Brown v. RJ Reynolds—The Proper Scope of Common Questions

*By Andrew Trask**

Class actions are not like other lawsuits. In a class action, an individual asks the court for permission to represent a group of people who have all been harmed in a similar way. As a result, the single most important debate in a class action is over certification—whether the lawsuit may proceed on behalf of a group of "similarly situated" people. And the single most important debate in certification is the debate over common issues: are there enough common issues to justify certifying a class for litigation, and possibly trial?

Since very few class actions get as far as trial,[1] this debate is largely rhetorical, and, as a result, can be difficult for courts to resolve effectively. As the late professor Richard A. Nagareda noted:

> At its extremes, this jousting over class certification conveys two radically different pictures of the world. According to class counsel's aggregate proof, everything is all the same. Under defense counsel's aggregate proof, the world is so full of microscopic individual differences that it is a wonder any class action ever can be certified.[2]

As courts have begun to recognize, however, simply pointing to common questions is not enough to justify certification, because "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality."[3] As a result, courts look for "a common issue the resolution of which will advance the litigation."[4] But what does that mean?

While, on the surface, the recent decision in *Brown v. R.J. Reynolds Tobacco Co.*[5]—which held that generalized classwide jury findings have no preclusive effect on subsequent individual lawsuits—addresses the preclusive effect of a class action verdict, it also provides an excellent response to this question. And the *Brown* decision comes to this debate from a unique perspective: rather than envisioning how a trial *might* proceed and basing its ruling on that thought experiment, the Eleventh Circuit examined an established trial record to determine whether various "common issues" actually advanced the litigation.

I. Background: A Brief History of Tobacco Class Actions.

Since the first tobacco class action was filed in the 1990s, these cases have provided a unique opportunity to watch a class action proceed all the way through to trial, because each side has the resources—and the will—to see the fight through all the way to the end. Tobacco companies were well-funded and prepared for a war of attrition.[6] Plaintiffs' lawyers saw a victory against tobacco companies as a "big lick"—a large payout that would justify years of difficult pursuit.[7] Moreover, the tobacco companies' growing status as pop-culture villain[8] made them an attractive target in jury trials. As a result, various consortia of plaintiffs' lawyers filed class actions against tobacco companies, suing them for causing fatal diseases like lung cancer,[9] for hooking smokers on nicotine,[10] and for falsely claiming their "light" cigarettes were healthier than other brands.[11]

The litigation that would become *Brown* began in Florida state court as the case *Engle v. Liggett Group*. In *Engle,* the plaintiffs sought to represent a class of everyone in the United States who had suffered or died "from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine."[12] On behalf of that class, the plaintiffs asserted a wide array of claims, ranging from strict liability and negligence to fraud and intentional infliction of emotional distress.[13]

In 1994, the trial court certified plaintiffs' proposed nationwide class.[14] The tobacco companies appealed, arguing that the plaintiffs had not met their burden of demonstrating either that common issues would predominate over individualized ones or that the proposed class action was a superior method of resolving the dispute, both required by Florida Rule of Civil Procedure 1.220(b)(3).[15] The appellate court affirmed the certification, holding that the plaintiffs had demonstrated predominance because "the basic issues of liability common to all members of the class will clearly predominate over the individual issues."[16] However, it did agree that the class as certified would be unmanageable, so it limited the class to Florida residents.[17]

Three and a half years after its certification ruling, the trial court approved a plan that divided the proposed classwide trial into three phases.[18] In Phase I (projected to take one year) the jury would decide common issues of liability, and whether the class as a whole was entitled to punitive damages.[19] Phase II would determine two issues: (1) whether the various tobacco company defendants were specifically liable to the three lead plaintiffs (Frank Amodeo, Mary Farnan, and Angie Della Vecchia) for compensatory damages, and (2) the total punitive damages the tobacco companies owed to the class.[20] Finally, in Phase III, new juries would decide liability and compensatory damages for each of the remaining 700,000 class members.[21] After reviewing the trial plan, the defendants moved to decertify the class, to no avail.[22]

