IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1856

On Review from a Decision of the

Third District Court of Appeal

HOWARD A. ENGLE, M.D., et al., Petitioners

v.

LIGGETT GROUP INCORPORATED, et al., Respondents

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENTS

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The Chamber of Commerce of the United States respectfully submits this amicus brief in support of approval of the Third District Court of Appeal decision.

STATEMENT OF INTEREST

Amicus curiae, The Chamber of Commerce of the United States ("the Chamber"), is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] The Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the business community, and has participated as *amicus curiae* in numerous cases addressing class certification.[2] The Chamber and its members have a strong interest in upholding the District Court's decision. Allowing this case to proceed as a class action would set a dangerous precedent, opening the floodgate for plaintiffs to bring massive personal injury class actions against automobile, pharmaceutical, chemical and numerous other companies that do business in Florida – and threatening the ability of those businesses to fairly defend themselves against potentially bankrupting lawsuits.

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[1] No counsel of any party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] These cases include *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *State Farm Mutual Auto Insurance Co. v. Speroni*, 525 U.S. 922 (1998).

INTRODUCTION

The trial court certified a class of hundreds of thousands of personal injury plaintiffs in a manner that violates fundamental due process principles, subverts well established class action rules based on those due process principles, and if upheld, would undermine the ability of thousands of Florida businesses in other industries to fairly defend themselves in class action suits. The trial court's decision also threatens to flood Florida courts with class actions by inviting the filing of non-manageable personal injury class actions that would be rejected by virtually every other court nationwide. Put simply: the issues here will reverberate far beyond this case and set precedents that will affect virtually every major company that does business in Florida.

Petitioners and their *amici* are effectively urging that the Court suspend the law governing class actions because this case involves the tobacco industry. In asking this Court to allow them to proceed with a class of more than 700,000 people who smoked for different periods of time, had various levels of addiction, possessed varying bodies of knowledge regarding the health effects of smoking, and allege medical problems "ranging from cancer and heart disease to colds and sore throats" *Liggett Group v. Engle*, 853 So. 2d 434, 440 (3rd DCA 2003), petitioners and their *amici* ignore the purpose of class actions, the limits of Florida's class action rule and the dangerous precedent that would be set if the

Florida Supreme Court were to reinstate the certification order in this case.

According to *amici* American Public Health Association *et al.*, a class action in this case would "consider the combined effects of the defendant's conduct on the public's health" and "the importance of the total societal burden" caused by the cigarette industry. (Am. Pub. Health Br. at 11.) But that is precisely the problem. Class actions are a procedural device for the efficient resolution of predominantly similar allegations by many individuals; they were never intended as a public policy cudgel to punish companies for allegedly causing a "societal burden." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("[c]lass certification is strictly a procedural matter and the merits of the claims are not to be considered"). Since class actions exist in Florida solely by virtue of court-created rules, they may not in any way be used to abrogate or diminish a party's litigation rights or defenses. *See Lundstrom v. Lyon*, 86 So. 2d 771, 772 (Fla. 1956). Indeed, Florida's class action rules, like those of federal and other state courts, impose strict requirements to protect procedural rights. Fla. R. Civ. P. 1.220; Fed. R. Civ. P. 23. *See Earnest v. Amoco Oil Co.*, 859 So. 2d 1255, 1258 (1st DCA 2003) (class can only proceed after "rigorous analysis" of compliance with requirements). As numerous courts have recognized, personal injury product liability claims (including tobacco cases), cannot be resolved as class actions ***as a procedural matter***, because they involve highly individualized circumstances.

The District Court properly held that although "the emotional appeal of the class representatives' claims is compelling," Florida's class action rule "clearly mandates" reversal of the certification order because plaintiffs failed to demonstrate the "predominance" of common claims and the "superiority" of the class action device. *Engle*, 853 So. 2d at 442. This Court should approve.

