cdc.gov/tobacco/statehi/pdf_2002/02FrontMatter.pdf. Tobacco use is said to be “the single most preventable cause of death and disease . . . in the United States.” Id. Approximately 400,000 deaths each year are attributable to smoking. See id. To put this in perspective, “[o]ne in every five deaths in this country is attributable to smoking.” Id. at 3. To put this in another perspective, tobacco is said to “kill[] more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined.” Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396, 44398 (Aug. 28, 1996) (codified in scattered parts of 21 C.F.R.).
435. At the time the Engle case was brought, Florida officials estimated that that “[e]very day in Florida, 35 people die from a smoking-related illness.” Linda Kleindienst & John Kennedy, Law Declares Medicaid War on Tobacco, ORLANDO SENT., May 27, 1994, at C1. It had been estimated that in 1992 alone that it had cost taxpayers $289 million to treat approximately 39,000 Florida Medicaid patients for smoking-related illnesses. Id. For 300,000 to 700,000 of such persons, this would amount to $2 billion to $5 billion, assuming that the health care costs were incurred at the same rate. See id.
436. Of course, tobacco use is an issue all over the world. In fact, it is being projected that tobacco will kill a billion people this century, which is ten times more than the one hundred
award would have the ruinous consequences alleged by the cigarette makers, would it really touch upon due process concerns, or would it simply be self-inflicted and well-deserved punishment that was overdue—assuming that they were responsible for the misconduct claimed?

VII. EPILOGUE

The Third District in Engle would comment that “[c]lass certification in mass-tort actions such as [in that case] ha[d] been historically disfavored by courts throughout the nation.”437 This is true. The underlying rationale is that “[w]hen personal-injury and death claims are involved, a strong feeling prevails that everyone enmeshed in the dispute should have his [or her] own day in court and be represented by a lawyer of his [or her] choice.”438 The problem with this rationale as it relates to tobacco is that cigarette manufacturers have been largely shielded from suits brought by individual smokers.439 This has occurred, in large part, because the courts have improperly construed the very law that was designed to deal with the health problem associated with smoking, the Federal Cigarette Labeling and Advertising Act (FCLAA),440 to provide cigarette manufacturers special protection from state law tort claims under the guise of “preemption.”441 This is unfortunate because state law tort claims serve the important functions of regulation and compensation.442 By precluding state law tort claims from being asserted against cigarette manufacturers, this has given them protection not accorded to others and has prevented any regulation of their behavior, such as forcing them to make cigarettes that are less hazardous.443 It has also denied those injured by their product the right to even seek compensation based solely on this federal Act that was never intended to be used in such fashion.444 Further...
ther, one should not be misled by the few recent verdicts—record breaking in fact—in favor of plaintiffs in individual suits, as the smokers in those cases started smoking prior to 1969, when the FCLAA supposedly began preempts state law tort claims against cigarette manufacturers.\(^445\) That one fact appears to have been crucial to these plaintiffs being able to get to a jury.\(^446\) As the population continues to grow older, this "loophole" is closing fast.\(^447\) It "will not be of any assistance to [anyone] who began smoking after 1969."\(^448\)

The preemption fiasco is just one aspect, albeit a very important one, of a larger problem, which is the "Law of Tobacco."\(^449\) "The Law of Tobacco concerns ensuring the continued vitality of the tobacco industry by protecting it, [not only] from liability suits, [but] other types of 'nuisances' such as advertising restrictions or FDA regulation."\(^450\) The Third District's opinion in Engle IV would appear to be another good illustration of the "Law of Tobacco" in operation, where the appellate court reversed itself on the issue of class certification and then made every possible ruling that it could in favor of the tobacco defendants in that case.\(^451\) In stark contrast, the Supreme Court of Florida showed great courage in Engle VI by first simply accepting jurisdiction to review the case and then issuing a decision that did not bow to the "Law of Tobacco."\(^452\) As indicated by the premise of this article, the only issue one might take with an otherwise well-written and well-reasoned opinion by the Supreme Court of Florida in Engle was its ruling, unanimous no less, that the punitive award in that case was unconstitutionally excessive.\(^453\)

Engle may signal the end to future smokers' class suits.\(^454\) Even class suits that are not specifically brought to recover damages for the health prob-

\(^{446}\) Id. at 52.
\(^{447}\) Id. at 53.
\(^{448}\) Id.
\(^{449}\) Id. at 21.
\(^{451}\) Engle v. Liggett Group, Inc. (Engle VI), No. SC03-1856, slip op. at 53 (Fla. July 6, 2006).
\(^{452}\) Id. at 1, 53.
\(^{453}\) See id.
\(^{454}\) It would be interesting to see if the courts would reevaluate their stance on smokers' class suits if the preemption problem did not exist. With a flood of lawsuits, possibly as never seen before, a class action might be viewed more favorably.
lems associated with smoking are being rejected by the courts.455 With possibly having an end to any real threat from either individual suits or class actions, the future of Big Tobacco certainly looks bright.456 The question is: at what cost—specifically, for how long and to what extent is this going to prolong the health hazard associated with tobacco?

