

FLORIDA HIGH COURT SHOULD REJECT “REGULATION THROUGH LITIGATION”

by

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Recently a number of public health organizations filed a friend of the court (*amicus*) brief in a multi-billion dollar class action lawsuit before the Florida Supreme Court.¹ These organizations have earned widespread respect for their long fight against serious diseases. Unfortunately, as part of their mission, these groups have allied with profit-seeking plaintiffs’ lawyers and embraced litigation as a means of forcing unpopular social change. As this LEGAL BACKGROUNDER argues, the Florida high court has an important opportunity to firmly reject this “regulation through litigation” approach and affirm respect for the rule of law and the limited role our Constitution granted to the judiciary.

The case at issue is *Engle v. Liggett Group, Inc., et al.* In *Engle*, a jury awarded \$145 billion to a so-called “class” brought by Dr. Howard Engle, on behalf of all smokers in Florida. The decision was rife with serious errors. Florida’s Third District Court of Appeals, considered a forum favorable to plaintiffs, overturned the trial court’s verdict on several grounds. *Liggett Group Inc. v. Engle*, 853 So.2d 434 (Fla. Dist. Ct. App. 2003). See, e.g., Michael I. Krauss, *Liggett Group v. Engle: A Case Study of Class Action Abuse*, LEGAL BACKGROUNDER (Wash. Lgl. Fndt.), Vol. 18, No. 48. Most important for this paper’s analysis of the health groups’ views, the court found that the class action mechanism’s use was inappropriate in the case of smokers’ alleged harm. In ruling this way, the Florida appellate court joined every appellate federal court and virtually every state court that has ever faced the issue.

¹Brief of *Amici Curiae*, American Pub. Health Ass’n, American Med. Ass’n, American Academy of Pediatrics, American Heart Ass’n, American Lung Ass’n, American Legacy Found., and Roswell Park Cancer Inst., *Engle v. Liggett Group, Inc.*, Fla. Sup Ct., Case No.: SC03-1856 (filed June 22, 2004), *available at* <http://www.flcourts.org/pubinfo/summaries/briefs/03/03-1856/Filed_06-22-2004_MotioinAmericanPublicHealth.pdf> [hereinafter Brief].

A fundamental requirement of class action litigation is that facts that are in common must outweigh facts that are not in common. The U.S. Supreme Court has affirmed this principle several times, most recently in *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997). In that case, the Court held that a class action was inappropriate because asbestos lawsuit plaintiffs were injured at different times, in different manners, with different diseases. While the Court was focusing on asbestos, its reasoning is entirely applicable in smoking cases. The efficiencies promoted by class actions are blown apart when each case has its own identity and postmark.

The Florida appeals court properly applied this principle in its review of the *Engle* trial court ruling. Its analysis opened with a statement which the Florida Supreme Court will hopefully embrace on appeal: “Although the emotional appeal of the class representatives’ claim is compelling, our job as appellate judges is not to be swayed by emotion where to do so results in violating *established legal principles*.” *Engle*, 853 So.2d at 442 (emphasis added). Past precedent cited by the court, both in Florida in analogous cases and nationally in tobacco-related cases, overwhelmingly dictated that trying *Engle* as a class action was entirely inappropriate. *See id.*, pp. 444-445.

The court found that in *Engle*, common issues of fact and law clearly did not predominate over individual ones, and class representation was not a superior method of trying the cases. Proceedings in the trial court demonstrated that “individualized issues of liability, affirmative defenses, and damages, outweighed any ‘common issues’ in this case,” *id.* at 445, and thus class representation is not “superior.” Issues such as whether a plaintiffs’ illness was proximately caused by defendants’ alleged misconduct (which requires particularized medical causation evidence), how and why plaintiffs relied upon defendants’ alleged misstatements, and how aware each plaintiff was of the health risks of smoking, the court found, were all individual in nature. The court also noted that proceeding with *Engle* as a class action would do an injustice to absent class members, who would be bound to negative decisions based on individual class representatives’ claims. *Id.*

In concluding its analysis, the court stated that “even though there is a common nucleus of facts concerning the defendants’ conduct, this case presents a multitude of individualized issues which make it particularly unsuitable for class treatment.” *Id.* at 450. The appeals court in Florida did what scores of other federal and state courts had done in the past when faced with unmanageable tobacco-related class actions: without regard to personal or emotional beliefs about the product at issue, they upheld the defendants’ fair trial and due process rights.

Certainly the health groups, along with the parties appealing the *Engle* verdict, appear to have an uphill battle in convincing the Florida Supreme Court to overturn an appeals court decision so firm in its application of the law. When faced with such a strong result, the public health groups apparently chose to entirely ignore the reasoning and result, and instead attempt to steer the state Supreme Court towards a radical reengineering of class action law, based on activists’ view of the mechanism as a valid tool for social policy change.

The health groups entirely misconstrue the purpose of class actions. Their brief views class actions as a legal tool to litigate and remedy a societal issue, rather than cases with common facts and issues of law. *See* Brief at 10 (“A class action allows representative persons to address a problem that affects communities or populations; evidence is provided to the trier of fact that damage is being done on a societal level.”); Brief at 11 (“The class is a legal tool that gives the injured *public* a means of effective protection and prevention.”; [C]lass actions are more than a managerial tool providing efficiency for the courts and litigants.”). As the Third District Court of

Appeals indicated, class actions are appropriate when people are injured in a similar way at a similar time with similar injuries. As virtually every court in the nation has recognized, this does not occur in asbestos, tobacco, or any other so-called toxic tort cases where injuries are highly individualized. The proper forum for developing policy to address societal issues is the legislature, not the courts through class action litigation.