ARGUMENT

I. PERSONAL INJURY PRODUCT LIABILITY CASES ARE NORMALLY UNSUITED FOR CLASSWIDE ADJUDICATION.

The District Court properly recognized that in this case – as in virtually all personal injury cases – "each class member had unique and different experiences that will require the litigation of substantially separate issues" and that the certified class thus failed to meet the "predominance" requirement of Fla. R. Civ. P. 1.220(b)(3). *Engle*, 853 So. 2d at 446. The court also properly recognized that class actions are not a "superior" means of adjudicating personal injury claims, because personal injury class actions threaten due process rights, unduly pressure defendants into settling claims regardless of merit, and are, in any event, unnecessary because such cases are substantial enough to be brought individually.

A. Personal Injury Product Liability Cases Require Inherently Individualized Factual Inquiries.

The District Court decision decertifying the class in this case is consistent with a long line of federal and state court case law recognizing that personal injury

product liability actions typically must be tried individually – not as a group – because the jury must separately consider the highly individualized circumstances related to each claimant's injury and what caused it. *See In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 65-6 (S.D.N.Y. 2002) ("[A]ll relevant Court of Appeals and the bulk of relevant district court decisions have rejected class certification in product liability cases.").[3] The United States Supreme Court has even rejected certification of a personal injury product liability case in the settlement context, despite the fact that such cases do not need to meet the "manageability" requirement. *See Amchem*, 521 U.S. at 623-24 (affirming reversal of class settlement in asbestos case). The Court's decision in *Amchem* strongly suggests that personal injury class actions are inappropriate in any circumstance, except possibly in the context of single accidents. *See id.* (unlike single-accident case, "class members in this case were exposed to different asbestos-containing

[3] *See also Baker v. Wyeth-Ayerst Labs.*, 992 S.W.2d 797, 800-01 (Ark. 1999); *Geiger v. Am. Tobacco Co.*, 716 N.Y.S.2d 108, 109 (N.Y. App. Div. 2000); *Rose v. Medtronics, Inc.*, 166 Cal. Rptr. 16, 19-20 (Cal. Ct. App. 1980); *Rosenfeld v. A.H. Robbins Co.*, 407 N.Y.S.2d 196, 198-202 (N.Y. App. Div. 1978); *Morrissy v. Eli Lilly & Co.*, 394 N.E.2d 1369, 1375-78 (Ill. Ct. App. 1979); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189-92 (9th Cir. 2001); *In re Am. Med. Sys.*, 75 F.3d 1069, 1081-83 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1296-1304 (7th Cir. 1995); *In re N. Dist. Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852-56 (9th Cir. 1982); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 205-10 (D. Minn. 2003); *In re Paxil Litig.*, 218 F.R.D. 242, 245-50 (C.D. Cal. 2003); *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 163-174 (S.D.N.Y. 2003); *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 300-08 (N.D. Ohio 2001); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 369-74 (N.D. Ill. 1998); *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 673-81 (N.D. Ohio 1995).

products, in different ways, over different periods, and for different amounts of time").[4]

Based on many of these concerns – and others discussed below, "[a] myriad of federal and state courts have shown a predominant, indeed almost unanimous reluctance to certify . . . class actions for mass tobacco litigation." *Angeletti*, 752 A.2d at 222. *See also Engle*, 853 So. 2d at 444 (listing cases). These courts have recognized that tobacco claims – like personal injury claims in general – are singularly unsuited for certification under Fed. R. Civ. P. 23 and its state court analogues because they raise individualized issues regarding knowledge of risk, extent of addiction, and causation.[5] *See, e.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 149 (3d Cir. 1998) (smokers' claims involve numerous individualized issues, including "…nicotine addiction, causation, . . . contributory/comparative negligence and the statute of limitations").[6]

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[4] *See also* Peter A. Drucker, *Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate for Class Action Treatment?*, 29 SETON HALL L. REV. 213, 229 (1998).

[5] Fla. R. Civ. P. 1.220 is based on Fed. R. Civ. P. 23, and Florida courts thus consider federal precedents as persuasive authority in construing Rule 1.220. *Engle*, 853 So. 2d at 444 n. 5.