Reversal of the $145 billion punitive award was probably viewed as a great victory for Big Tobacco. But was it really? Despite the discarding of the mammoth punitive award, the cigarette manufacturers appear to have two definite reasons not to be pleased with Florida’s highest court, and they both stem from the fact that the court did not completely dismantle the class. One is obvious from the opinion while the other is not. Clearly, the tobacco defendants could not be happy with the fact that class members will be allowed to bring their own suit with the benefit of many of the findings by the jury in Engle.457 This is going to encourage many to assert claims against the tobacco defendants who otherwise would not.458 This may also result in the tobacco defendants paying significantly more than the almost $7 million (in compensatory damages alone) that they currently are to pay to two of the class representatives.459 The other reason, which cannot be gleamed from the Supreme Court of Florida’s opinion, involves the fact that when the tobacco

455. Last December, the Supreme Court of Illinois completely overturned a judgment of $10.1 billion in a class action that claimed consumer fraud over “light” cigarettes. Price v. Philip Morris, Inc., 848 N.E.2d 1, 50 (III. 2005). The Illinois high court reversed the judgment, which was $7.1 billion in compensatory damages and $3 billion in punitives, on the ground that the FCLAA preempted claims against cigarette manufacturers under Illinois consumer law. Id. at 50–51. See also Marrone v. Philip Morris USA, Inc., 850 N.E.2d 31 (Ohio 2006) (reversing the certification of a limited class of cigarette purchasers from a six county area in a consumer action brought over the way “light” cigarettes were marketed). But see Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (certifying a class of current and former smokers in a RICO action alleging that cigarette manufacturers induced them to buy “light” cigarettes by falsely representing that they would experience reduced health risks from lower amounts of tar and nicotine).

456. This is true despite the fact that the smoking rate in this country is said to be continuing to decline. See Marc Kaufman, Smoking in United States Declines Sharply: Cigarette Sales at a 54-Year Low, WASH. POST, Mar. 9, 2006, at A1.

457. See Engle VI, No. SC03-1856, slip op. at 53.

458. Apparently, lawsuits have already been filed in response to the ruling by the Supreme Court of Florida. See Christina Cheddar Berk, Cigarette Makers Ask for Review, WALL ST. J., Aug. 9, 2006, at D3.

459. As noted earlier, following the verdict in Engle, one class member in a separate proceeding received a judgment of $37.5 million in compensatory damages. If this verdict is upheld, it shows how the damages against the cigarette makers could easily accumulate. Further, it would seem that all of the class members (including the three already with compensatory awards) would be permitted to seek punitive damages if the tobacco defendants are found liable in their individual suits. See Weaver, supra note 312.
defendants initially appealed from the $145 billion punitive verdict, they apparently agreed that, in lieu of posting the full appeal bond, they would “forfeit” $709 million which would be paid to the class no matter which side won. Of course, after the Third District reversed the case in its entirety, including the class certification, it would be suggested that, since there was no class to pay, this money would possibly be returned to the tobacco defendants. The decision by the Supreme Court of Florida has, therefore, made it harder for the tobacco defendants to make the case that they are entitled to this money back. For the tobacco defendants, there is still clearly a lot at stake in Engle.

It will be most interesting to observe what happens in Engle from this point forward. As this article was going to press, a motion for rehearing filed by the tobacco defendants had still not been ruled upon by the Supreme Court of Florida so the opinion in Engle VI was not yet final. Will the Supreme Court of Florida stand by its ruling in Engle VI? Despite an obviously careful and thoughtful opinion, there is still time for the “Law of Tobacco” to interject itself before that Court. Further, even if Florida’s Highest Court holds firm, the tobacco defendants are likely to seek review from the United States Supreme Court. Although from the surface, there does not appear to be any basis for federal jurisdiction in Engle, with the “Law of Tobacco” involved, one should not bet against the cigarette makers.

461. See id.
462. Some, of course, had said the same thing about the other recent famous case that the United States Supreme Court took from Florida, Bush v. Gore. 531 U.S. 98 (2000).