The Phase I trial. The Phase I trial, which would determine the "common issues" in the case,[23] lasted more than ten months.[24] During that time, the plaintiffs presented evidence of the historical conduct of tobacco companies, and the "general health effects of smoking."[25] (In other words, the plaintiffs presented evidence that smoking would cause various diseases, such as lung cancer.)[26]

In the course of the trial, the plaintiffs' counsel Stanley Rosenblatt engaged in a number of tactics that raised objections from the defense counsel. In his opening statement, he claimed that the defendants "divide the American consumer up into groups," including "white" and "black."[27] Then, in his closing, Rosenblatt repeatedly invoked Martin Luther King, Rosa Parks, and civil disobedience, and compared the defendants' arguments to defending slavery or the Holocaust.[28] And he ended one day of his argument by stating that the defendants were arguing that

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tobacco was "a legal product. It's a legal product. Legal don't make it right. Legal don't make it right."[29]

The defendants moved for a mistrial, and Rosenblatt admitted that he had asked the jury to disregard the law.[30] Nonetheless, the trial court refused to grant a mistrial, reasoning that it would be absurd to nullify more than ten months of trial because of a single day of (admittedly inappropriate) argument.[31]

At the close of Phase I, the jury made a number of generalized findings, including:

- that smoking caused all but three of twenty-three listed medical conditions;[32]
- that nicotine cigarettes are addictive;[33]
- that all of the defendant tobacco companies had placed cigarettes on the market that were defective and unreasonably dangerous;[34]
- that the tobacco companies conspired to conceal information about either the health effects or the addictive nature of cigarettes to keep the public smoking;[35]
- that the tobacco companies sold cigarettes that were not fit for their intended use;[36]
- that the tobacco companies sold cigarettes that did not conform to the representations made about them;[37] and
- that the tobacco companies did not exercise due care in manufacturing their cigarettes.[38]

These findings gave what looked like an enormous advantage to the plaintiffs. As the Eleventh Circuit would later describe the verdict, "The *Engle* class came close to running the table—the jury answered 'yes' to almost every question put to them."[39]

The Phase II trial. The first part of Phase II was supposed to try the claims of three of the lead plaintiffs: Amodeo, Farnan, and Della Vecchia.[40] As the Florida Supreme Court later described it, despite the presence of the Phase I findings, the Phase II trial still "required lengthy proof to establish the individualized elements of [the lead plaintiffs'] claims."[41] In fact, it took five months to litigate the claims of these three plaintiffs.[42] In particular, there was extensive debate over the whether the kinds of cancer the plaintiffs had contracted were caused by smoking.[43] Among other evidence, plaintiffs Farnan and Della Vecchia presented fourteen different experts to establish that smoking had caused each of their cases of lung cancer.[44]

The Phase II trial also featured more of Rosenblatt's questionable conduct that led to a finding of contempt. During the tobacco companies' opening statement, he interrupted to object that "there can be a payout" (a reference to the punitive damages award, which the plaintiffs were requesting in a single lump sum as opposed to installments), and peppered references to "payouts" throughout his direct and cross-examinations of witnesses.[45] He also called one attorney's argument "a fraud," discussed how he wanted to "punch" one defense witness "in the face," and accused several witnesses (the CEOs of the tobacco companies) of perjury.[46] After repeated defense objections, the trial court held Rosenblatt in contempt, but once again would not grant a mistrial.[47]

The jury found that all three lead plaintiffs were entitled to compensatory damages, although the amounts varied and were offset by findings of comparative fault.[48] It also awarded $145 billion in punitive damages to the class as a whole, and demanded—as Rosenblatt had urged—that it be paid immediately rather than in installments.[49]

Once Phase II was completed, the tobacco companies filed a motion for new trial, a motion to set aside the verdict, a motion for entry of judgment, and a motion to decertify the class.[50] The trial court denied each of these motions.[51]

Appeals. At that point, the tobacco companies appealed both the certification decision and the punitive damages award. This time, the Court of Appeals for the Third District decertified the class,[52] noting that "[i]n the years since initial affirmance of certification in 1996, virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper."[53] It also pointed out that the trial court's experience comported with these other courts' rulings, since the Phase II trial had required extensive individualized inquiries into both causation and damages, which made the case "particularly unsuitable for class treatment."[54]

