No. SC03-1856

IN THE SUPREME COURT OF FLORIDA

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

v.

LIGGETT GROUP, INC., *et al.*,
Respondents.

_____

On Petition for Review from
the District Court of Appeal of Florida, Third District

_____

BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND SEEKING AFFIRMANCE OF THE ORDER BELOW

On Motion for Leave of Court

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July 23, 2004

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide. Since its founding in 1977, WLF has engaged in litigation and advocacy to defend and promote individual rights and a balanced civil justice system. WLF regularly participates in appellate litigation in support of its view that improper certification of class actions undermine the fairness of American civil justice. Among the many federal and state court cases in which WLF has appeared to provide expertise on the proper scope of class action litigation are *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); *Gilchrist v. State Farm Mut. Automobile Ins. Co.*, No. 03-107998-H (11th Cir., decision pending); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000); *Diamond Multimedia Systems v. Superior Court*, 19 Cal. 4th 1036 (1999), cert. denied, 527 U.S. 1003 (2000).

The National Association of Manufacturers (NAM) is the nation's largest industrial trade organization. It represents 14,000 member companies and 350 member associations serving manufacturers and

employees in every industrial sector and all 50 states.

WLF and NAM are submitting this brief because they are concerned that if the proposed class is certified on the basis of the policy arguments advanced by Plaintiffs and their *amici* – notwithstanding the lack of predominance and superiority as required by Fla. R. Civ. P. 1.220 – the result would be to cast aside the carefully-crafted balance of plaintiffs' interests, defendants' interests, and judicial efficiency embedded in Rule 1.220.

INTRODUCTION AND SUMMARY OF ARGUMENT

In determining whether class certification was proper in this case, the District Court of Appeals was required to address two legal questions that are highly familiar, and indeed routine, in the context of class action litigation: Does the proposed class satisfy the "predominance" requirement of Fla. R. Civ. P. 1.220(a)? And does it satisfy the "superiority" requirement of Rule 1.220(a)? In a careful analysis of the proceedings and findings of Phase 2 of the trial, and of the applicable case law, the court below concluded that the answer to both questions was "no." *Liggett Group, Inc.*

v. Engle, 853 So. 2d 434, 445-49 (Fla. 3d DCA 2003) (hereinafter *Engle*). This unexceptional conclusion was consistent with the decisions of scores of state and federal court decisions addressing the certification of smokers' class actions. *Id.* at 444 (collecting authorities).

Plaintiffs do not even attempt to refute the analysis of the District Court of Appeals with respect to predominance and superiority. *See* Petitioners' Br. at 16-24. Instead, Plaintiffs claim merely that the lower court's decertification order comes, in effect, too late and that class status should be granted for public policy reasons. For the reasons set out below, both of these arguments are meritless. As explained in Part I below, the certification of the class was always provisional, and Florida procedure mandates that the appeal of a denial of decertification must await the entry of a final order – as was the case here. Also, as discussed in Part II, Rule 1.220 does not allow for classes that otherwise lack predominance and superiority to be certified on the basis of asserted "public interest" reasons, and this proceeding is not a proper forum for amending the Florida Rules of Civil Procedure.

ARGUMENT

I. THE DECERTIFICATION HERE PROPERLY FOLLOWED PHASE 2 OF THE TRIAL AND PRECEDED ENTRY OF JUDGMENT

The District Court of Appeals properly rejected Plaintiffs' claim that the class was improperly decertified after trial and that the "law of the case" bars decertification. *See Engle,* 853 So. 2d at 443 n.4. Under Fla. R. Civ. P. 1.220(d)(1), "An order under this subsection [determining whether a claim or defense is maintainable on behalf of a class] may be conditional and may be altered or amended before entry of a judgment on the merits of the action." Here, contrary to Plaintiffs' characterization of the motion as a "post-trial motion" (Petitioners' Br. at 16), the motion for decertification was filed and denied prior to Phase 3 of the planned three-phase trial. Although the trial court had ordered payment of $145 billion in punitive damages into the court pending the division of those damages among the class members, it had not even begun the Phase 3 proceedings in which it was to hear individual liability and compensatory damages claims. *Engle*, 853 So.

2d at 441-42.

Indeed, it is unclear that Defendants could have obtained appellate review of the denial of decertification any earlier than they did. Under Fla. R. App. P. 9.130(a)(3)(C)(vi) and 9.130(a)(6), while trial court orders certifying or declining to certify a class are eligible for interlocutory review, orders *decertifying* a class are not. *Okeelanta Corp. v. McDonald*, 730 So. 2d 1283, 1284 (Fla. 4th DCA 1999). Thus, when Defendants unsuccessfully moved the trial court for decertification of the class in 1998 and then brought an appeal of that denial, the District Court of Appeal dismissed the appeal for lack of jurisdiction.[1] *Engle*, 853 So. 2d at 443.