[6] *See also Geiger*, 716 N.Y.S.2d at 109 (reversing certification; "[t]he purportedly common issues proposed by the plaintiffs in their complaint are actually dependent on the resolution of issues such as addiction and causation as to each individual member of the proposed class"); William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1889 (2000) ("problems of using class actions for

Unlike most courts, which consider class certification issues at the beginning of a case or on interlocutory appeal, the appellate court here had the benefit of deciding the issue with a measure of hindsight – after three named plaintiffs' claims had been tried to a verdict. That proceeding, known as Phase IIA, lasted for five months and resulted in damages determinations for just three of the more than 700,000 class members. *Id.* at 445 n.8. During Phase IIA, the jury considered a plethora of individualized issues, including causation, damages, comparative fault and statute of limitations. *Engle*, 853 So. 2d at 445-448, 455. Phase IIA offers an instructive case study of why personal injury class actions are inefficient and unfair. Among other problems:

- The plaintiffs must each demonstrate causation separately. A "general causation" finding that a given product has a potential to cause injury does nothing to facilitate the much more time-consuming proximate cause, injury-in-fact, and liability showings required for each plaintiff to prove his or her claim. *See, e.g.*, *Paxil*, 218 F.R.D. at 249; *Kurczi*, 160 F.R.D. at 677-78; *Puerto Rico v. M/V Emily S*, 158 F.R.D. 9, 13, 15 (D.P.R. 1994). Here, the causation inquiry will require the jury to determine separately for each class member: (1) whether the plaintiff was addicted to smoking; (2) what illness the plaintiff suffered; and (3) whether that illness resulted from smoking a defendant's

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other kinds of mass torts . . . can be illustrated with cases of personal injury claims of smokers against tobacco companies").

products. Deciding this issue separately on behalf of 700,000 more class members would overwhelm the common issues in the case.

- The jury must address assumption of risk and comparative fault individually for each plaintiff. In Phase IIA, the three named plaintiffs were also required to litigate – separately and extensively – each individual's level of awareness regarding the health risks of smoking and whether they assumed the risk of smoking. The differences were significant. One learned about the consequences of smoking in nursing school and from her father's smoking-induced heart condition, while another testified that he did not think smoking was "addictive or caused lung cancer because he 'didn't believe that the government would allow cigarettes to be sold if they were unsafe.'" *Engle*, 853 So. 2d at 446 n.11.
- The jury must separately determine damages. Unlike the paradigmatic class action in which each class member suffered the same low-value injury, personal injury cases involve widely disparate damages. *See Rose v. Medtronics, Inc.*, 166 Cal. Rptr. 16, 19 (Cal. App. 2d Dist. 1980) (rejecting certification in part because of "wide disparity in damages that ordinarily arises" in personal injury cases). That is particularly true in a case such as this where the allegations range from minor throat irritations to deadly cancers. The compensatory

damages component of the Phase IIA trial took several days and the awards to the named plaintiffs varied substantially – from $2.85 million to $5.83 million.

In short, far from being an exception to the general rule that personal injury cases should not be certified, the *Engle* case offers a textbook example of the overwhelming individualized inquiries that arise in such cases.

B. Personal Injury Class Actions Offer Courts A Hobson's Choice Between One Prejudicial Trial Based On A Fictional Composite Plaintiff And Thousands Of Unmanageable Mini-Trials.

Because personal injury class actions do not involve monolithic claims, there is no simple way to devise a trial plan that will resolve all the class members' claims fairly and efficiently. Plaintiffs typically offer one of two "solutions" to this problem: (1) holding a single trial that purports to resolve the claims of the entire class, often by presenting the jury with a fictional, composite plaintiff; or (2) establishing an individual (and inevitably, unmanageable) mini-trial process for each class member. The trial court here tried both, with dire results.