The Florida Supreme Court, however, overturned the decertification once the plaintiffs appealed, holding that the vast majority of the Phase I findings were proper.[55] It did single out the jury's findings on misrepresentation, intentional infliction of emotional distress, and conspiracy to commit fraud by misrepresentation as improper because of their "highly individualized" nature.[56]

The *Engle* Court also found that continuing classwide treatment in a Phase III trial was not feasible because of the predominance of individualized issues such as causation, affirmative defenses like comparative fault, and damages.[57] It held that, since the Phase I trial was already over, "the pragmatic solution is to now decertify the class, retaining the jury's Phase I findings other than those . . . which involved highly individualized determinations."[58] From there, class members could choose to file individual lawsuits for damages, and rely on the res judicata effect of the Phase I factual findings.[59] However, the *Engle* Court also specifically stated that "the Phase I jury did *not* determine whether the defendants were liable to anyone."[60]

The Florida Supreme Court also instructed that subsequent courts would have to give the *Engle* findings res judicata effect.[61] But while the Florida Supreme Court could state its opinion on the preclusive effect of its ruling, it could not enforce it.[62] That question would be left to subsequent courts, like the Middle District of Florida.

II. The *Brown* Case.

After the Florida Supreme Court decertified the *Engle* class, thousands of class members filed claims in various state and federal courts.[63] At first, the parties tried to consolidate all of the cases under the federal multi-district litigation (MDL) procedure.[64] But the Judicial Panel on Multi-District Litigation (JPML) denied the request.[65] So the parties consolidated the cases another way: approximately 4,000 former class members filed complaints in Duval County court in Florida; each complaint contained the claims of approximately 200

plaintiffs.[66] The defendants then removed those cases to the Middle District of Florida under the Class Action Fairness Act's (CAFA's) "mass action" provisions.[67]

Once the cases were consolidated in the Middle District of Florida, the defendant tobacco companies moved under Rule 16(c)[68] to challenge the findings of the *Engle* jury.[69] The plaintiffs had planned to rely on these findings to prove liability and "general" causation.[70] The tobacco companies argued that applying the findings would "conflict with Florida law and with the dictates of due process as guaranteed by the Fourteenth Amendment."[71]

The plaintiffs opposed the Rule 16 motion on several grounds. They argued that the *Rooker-Feldman* doctrine (which prevents a party that lost in state court from seeking a de facto appellate review by litigating the case again in federal court)[72] barred review of the state-court findings, that the findings were res judicata, and that the Full Faith and Credit Clause of the Constitution mandated a strict application of the state court's findings.[73]

Since the *Rooker-Feldman* doctrine constituted a jurisdictional challenge to the defendant's motion, the district court addressed that question first.[74] It held that the doctrine did not apply because the defendants had not filed *Brown* to challenge the state-court findings; instead, the plaintiffs had filed the case to enforce them.[75] The defendants' removal to federal court under CAFA did not change that original procedural posture.[76]

So the district court turned to the merits of the challenge, namely: could the plaintiffs rely on the Phase I findings as res judicata?[77] The battle lines were clearly drawn: while the plaintiffs expressly advocated this position, the tobacco companies argued that the Phase I findings were too general to serve as proof of any element of the plaintiffs' claims.[78]

The district court began by determining what kind of preclusive effect it would have to give the findings.[79] The *Engle* Court had muddied this issue by announcing the findings would have "res judicata" effect while also declaring that there had been no finding of liability.[80] Nonetheless, the district court determined that what the *Engle* Court had meant was collateral estoppel (issue preclusion) rather than res judicata (claim preclusion).[81]