The "law of the case" argument is equally unavailing in view of the inherently tentative character of class certifications under Rule 1.220. The trial court specifically recognized that the initial approval of class certification by the District Court of Appeals was "preliminary." *Engle,* 853 So. 2d at 443 n.4.

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[1] That order is reproduced at *R. J. Reynolds Tobacco Co. v. Engle*, 711 So. 2d 553 (Fla. 3rd DCA 1998).

II. THE "PREDOMINANCE" AND "SUPERIORITY" REQUIREMENTS ARE MANDATORY AND CANNOT PROPERLY BE DISREGARDED ON POLICY GROUNDS

Plaintiffs and their *amici* appear to argue that certification of the proposed class is proper on the ground that it "serves the public interest." Petitioners' Br. at 22. "Individuals' lawsuits against tobacco companies, which are more like individuals' medical encounters than the public health approach, have not been successful in altering the behavior of those companies, and the death toll from smoking remains unacceptable. Class action is needed." Br. *Amici Curiae* of American Public Health Association *et al*. at 10.

But Rule 1.220(a) contains no tobacco exception, no hazardous-product exception, and indeed no public policy exception of any kind. The rule states, "Before *any* claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class, the court *shall* first conclude" that the prerequisites to a class action are present – including those of predominance and

superiority. Fla. R. Civ. P. 1.220(a) (emphasis added).

The U.S. Supreme Court has interpreted Rule 23 of the Federal Rules of Civil Procedure, on which Rule 1.220 is based,[2] in the same manner. The Court noted in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

[2] *Engle*, 853 So. 2d at 444 n.5.

If Rule 1.220(a) is to be amended, it is not properly amended in this proceeding. Pursuant to its rulemaking powers under the Florida Constitution, Art. V, § 2(a), this Court has established deliberative procedures for the consideration and adoption of such amendments. Under the Internal Operating Procedures of this Court, petitions to amend the Florida Rules of Civil Procedure or other procedural rules promulgated by the Court are to be filed by the Florida Bar or a committee designated by the Court. Such proposals are published for comment and may be set for oral argument. *Manual of Internal Operating Procedures* § II(F)(3) (2002).[3] In urging this Court to adopt a defendant-specific exception to Rule 1.220(a) – or, at most, an amorphous public policy exception – they are bypassing the mechanism established by this Court for winnowing and evaluating proposed amendments to its rules.

Amicus Prof. John F. Banzhaf III suggests that this Court should follow the lead of various decisions in which courts have modified common-law

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[3] Fla. R. Civ. P. 1.220 in its present form was adopted and published in *In re Amendments to the Florida Rules of Civil Procedure*, 604 So. 2d 1110, 1131-33 (Fla. 1992).

tort doctrines in a plaintiff-friendly manner. *See* Br. *Amicus Curiae* of Law Professor John F. Banzhaf III at 4-7. The comparison is inapposite. Here, the issue presented is based on promulgated rules – the Florida Rules of Civil Procedure – not on common law. Thus, for example, Prof. Banzhaf's reliance on *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), is misplaced. In *MacPherson*, the court determined that a duty of care under common law should extend beyond the initial purchaser to subsequent purchasers, regardless of the existence of privity of contract. The case of *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), involves the adoption of the doctrine of strict liability to product manufacturing cases; again, the decision was based solely on the court's decisional authority under the common law, and did not involve the judicial rewriting of a governing rule or statute.

Similarly, Prof. Banzhaf cites *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944), which modified the common law doctrine of *res ipsa loquitur*, another common law doctrine. *Ybarra* permitted a hospital patient to recover for a medical malpractice, even though the patient was not able to

point to each element of the common law *res ipsa loquitur* doctrine. Unlike the present case, the court in *Ybarra* had no statute to rely upon in rendering its decision. The latest of Prof. Banzhaf's model cases, *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), expanded the reach of a common law doctrine used to determine whether causation could be established in a negligence action. Just as in the other cases upon which Prof. Banzhaf relies, no statute existed in *Sindell* for the court to apply in determining liability of the defendants. The courts in all these cases, unlike this Court here, were at liberty to expand and reshape the law in these areas precisely because the issues were common law issues.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the decision below.

Respectfully submitted,

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I HEREBY CERTIFY that on this 23rd day of July, 2004, I caused one copy of the foregoing brief to be deposited in the U.S. Mail, first-class postage pre-paid, addressed to each of the following:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

This brief complies with the font requirement of Rule 9.210(a)(2) because it has been prepared using Times New Roman in 14 point.

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