First, the Phase I and Phase IIB "general liability" and punitive damages trials proceeded without an actual plaintiff, putting the very real and present defendants at a substantial disadvantage. In Phase IIB, "[t]he jury did ***not*** determine whether defendants were liable to anyone" and simply awarded punitive damages to a hypothetical class. *Engle*, 853 So. 2d at 450.

The Phase I and IIB trials in this case raise a concern that has come to be

known as the "perfect plaintiff" problem. As a number of courts have recognized, the ability to construct a theoretical and thus "perfect" plaintiff results in prejudicial trials because it allows the plaintiffs' lawyers to create a sympathetic composite plaintiff. The term "perfect plaintiff" was coined by the U.S. Court of Appeals for the Fourth Circuit in *Broussard v. Meineke Discount Muffler Shops, Inc.* 155 F.3d 331, 344-345 (4th. Cir. 1998). In that case, the trial court certified a class action brought by franchisees alleging various tort and consumer protection violations. In decertifying the class, the appeals court held:

> [P]laintiffs enjoyed the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation. Plaintiffs were allowed to draw on the most dramatic alleged misrepresentations made to Meineke franchisees, including those made in final review sessions with absent class members, with no proof that those 'misrepresentations' reached them. And plaintiffs were allowed to stitch together the strongest contract case based on language from various [agreements].

Id. at 344. *See also Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 564 (D.S.C. 2000) (certification would lead to a "composite" and "purely fictional" class representative with "no likeness to any one of the real Plaintiffs in th[e] case"); *Southwestern Ref Co. v. Bernal*, 22 S.W. 3d 425, 438 (Tex. 2000) ("[a]ggregating claims can dramatically alter substantive tort jurisprudence . . . [b]y removing individual considerations from the adversarial process").

The problem identified by the *Meineke* court is heightened in the context of personal injury class actions because of the strong emotions evoked by such cases.

Litigating a personal injury action on behalf of theoretical plaintiffs (as opposed, for example, to a particular individual who may have been exposed to a certain product despite warnings and a full knowledge of the health risks) enables the plaintiffs' lawyers to create a particularly sympathetic portrait of the "victims" of the defendant's conduct, untethered to the reality of their individual knowledge, exposure, assumption of risk, and other relevant experiences. The due process problems that result when one side presents a sympathetic "fictional composite" while at the same time attacking a very real defendant – particularly in a personal injury case – render a fair trial impossible. *See Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (reversing consolidation of 48 asbestos cases; "[t]he benefits of efficiency can never be purchased at the cost of fairness").[7]

While Phases I and IIB of the *Engle* trial raised the specter of the "perfect plaintiff" problem, Phases IIA and III raise the second problem noted above: the unmanageability of holding individual mini-trials for 700,000 class members. Phase IIA involved mini-trials of just three class representatives and lasted five months. Phase III will involve selection of "new juries [to] decide the individual liability and compensatory damages claims for each class member (estimated to

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[7] *Cf.* Brian H. Barr, *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, 824 (2001) (*Engle* trial plan violated "due process rights" by awarding "punitive damages to an entire class of injured Florida smokers prior to any findings of individual liability and individual harm for each class member").

number at least 700,000)." *Engle*, 853 So. 2d at 442. Even if these trials proceed at twice the speed of Phase IIA, it would take tens of thousands of years to complete them. *See id.* at 443 (noting trial court's concern that "the necessary individual hearings will place a serious demand upon Florida's judicial resources"). Not surprisingly, numerous courts have highlighted concerns about the manageability of individual class member trials in rejecting personal injury class actions. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001) ("[g]iven the fact that approximately 66,000 individuals had these leads implanted, there are potentially 66,000 different instances that the Court would have to examine to determine" causation, making the case to difficult to manage).[8] *See also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS. L. REV. 805, 832 (1997) (emphasizing manageability problems inherent in personal injury class actions; "even if there is a common upstream inquiry…there is an immediate need to shift downstream and find fact after fact" individually).