The real problem the district court identified, however, was that even if it gave preclusive effect to the Phase I findings, the plaintiffs could not use them to establish liability in any of their individual cases.[82] The Phase I jury verdict form did not identify any specific act committed by any specific tobacco company that harmed any plaintiff.[83] For example, while the Phase I verdict indicated that each defendant tobacco company had manufactured a defective cigarette at some time, there were no specific findings linking any particular cigarette to the alleged defect.[84] That lack of specificity made it "impossible to determine whether the unreasonably dangerous defect was present in the cigarettes smoked by a particular plaintiff, let alone the same defective design that was the cause of any alleged injury."[85] As a result, the district court decided that it "would have to embark on sheer speculation" to determine both what issues had been decided in Phase I, and how to apply them to the current plaintiffs' claims.[86] Given those circumstances—and the fact that "the *Engle* plaintiffs as a whole allege different acts and omissions by different Defendants, breached different tort duties to different people at different times causing different injuries"[87]—the district court specifically held that it could "not manipulate established procedural and substantive law in the interests of expediting the progress of this litigation."[88]

The district court also noted (as had the Florida court of appeals) that "virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper."[89] And it raised constitutional concerns about the plaintiffs' counsel's conduct at trial, calling it "galling and shocking [] in a constitutional sense."[90]

Based on this comprehensive opinion, and given the damages at stake, the plaintiffs appealed to the Eleventh Circuit, which thus faced a case in which a federal district court refused to recognize the preclusive effect of the findings of a Florida state court jury.[91]

The Eleventh Circuit affirmed the district court's rejection of the *Rooker-Feldman* doctrine.[92] It also held that the "res judicata" effect the Florida Supreme Court had announced was issue—not claim—preclusion, because the Phase I trial had only decided factual issues, not complete causes of action.[93]

Then it turned to the primary issue in the appeal. While the parties had agreed that they were really arguing over the issue-preclusive effect of the Phase I findings, they disagreed "about what the findings mean to this case[: t]he plaintiffs think that they mean a lot while the defendants think that they mean not so much."[94] Since, under Florida law, only issues that had been "actually litigated" have preclusive effect, the Eleventh Circuit held that "the Phase I approved findings may be given effect to the full extent of, but no farther than, what the jury actually found."[95] Of course, this conclusion begged the question: what did the jury actually find? The plaintiffs urged the court to hold that they could supplement the jury's generalized findings with other information from the trial record.[96] The defendants argued that the only findings that a court could adopt were the "general, non-specific" findings in the plain language of the verdict form.[97]

As the Eleventh Circuit recognized, siding with the defendants would mean declaring that the *Engle* Phase I findings were essentially meaningless. As it explained:

> Question 3 on the verdict form asked the jury: "Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous?" The jury answered "yes," for every time period for every defendant except Brooke Group, Ltd., Inc. Under the defendants' view, the only fact that the jury found was that they sold some cigarette that was defective and unreasonably dangerous during the time periods listed on the verdict form. That would mean that the finding may not establish anything more specific; it may not establish, for instance, that any particular type of cigarette sold by a defendant during the relevant time period was defective and unreasonably dangerous.[98]

The plaintiffs argued that the lack of specificity in the findings meant the jury had issued a blanket finding that all cigarettes sold by the defendants were defective, since the jury had not

specifically excluded any defendant, cigarette, or time period from its findings.[99] But, as the court noted, nothing in the record supported that argument.[100] As a result, the court held that the Phase I findings had no preclusive effect for any individual plaintiffs.

III. How Specific Must a Common Question Be?

While at first glance *Brown* addresses the preclusive effect of the *Engle* class action, the real question the Eleventh Circuit wrestled with was the scope of Rule 23(b)(3)'s predominance inquiry. Neither the Middle District of Florida nor the Eleventh Circuit refused on principle to apply the findings of the Florida jury; instead, they found themselves unable to apply those findings because they lacked enough facts to understand what issues the jury had actually (or necessarily) decided.

Before the Florida Supreme Court rendered its opinion in *Engle*, a critical mass of federal courts had held that class actions against tobacco companies alleging liability for selling cigarettes presented too many individual issues to justify certifying a class.[101] Specifically, the question of whether smoking caused a particular smoker's poor health or addiction to nicotine involved questions of medical causation that seemed too complex to try en masse.[102] Similarly, the question of whether a particular smoker bought cigarettes because of a particular understanding of their health effects required an inquiry into each smoker's state of mind—an individual issue that would swamp any common issues in litigation.[103]

Before *Engle,* these conclusions were largely intuitive. In fact the Fifth Circuit had reversed certification of a tobacco class in part because there was no record of *any* jury trials—individual or classwide—on which it could rely to determine how a classwide tobacco trial might proceed.[104] The *Brown* court, by contrast, rendered its decision based on the plaintiffs' best attempt to conduct an actual classwide trial. And, despite a fiercely litigated trial in which the plaintiffs won the first two phases, they still could not establish factual findings that advanced the claims of the absent class members in any meaningful way.

