

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 AMICI CURIAE,

**AMERICAN PUBLIC HEALTH ASSOCIATION
AMERICAN MEDICAL ASSOCIATION
AMERICAN ACADEMY OF PEDIATRICS
AMERICAN HEART ASSOCIATION
AMERICAN LUNG ASSOCIATION
AMERICAN LEGACY FOUNDATION
ROSWELL PARK CANCER INSTITUTE**

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Filed by Leave of the Court

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INTRODUCTION

This amici brief is filed¹ by the American Public Health Association, the American Medical Association, the American Academy of Pediatrics, the American Heart Association, the American Lung Association, the American Legacy Foundation, and the Roswell Park Cancer Institute.

The American Public Health Association (APHA) is the oldest and largest organization of public health professionals in the world, representing more than 50,000 members from over 50 occupations of public health. APHA has been setting priorities in public health for over 130 years. Throughout its history, it has been in the forefront of numerous efforts to prevent disease and promote health, including its long-standing efforts to eliminate tobacco-related disease.

The American Medical Association (AMA), with approximately 250,000 members, is the nation's largest professional organization of physicians and medical students. The AMA's physician members practice in all fields of medical specialization and in every state, including Florida. Founded in 1847, the AMA's purpose is to promote the science and art of medicine and the betterment of public health. As such, the AMA strongly opposes the promotion and use of tobacco products and seeks to reduce the health hazards inherent in smoking.

¹ In accordance with Florida Rules, the amici request leave of the Court to submit this amici curiae brief.

The American Academy of Pediatrics (AAP) is a non-profit corporation representing 57,000 primary care pediatricians, pediatric medical subspecialists and pediatric surgical specialists dedicated to the health, safety, and well being of infants, children, adolescents and young adults. AAP engages in a range of activities including advocacy, research and public education on issues of importance to the pediatric population. These issues include efforts to prevent children and adolescents from using tobacco products or being exposed to second-hand tobacco smoke.

The American Heart Association, representing 22.5 million volunteers and supporters, is a nonprofit, voluntary health organization funded by private contributions. Its mission is to reduce disability and death from cardiovascular diseases, including heart attack and stroke. Heart disease is the nation's leading cause of death. Stroke is the number three killer. Both are leading causes of significant long-term disability. Over 61 million Americans – about 1 in 5 – suffer from some form of cardiovascular disease. Much of this death and disability is tobacco related. It is estimated that heart disease, stroke and other cardiovascular disease cost the nation \$351.8 billion in 2003, including \$209.3 billion in direct medical costs.

The American Lung Association, currently celebrating its 100th anniversary, is one of the nation's oldest voluntary health organizations, with constituent offices

and hundreds of thousands of volunteers in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. Cigarette smoking is a major cause of chronic obstructive lung disease – which includes emphysema and chronic bronchitis. Therefore, the American Lung Association has long been active in research, education, and public policy advocacy on the adverse health effects of tobacco use.

The American Legacy Foundation is dedicated to building a world where young people reject tobacco and anyone can quit. The Foundation was established in March 1999 as a result of the Master Settlement Agreement (MSA) between the attorneys general in 46 states and five U.S. territories and the tobacco industry. The Foundation develops national programs that address the health effects of tobacco use through grants, technical assistance, youth activism, strategic partnerships, counter-marketing and grass roots marketing campaigns, and outreach to populations disproportionately affected by the toll of tobacco. Even though Florida is not an MSA state, the Foundation's **truth**® youth anti-smoking campaign has a significant presence in Florida, reaching over two-thirds of Florida's teens.

Roswell Park Cancer Institute, a National Cancer Institute designed comprehensive cancer center located in Buffalo, New York, is the nation's oldest free standing cancer research center. The Institute's scientists were instrumental in helping to establish the causal relationship between smoking and cancer.

ARGUMENT

Tobacco-Related Illness Remains a Public Health Epidemic

By any measure, tobacco-related illnesses are a public health epidemic in the United States, responsible for extraordinary mortality, morbidity, economic costs, and human suffering. Tobacco-related illnesses are the leading cause of preventable death in the U.S.² Cigarette smoking alone is responsible for an estimated 440,000 deaths annually.³ In fact, an amazing 1 out of every 5 deaths in the U.S. each year is associated with cigarette smoking.⁴ By comparison, consider that the U.S. Supreme Court has “repeatedly lamented” the public health tragedy of motor vehicle crash deaths occurring on the nation’s roads each year.⁵ Yet, there are more than 10 times as many tobacco-related deaths each year as motor vehicle crash deaths.⁶ And of course, deaths associated with smoking are only the

² Centers for Disease Control and Prevention. Smoking-attributable mortality and years of potential life lost – United States, 1984. *Morbidity and Mortality Weekly Report* 1997;46:444-451.