The mini-trial approach also violates defendants' jury trial rights under article I, section 22 of the Florida Constitution, because it would require the trial

[8] *See also Castano*, 84 F.3d at 747 (finding "extensive manageability problems" in tobacco class action; "[c]ases with far fewer manageability problems have given courts pause"); *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 173-74 (S.D.N.Y. 2003) (rejecting certification of class action involving needle devices because of the "plethora of individual issues left for resolution after a trial on the class-wide" issues); *Jones v. Allercare*, 203 F.R.D. at 290 ("trying this case as a class action would require an overwhelming number of mini-trials").

court to empanel thousands of new juries to hear the individualized aspects of the class members' claims. Florida law prohibits the reexamination of issues by multiple juries, which can result in inconsistent verdicts. *See W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994) (in bifurcated trial, "same jury" should decide liability, actual damages and punitive damages); *Woltin v. Richter*, 761 So.2d 459, 460 (4th DCA 2000) (same). Similar concerns have led a number of federal courts to reject certification of personal injury class actions with bifurcated trial plans. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1303-04 (issues of liability could not be separated from the issues of damages in personal injury case without running afoul of the Seventh Amendment).[9]

C. Personal Injury Cases Do Not Require The Class Action Device Because They Are Substantial Enough To Be Brought Individually.

If the fairness and manageability concerns raised by personal injury class actions were not enough to prohibit such cases from proceeding, these are also the cases for which the class action device is ***least*** necessary. That is because a personal injury plaintiff maintains a strong interest in deciding the direction of his or her individual case and has the prospect of substantial rewards. *See In re*

[9] *See also Castano*, 84 F.3d at 750-51 (rejecting tobacco class action, in part because of "the risk that in order to make this class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment"). Cases decided under the Seventh Amendment of the U.S. Constitution are "helpful and persuasive" in construing Florida's jury trial right. *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986).

Rhone-Poulenc Rorer, Inc., 51 F.3d at 1299 (the most "compelling" rationale for the use of class actions is where the claims are "tiny relative to the expense of litigation" – a situation that is absent in personal injury claims); *Amchem*, 521 U.S. at 625 (class certification is not appropriate where "individual stakes are high").[10]

Petitioners' arguments that this case is an exception to the general rule that personal injury claims are not "small value" claims because the tobacco industry defends itself vigorously against personal injury claims is unconvincing. First, this case has demonstrated that it ***is*** possible to achieve huge verdicts against tobacco companies. After all, each of the three plaintiffs whose claims were litigated in Phase IIA was awarded a seven-figure compensatory damages verdict, and the jury awarded a staggering $145 billion in punitive damages. Thus, even if plaintiffs are correct that some personal injury lawyers hesitated in the past to challenge these defendants, these verdicts will undoubtedly shift the sands. *See Engle*, 853 So. 2d at 449 (characterizing petitioners' "negative value" argument as "intellectually improper" and refuted by the Phase IIA verdict).[11] Second, the wealth of a

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[10] *See also Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 173 (S.D.N.Y. 2003) (plaintiffs in personal injury cases can "employ tort lawyers, on a contingency basis, to bring individual actions"); *Medtronics*, 166 Cal. Rptr. 2d at 18 (personal injury cases should be tried individually because of "the great importance of tort claims for personal injuries to the claimants themselves").

[11] In any event, there have been numerous other substantial verdicts against the tobacco industry in individual cases. *See, e.g., Boeken v. Philip Morris, Inc.*, 2001 WL 1894403 (Cal. Sup. Ct. Aug. 9, 2001) ($5,540,000 compensatory damages); *Boerner v. Brown & Williamson Tobacco Corp.*, 2003 WL 21703767 (E.D. Ark.

company or industry (no matter how vast or in the views of some, undeserved) is irrelevant to the "negative value" analysis – as are aggressive defense tactics or "no-settlement" policies. Allowing plaintiffs to proceed with otherwise improper class actions simply because they are suing companies with a strong legal strategy would unfairly penalize businesses for exercising their right to defend themselves.