This inability highlights the real stakes of certification debates. In particular, the debate over predominance is more than just a semantic game in which a party wins if it can convince the court to accept the level of generality that will prove most favorable to it. Instead, the debate over predominance establishes how useful classwide findings will be to individual class members in later litigation.

Given the potential "big lick" involved in winning a tobacco class action, and the ingenuity of plaintiffs' counsel, this debate is far from over. In December 2010, the Minnesota Court of Appeals affirmed the certification of a statewide class of smokers who claimed that tobacco companies had misrepresented the health benefits of their "light" cigarettes.[105] While defendant Altria Group (formerly Philip Morris) argued that individual issues would predominate over common issues in the litigation, the court held that it "has not, at this point in the litigation, negated the commonsense inference that its massive advertising campaign was successful in persuading consumers that Lights were healthier than regular cigarettes."[106] Assuming that the defendant does not settle, there may soon be a second tobacco class trial to test the threshold for predominance of common issues.

Conclusion.

Ultimately, given the vagueness of Florida jury's verdict in *Engle*, *Brown* sharpens the teeth of Rule 23's commonality and predominance requirements. By showing just how a "common question" may fail to advance classwide litigation in any meaningful way, the ruling will inform future courts and litigators of the proper scope of common questions.

Endnotes

1 Brian Anderson & Andrew Trask, The Class Action Playbook § 7 at 192 (2010).

2 Richard A. Nagareda, *Class Certification in an Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 102-03 (2009).

3 Sprague v. Gen. Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998); *see also* Gaston v. Exelon Corp., 247 F.R.D. 75, 82 (E.D. Pa. 2007) ("Plaintiffs could simply propose the question 'has employer discriminated against class members' and always meet the commonality requirement. Obviously, something more is necessary.").

4 *Sprague*, 133 F.3d at 397.

5 611 F.3d 1324 (11th Cir. 2010); *see also* Richard A. Nagareda, Mass Torts in a World of Settlement xi (2007).

6 *See* Richard A. Nagareda, Mass Torts in a World of Settlement 188 (2007) (quoting an internal strategy memorandum at a tobacco company: "The way we won these cases was not by spending all of R.J. Reynolds's money, but by making that other son of a bitch spend all of his."); Curtis Wilkie, The Fall of the House of Zeus: The Rise and Ruin of America's Most Powerful Trial Lawyer 48 (2010) (Trial lawyers planning tobacco lawsuits knew they were litigating against a well-funded and determined adversary.).

7 *See* Curtis Wilkie, The Fall of the House of Zeus 65 (defining "big lick"); Nagareda, Mass Torts in a World of Settlement, *supra* note 6, at 124 (noting that a tobacco "cover-up" could justify large punitive damage awards).

8 *See, e.g.*, Christopher Buckley, Thank You for Smoking (1994) (tobacco lobbyist suffers moral crisis, hijinks ensue); John Grisham, The Runaway Jury (1996) (brother of lung cancer victim manipulates jury in tobacco trial); Greg Rucka, Smoker (1998) (bodyguard must protect witness in tobacco trial from professional assassin).

9 Emig v. Am. Tobacco Co., 184 F.R.D. 379 (D. Kan. 1998); Small v. Lorillard Tobacco Co., 252 A.D.2d 1 (N.Y. App. Div. 1998); Geiger v. Am. Tobacco Co., 277 A.D.2d 420 (N.Y. App. Div. 2000).

10 Barnes v. Am. Tobacco Co., 161 F.3d 127, 131 (3d Cir. 1998); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Arch v. Am. Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997).

11 McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008).

12 R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996) ("*Engle I*"). Given the timing of early opinions, it appears that *Engle* may have been filed as a rival case to *Castano*.

13 *Engle I*, 672 So. 2d at 40.