³ Centers for Disease Control and Prevention. Annual smoking-attributable mortality, years of potential life lost, and economic costs, 1995-1999. *Morbidity and Mortality Weekly Report* 2002;51(14):300-303.

⁴ Centers for Disease Control and Prevention. *Health United States, 2003*. Hyattsville, MD: CDC, National Center for Health Statistics; 2003.

⁵ *Michigan State Police Department v. Sitz*, 496 U.S. 444, 451 (1989).

⁶ National Highway Traffic Safety Administration, *Traffic Safety Facts* 2002.

proverbial tip of the iceberg. For each death, an estimated 20 smokers remain living with a smoking-related illness.⁷

Another measure of the public health burden of a disease or other condition is called “years of potential life lost” or YPLL. YPLL measures the number of years prior to either average life expectancy or some fixed age – such as age 65 – that are lost due to a specific cause or condition.⁸ The goal of measuring YPLL is to better appreciate not just the total number of deaths, but all of the years of life robbed from smokers by tobacco use. Each year, premature deaths from smoking are associated with 5.6 million years of potential life lost. On average, adult smokers lost 13-14 years of life due to their smoking.⁹

Smoking, however, is a problem that is not limited to adults. The early onset of tobacco use defines it as a pediatric disease also. Each day, more than 4,000 children try their first cigarette; and each day more than 2,000 other children under

⁷ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: A Report of the Surgeon General*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2004.

⁸ John M. Last, *A Dictionary of Epidemiology* 2001.

⁹ Centers for Disease Control and Prevention. Annual smoking-attributable mortality, years of potential life lost, and economic costs, 1995-1999. *Morbidity and Mortality Weekly Report* 2002;51(14):300-303.

18 years of age become new, regular, daily smokers. The average age for the initiation of cigarette use is 16 years of age.¹⁰

Although the economic burden of tobacco-related illness will never match the emotional devastation of lives cut short or impaired, the associated costs are nevertheless enormous. The average annual health-related economic cost of smoking exceeds \$155 billion. Of this approximately \$75 billion is associated with health care medical expenditures. Another \$80 billion represents the lost productivity for smoking-related deaths. In 1998, the medical costs of smoking represented fully 8% of all personal health care expenditures. Put another way, for each of the 22 billion packs of cigarettes sold in the U.S. in 1999, almost \$3.50 was spent on medical care alone.¹¹

In 1997 and 1998, all 50 states reached settlements with the tobacco industry resolving lawsuits seeking to recover the Medicaid costs of treating smoking-related illnesses among their citizens. Of course, it would be a grave error to conclude that this settlement has somehow led to a reduction in the epidemic of tobacco-related mortality. In fact, since 1998, more than an additional 2 million

¹⁰ Substance Abuse and Mental Health Services Administration (SAMHSA), *National Survey on Drug Use and Health* (2002), at Table 4.16A.

¹¹ Centers for Disease Control and Prevention. Annual smoking-attributable mortality, years of potential life lost, and economic costs, 1995-1999. *Morbidity and Mortality Weekly Report* 2002;51(14):300-303.

Americans have lost their lives due to smoking. Much of the settlement money has been used for purposes other than smoking cessation.

Beginning in 1964, the office of the U.S. Surgeon General has published a series of reports documenting the health effects of smoking.¹² Since that first report was published, 12 million Americans have died of smoking-related illnesses.¹³ In May 2004, on the 40th anniversary of the first report, the Surgeon General's office released a new report, *The Health Consequences of Smoking*.¹⁴ The list of diseases and conditions now considered to be caused by smoking – once limited to bronchitis, lung cancer, and laryngeal cancer – is staggering. It merits the space in this brief to simply list these conditions. They include the following cancers: bladder, cervical, esophageal, kidney, laryngeal, leukemia, lung, oral, pancreatic, and stomach. The report also concludes that there is a causal relationship between smoking and numerous other conditions such as: cardiovascular disease, including stroke and coronary heart disease; respiratory

¹² U.S. Department of Health, Education, and Welfare. *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*. Atlanta, GA: U.S. Department of Health, Education, and Welfare, Public Health Service, Communicable Disease Center, DHEW publication 1103; 1964.