The health groups' brief also suggests that class actions are needed for "small claimants," in the sense that, as individuals, their resources to pursue litigation are far less than a tobacco company to defend against a lawsuit. *Id.* at 12-13. The error of this statement is that wealthy personal injury attorneys who represent smokers operate on a contingency fee basis, not based on a client's resources. Class action certification does not consider the wealth or resources of individual claimants, nor should it. Rather, class actions offer a means of bringing small *claims* with shared facts and questions of law together in one lawsuit that would not otherwise be economically efficient or feasible to be brought on their own. The groups attempt to argue that class actions in tobacco lawsuits provide claimants with the "only economically available means for judicial relief." *Id.* at 11 (quoting Alba Conte & Herbert B. Newberg, *NEWBERG ON CLASS ACTIONS* 421-2 (4th ed.)). Tobacco lawsuits, though, do not involve "small claimants." When individual court cases are won, the verdict is in the millions or billions of dollars. Hundreds of cases involving smoking are currently pending throughout the country. Some individual claimants have won their cases, but most have not. They did not lose because they were "small claimants;" they lost because juries concluded that the plaintiff had clearly recognized the risks involved and should not be rewarded for choosing to smoke.

The health groups' brief further suggests that if smokers were required to bring their own lawsuits, they would lose substantive rights. Brief at 10. This also is not the case. The substantive rights of an individual suing under a class action are the same as a person suing under an individual action. The rules of law do not change; they are the same. Class actions merely give people the right to band together when they have suffered identical injuries and avoid clogging courts with repetitive suits based on the same or virtually the same facts.

The health groups' brief goes on to state that without class actions, "the tobacco companies are granted what amounts to an immunity from responsibility." *Id.* at 13. Not only should a court refrain from taking this into consideration when judging the class certification issue, it also is not an accurate statement. Again, the industry has had to face hundreds of cases filed by individual smokers, some of which have met with success. The companies are in the process of paying \$246 billion under the settlement reached with state attorneys general in 1998 as a result of their lawsuits. And the companies will go to trial beginning in September against the federal government in its racketeering lawsuit requesting \$280 billion in "ill-gotten gains" under the federal RICO law. Clearly neither the legal system nor the law provide immunity for tobacco companies.

Although class actions may involve similar situations, the health groups' brief states that the smokers in *Engle* "share highly significant similarities among themselves." *Id.* at 14. As this paper elaborates on above, this is absolutely not true in *Engle*. Each plaintiff had different knowledge about risks, and causation issues with respect to each plaintiff are quite individualized. Grouped together are claims dealing with heart disease, different types of cancers, and a wide variety of other illnesses. Moreover, defenses vary with respect to each plaintiff, and damages as alleged would vary widely.

On the issue of liability, the brief attempts to cast its argument in the context of design defect and analogizes cigarettes to the "Ford Pinto" and three-wheeled, all-terrain vehicles. The Pinto allegedly caught fire with relatively minor rear-end collisions, and three-wheeled, all-terrain vehicles

turned over because they had a narrow wheel base. *Id.* at 15, 17-18. The brief states that the manufacturer of Pintos recalled and modified them, and three-wheeled, all-terrain vehicles' production was ceased. *Id.* at 15. The brief suggests that liability against tobacco companies would bring about a similar result. *See id.* at 18. The brief is inaccurate both with respect to its analogy to defective products and the consequences of a misanalogy applied to cigarettes.

With both the Pinto and three-wheeled, all-terrain vehicles, there was a reasonable alternative design that gave a person a safer ride without the product's risks. *See* RESTATEMENT OF THE LAW THIRD, TORTS: PRODUCTS LIABILITY § 2(b) (1998). Automobile manufacturers can place a firewall between the rear bumper and passengers; manufacturers can increase the distance between the rear bumper and the gas tank. Four-wheeled, all-terrain vehicles do a very good job. It is not necessary to have three-wheeled vehicles. By way of contrast, whether one likes or dislikes cigarettes, they are a lawful product and there is no reasonable alternative design, at least today, that grants smokers what they desire without the significant health risks that are mentioned on every pack of cigarettes and openly acknowledged by tobacco companies in their websites and in advertisements.

One of the most disingenuous parts of the brief with regards to design issues points to the most famous torts professor of the last century, William L. Prosser, as supporting the view that tort law should be used against cigarette companies and they should be subject to massive liability. Ironically, the late Professor Prosser actually concluded — and he wrote this in the *Restatement of Torts (Second)* — that a product with well-known risks that was lawful and had no practical alternative design should not be subject to liability. He specifically mentioned sugar, alcohol AND tobacco. *See* RESTATEMENT OF TORTS (SECOND) 402A, cmt. i (1965).

Amicus curiae briefs roughly translate to “friend of the court” briefs. “Friends” are welcome to present controversial arguments and even unpopular points of view, and the courts are equally welcome to utilize or ignore the reasoning they contain. One would hope the Florida Supreme Court would in fact do neither, and instead, in the course of upholding the appeals court ruling, specifically reject the public health activists' view of class actions as a legitimate social policy making tool.

The Court will hopefully understand that more is at stake in this case, as the urgency of the activists' brief reflects, than one “disfavored” product or industry. Producers and consumers of other “risky” products such as alcohol, fast food, or pharmaceuticals would suffer if class actions and judges replace public debate and elected officials as the way to regulate personal conduct. That is just what would happen if the Florida Supreme Court does what the activists urge the justices to do: follow their emotions, ignore overwhelming precedent, and institutionalize regulation through class action litigation. Litigation is an extremely imprecise, unwieldy, and inefficient way to regulate businesses and consumer conduct. Certainly public health activists should understand that public health policy making is far too important a job to be placed in the hands of unaccountable and inexpert lawyers, juries, and judges.