14 *Id.*

15 *Id.* at 41. Florida's class-action rule substantively mirrors Federal Rule of Civil Procedure 23. Seven Hills, Inc. v. Bentley, 848 So. 2d 345, 352-53 (Fla. Dist. Ct. App. 2003).

16 *Engle I*, 672 So. 2d at 41.

17 *Id.* at 42.

18 Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1256 (Fla. 2006) ("*Engle III*"). For an explanation of "general causation," see Nagareda, Mass Torts

in a World of Settlement, *supra* note 6, at 14 ("General causation entails a showing that the product in question is capable of causing a particular disease in humans generally.").

19 Liggett Group, Inc. v. Engle, 853 So. 2d 434, 441 (Fla. Dist. Ct. App. 2003) ("*Engle II*"); *Engle III*, 945 So. 2d at 1256.

20 *Engle III*, 945 So. 2d at 1257.

21 *Engle II*, 853 So. 2d at 442; *Engle III*, 945 So. 2d at 1258.

22 *Engle II*, 853 So. 2d at 443. For more on the use of decertification motions, see Anderson & Trask, The Class Action Playbook, *supra* note 1, at § 7.5.

23 *Engle II*, 853 So. 2d at 445.

24 *Id.* at 461.

25 *Id.* at 441.

26 *Id.* at 453.

27 *Id.* at 459.

28 *Id.* at 459-61.

29 *Id.* at 459-60.

30 *Id.* at 461.

31 *Id.*

32 Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328, 1341 (M.D. Fla. 2008).

33 *Brown*, 576 F. Supp. 2d at 1341.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1327 (11th Cir. 2010).

40 *Engle II*, 853 So. 2d. at 445.

41 *Id.* at 445 & n.8.

42 *Id.* at 445 n.8.

43 *Id.* at 446 n.9.

44 *Id.*

45 *Id.* at 464.

46 *Id.* at 464-65.

47 *Id.* at 464.

48 *Engle III*, 945 So. 2d at 1257.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Engle II*, 853 So. 2d at 443.

53 *Id.* at 443-44. It also noted that each of those courts applied rules that were similar to Florida's class-action rule.

54 *Id.* at 450.

55 *Engle III*, 945 So. 2d at 1255.

56 *Id.*

57 *Id.* at 1268-69.

58 *Id.* at 1269. The "highly individualized" findings included findings for fraud and intentional infliction of emotional distress. *Id.*

59 *Id.*

60 *Id.* (emphasis in original).

61 *Id.*

62 Fed. R. Civ. P. 23, Advisory Comm. Note, 1966; *see also* Anderson & Trask, The Class Action Playbook, *supra* note 1, § 9 at 242 ("The court that presided over the original class action does not determine the preclusive effect of its own judgment. Instead, a second court—in which the new plaintiff has filed her complaint—must decide whether the prior class judgment has any preclusive effect.") (internal footnotes omitted).

63 Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328, 1334 (M.D. Fla. 2008).

64 *Id.*

65 *Id.*

66 *Id.* at 1334 & n.11. The district court's opinion does not say whether this was an agreed tactic. However, it is fair to infer that the plaintiffs knew that filing complaints that consolidated the claims of 200 plaintiffs per case would subject them to the mass-action provisions of CAFA. *See* 28 U.S.C. § 1332(d)(11).

67 *Brown*, 576 F. Supp. 2d at 1334.

68 Rule 16(c)(2) provides, among other things, that:

> At any pretrial conference, the court may consider and take appropriate action on the following matters:
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> (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
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> (B) amending the pleadings if necessary or desirable;
>
> . . .
>
> (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
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> . . .
>
> (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
>
> . . .
>
> (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

Fed. R. Civ. P. 16(c)(2). While the district court opinion does not specify which part of Rule 16(c) the defendants argued was relevant, it appears that one of these provisions was the likely ground.

69 *Brown*, 576 F. Supp. 2d at 1330.

70 *Id.*

71 *Id.*

72 *See* Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284-85 (2005).

73 *Brown*, 576 F. Supp. 2d at 1334.