D. Class Treatment Of Personal Injury Class Actions Unfairly Forces Defendants Into Exorbitant Settlements.

Far from being necessary to enable plaintiffs to have their day in court, personal injury class actions have the reverse effect – denying defendants theirs. "In the context of mass tort class actions, certification dramatically affects the stakes for defendants," by strengthening unmeritorious claims, making it "more likely that a defendant will be found liable," and resulting "in significantly higher damage awards." *Castano*, 84 F.3d at 746. The aggregation of a large number of disparate claims in a single proceeding thus usually serves either to force a "blackmail" settlement divorced from the merits of the individual claims, or leads to an inflated jury award that likewise does not reflect the merits of those claims. *Id.* ("[C]lass certification creates insurmountable pressure on defendants to settle. . . . The risk of facing an all-or-nothing verdict presents too high a risk even when

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May 23, 2003) ($4,025,000 compensatory damages); *see also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1834-35 (1995) (plaintiffs can overcome tobacco defendants' perceived advantage when a sufficient number of plaintiffs have filed claims and shared discovery).

the probability of an adverse judgment is low."); *Rhone-Poulenc*, 51 F.3d at 1300 (expressing concerns about personal injury class actions because "one jury" can "hold the fate of an industry in the palm of its hand"); Barry F. McNeil & Beth L. Fancsal, Mass *Torts & Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-92 (1996). The unfairness and undesirable results associated with aggregating dissimilar claims are particularly acute in the personal injury context because, as explained above, personal injury claims are inherently individualized and thus should be tried through a case-by-case process that will more accurately reflect the true value of each claim. *See Castano*, 84 F.3d at 747. Thus, in the vast majority of cases, certification of a personal injury case effectively means that the defendant must fold its cards; with no hope for a fair trial, the only option is to accede to a settlement that is wholly unwarranted.

II. FRAUD CASES ARE UNSUITED FOR CERTIFICATION.

The appellate court's decertification order also properly recognized that even putting aside the personal injury aspects of their case, petitioners' claims cannot be pursued on a class basis because they are alleging fraud. Like personal injury cases, fraud cases are widely recognized as inappropriate for certification because they require case-by-case inquiries into whether each claimant was indeed defrauded. *Engle*, 853 So. 2d at 446. The advisory committee notes to Fed. R. Civ. P. 23 (upon which Florida's rule is based) caution against fraud class actions,

noting that "a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance." Fed. R. Civ. P. 23, advisory committee notes to 1966 amendment.

Almost every court to consider the issue – including this one – has agreed, finding that fraud claims are particularly ill-suited for class resolution because they require a showing of reliance, which is, by definition, inherently individualized. *See, e.g. Avila S. Condo. Ass'n v. Kappa Corp.*, 347 So. 2d 599, 609 (Fla. 1977) ("fraud claims . . . are inherently diverse, as a matter of law") (citation omitted); *Chateau Cmtys., Inc. v. Ludtke*, 783 So. 2d 1227, 1231 (Fla. 5th DCA 2001); *Hoechst Celanese Corp. v. Fry*, 753 So. 2d 626, 628 (Fla. 5th DCA 2000).[12] Nor can a court simply presume reliance in order to facilitate class certification. Such an approach would improperly allow the class action device to change substantive law, effectively excusing each class member's burden of showing reliance. The trial court's certification of the fraud claims despite well-established precedent in this area further reflects its complete disregard of basic class action principles, and if upheld, would reverse this Court's prior holdings.

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[12] *See also Castano*, 84 F.3d at 745; *Butler*, 611 So. 2d at 332; *Simon v. Merrill Lynch, Pierce, Fenner & Smith*, 482 F.2d 880, 882 (5th Cir. 1973); *Basic, Inc. v. Levinson*, 485 U.S. 224, 242 (1988); *Keyes v. Guardian Life Ins. Co.*, 194 F.R.D. 253, 257 (S.D. Miss. 2000); Charles A. Wright *et al.*, *Federal Practice and Procedure: Civil 2d* § 1778, at 540 & n.30 (1982) (collecting cases)).