74 *Id.* at 1335 (citing Dimaio v. Democratic Nat'l Comm., 520 F.3d 1299, 1301 (11th Cir. 2008) (jurisdictional question requires resolution before merits of claims)).

75 *Id.* at 1337.

76 *Id.* ("It would be incongruent with the doctrine's structure and purpose to find that the Defendants' decision to exercise its rights under CAFA divested this Court of jurisdiction over this case or Defendants' present motion.").

77 *Id.*

78 *Id.*

79 *Id.* at 1338. While the plaintiffs argued that—given the *Engle* Court's statement that the Phase I findings would have "res judicata effect"—the district court should not independently determine their preclusive effect, the principle that it falls to the later court to determine the preclusive effect of classwide findings is well-established. *See* Fed. R. Civ. P. 23, Advisory Comm.

Note, 1966; *see also* Anderson & Trask, The Class Action Playbook, *supra* note 1, § 9 at 242 & n.5.

80 *Brown*, 576 F. Supp. 2d at 1338.

81 *Id.* at 1340.

82 *Id.* at 1341.

83 *Id.*

84 *Id.* at 1343.

85 *Id.*

86 *Id.* at 1341.

87 *Id.* at 1348.

88 *Id.*

89 *Id.* at 1344 n.24 (citing 853 So. 2d at 443-44).

90 *Brown*, 576 F. Supp. 2d at 1347.

91 *Brown*, 611 F.3d at 1329 ("The Florida Supreme Court's instruction that the Phase I approved findings have 'res judicata effect' is at the heart of this appeal, which resulted from a lawsuit filed in federal district court by some of the former Engle class members.").

92 *Id.* at 1331 ("The Rooker-Feldman doctrine is inapplicable here. In place of it, ordinary preclusion rules govern the effect of the Engle Phase I approved findings.").

93 *Id.* at 1333.

94 *Id.* at 1333-34.

95 *Id.* at 1334-35.

96 *Id.* at 1335.

97 *Id.* at 1334.

98 *Id.* at 1335 (internal footnote omitted).

99 *Id.*

100 *Id.*

101 McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008); Geiger v. Am. Tobacco Co., 277 A.D.2d 420, 421 (N.Y. App. Div. 2000); Barnes v. Am. Tobacco Co., 161 F.3d 127, 149 (3d Cir. 1998); Emig v. Am. Tobacco Co., 184 F.R.D. 379, 395 (D. Kan. 1998); Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 12 (N.Y. App. Div. 1998); Arch v. Am. Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997); Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996).

102 *Geiger*, 277 A.D.2d at 421 ("[P]roof of whether the defendants caused the injury" would require establishing nicotine addiction for each class member); *Barnes*, 161 F.3d at 145 (Plaintiffs "must demonstrate that defendants' intentional or negligent nicotine manipulation caused each individual plaintiff to have a significantly increased risk of contracting serious latent diseases thereby demonstrating the need for medical monitoring."); *Emig*, 184 F.R.D. at 395 ("Determining addiction requires numerous individual inquiries about class members."); *Arch*, 175 F.R.D. at 488 ("If plaintiffs are unable to prove that cigarettes always cause addiction (a contention that plaintiffs do not advance), the Court is faced with the impossible reality of trying a case in which one million persons would have to be cross-examined as to causation."); *Castano*, 84 F.3d at 750 ("This class action is permeated with individual issues, such as proximate causation . . .").

103 *McLaughlin*, 522 F.3d at 234 (establishing loss causation under the plaintiffs' RICO theory would require individual inquiries because "individuals may have relied on defendants' misrepresentation to varying degrees in deciding to purchase Lights; some may have relied completely, some in part, and some not at all."); *Small*, 252 A.D.2d at 12 (inquiry into smokers' reliance would require "millions of individual trials."); *Arch*, 175 F.R.D. at 496; *Castano*, 84 F.3d at 750 ("This class action is permeated with individual issues, such as . . . reliance.").

104 *Castano*, 84 F.3d at 744.

105 Curtis v. Altria Group, Inc., No. A10-215, 2010 Minn. App. LEXIS 187, *63 (Minn. Ct. App. Dec. 28, 2010).

106 *Curtis*, 2010 Minn. App. LEXIS 187 at *53.