III. CERTIFICATION IS INAPPROPRIATE IN CASES THAT REQUIRE APPLICATION OF NUMEROUS STATES' LAWS.

The trial court's certification order here also directly conflicts with extensive case law prohibiting certification of classes that involve individualized choice-of-law issues and the application of multiple states' laws. In fact, variations in state law are widely recognized as precluding certification of product liability claims where the class members purchased the products at issue in numerous different states. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules.").[13] As the United States District Court for the Eastern District of Louisiana observed in *In re Ford Motor Co. Vehicle Paint Litig.*, state law variations pose an almost insuperable barrier to formulating a jury charge that is both accurate and comprehensible. 182 F.R.D. 214, 222-224 (E.D. La. 1998); *see also Am. Med. Sys.*, 75 F.3d at 1085. Moreover, because the nuances of each relevant state's law must be respected throughout the course of the litigation, managing a nationwide class with substantial state law variations can prove extraordinarily difficult. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001).

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[13] *See also Castano*, 84 F.3d at 741-44; *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 495 (S.D. Ill. 1999); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 458-62 (D.N.J. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 369 (N.D. Ill. 1998); *In re Stucco Litig.*, 175 F.R.D. 210, 217 (E.D.N.C. 1997); *Ex parte Exxon Corp.*, 725 So.2d 930, 931-33 (Ala. 1998); *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 194-95 (N.Y. App. Div. 1998).

Reinstatement of the class certification order here would thus contradict yet another well established principle of class action law – that courts should not certify cases that require application of varying state laws.

In this case, although the class definition is limited to Floridians, it is not limited to lifelong Florida residents. As a result, proper resolution of these claims will require hundreds of thousands of individualized choice-of-law analyses and application of the laws of numerous states. *See Sikes v. Teleline, Inc.*, No. 99-8007, 2002 U.S. App. LEXIS 2346, at *44 n. 44 (11th Cir. Feb. 13, 2002) (assuming "the laws of all fifty states apply, that alone would render the class unmanageable"). Evidence during the pretrial proceedings showed that "nearly 50% of Florida residents who are over 50 years old – those most likely to be class members – moved to Florida after reaching age 50," and that over 65 percent of smokers in Florida moved to the state after having become regular smokers. *Engle*, 853 So. 2d at 448. Under Florida's choice-of-law rule, which considers which state "has the most significant relationship to the occurrence and the parties," *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980), the court would thus have to consider numerous factors to determine on a person-by-person basis which state's laws should govern. The named plaintiffs illustrate the nature of this problem: one lived in New York for most of his smoking years and another in Michigan (where punitive damages are barred). *Id.* A former

named plaintiff spent nearly all of his smoking career in Colorado and only moved to Florida a few months before the suit was filed. *Id.* Hundreds of thousands of additional class members would pose similar choice-of-law quandaries.

As the appeals court noted, resolving each class member's claims would require a "full choice-of-law analysis" and application of the law of the "state with the most significant relationship to the parties and the occurrence." *Engle*, 853 So. 2d at 448. "Especially in a state which has a highly transient population," choice-of-law problems "present an insuperable roadblock to smokers' class actions." *Id.*[14] Thus, the claims here, though purportedly limited to one state, raise the same problems as fifty-state class actions that require application of every state's laws.

CONCLUSION

The District Court properly recognized that personal injury product liability claims cannot be certified as class actions. This Court should approve.

[14] *See also Reed v. Philip Morris, Inc.*, 1997 WL 538921, at *14 (D.C. Super. Ct. Aug. 18, 1997) (denying certification in D.C. smoking case because "[a] class member may have started smoking, learned of the dangers of smoking, tried to quit, been diagnosed with a smoking-related illness, and/or changed brands, all in different states"); *Philip Morris v. Angeletti*, 752 A.2d at 230-33 (reversing certification of Maryland-only smoker class action in part because of choice-of-law issues).

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

LAW REVIEW ARTICLES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page