¹³ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: A Report of the Surgeon General*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2004.

¹⁴ *Id.*

disease, including chronic obstructive pulmonary disease and pneumonia; reproductive effects, including fetal death and low birth weight; cataracts; hip fractures; and peptic ulcer. And this is not the complete list. The report concludes that “smoking harms nearly every organ of the body.”¹⁵

Although substantial progress has been made since 1964, the Surgeon General’s recent report concedes that “without substantially stronger national and state efforts, it is unlikely” that the Healthy People 2010 goals for reducing smoking prevalence and associated health effects will be met.¹⁶ In fact, as of 2003, no state had met the Healthy People 2010 objective of reducing the proportion of adults who smoke to 12%.¹⁷ To “stronger national and state efforts,” we add that litigation is a well-recognized and essential public health tool to reduce the unacceptable toll of tobacco on the health and well-being of Americans.¹⁸

¹⁵ Id. at 8.

¹⁶ Id. at 13.

¹⁷ Hannah K. Weir et al., *Annual Report to the Nation on the Status of Cancer, 1975-2000, Featuring the Uses of Surveillance Data for Cancer Prevention and Control*. 95 J. Nat’l Cancer Inst 1276 (2003).

¹⁸ See *infra*, next section.

Class Action Litigation is an Appropriate and Necessary Tool for Addressing the Epidemic of Tobacco- Related Illness

A class action differs from multiple individual lawsuits in much the same way that public health differs from medicine. The difference is not only in the quantity of involved individuals, but also in the quality and method of problem solving. The discipline of public health employs a community or population perspective in understanding and preventing significant health problems that take a toll on large portions of the population. Prevention is a principal interest of public health.

Where a medical practitioner might interact with a patient who is ill from a tobacco-related disease by treating the pathology and advising the patient to give up smoking, public health practitioners will address the problem of smoking differently, applying a wide range of strategies designed to separate the public from toxic exposures. As the Institute of Medicine stated in its 1988 report entitled *The Future of Public Health*, “Clearly, public health is ‘public’ because it involves ‘organized community effort.’...[N]either treatment of lung disease nor exhorting individuals to avoid smoking could have achieved the reduction of smoking in

public places made possible by organized community effort to adopt laws and regulations restricting smoking.”¹⁹

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.

Class actions are akin to public health’s organized community effort. 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. A class action for health damage relies upon more than clinical descriptions of harm to an individual. As Harvard legal scholar David L. Shapiro has written in his discussion of class actions’ focus on the entity of the class rather than the aggregation of individuals: “...we may not have sufficient data to say with any reasonable degree of assurance...that an individual’s exposure to the defendant’s product was in fact the cause of his disease. Yet with the same data, we may be able to say with considerable confidence that a specified increase in the rate of the disease with respect to the class as a whole was caused by the exposure to the product in question...”²⁰ Thus, both causation and the magnitude

¹⁹ Institute of Medicine 39, *The Future of Public Health* 1988.

²⁰ David L. Shapiro, *Class Actions: The Class as Party and Client*. 73 *Notre Dame L. Rev.* 913, 931 (1998).

of the effect of a defendant's behavior, when that effect is measured in hundreds of thousands of deaths per year, can be lost in an individual's lawsuit. On the other hand, by allowing the trial court to consider the combined effects of the defendant's conduct on the public's health, the importance of the total societal burden caused by that defendant can be understood. The class is a legal tool that gives to the injured *public* a means of effective protection and prevention.

Courts and legal scholars have also acknowledged the advantages that a class action provides for plaintiffs. The leading treatise on class actions mentions the following as among the major advantages that class actions afford plaintiffs: "...a more powerful litigation posture, mootness avoidance, tolling of the limitations period for the class, increased potential for an attorneys' fee award, and other jurisdictional, venue, and service benefits. For the small claimant, a class suit represents the only economically available means for judicial relief."²¹ Thus, class actions are more than a managerial tool providing efficiency for the courts and litigants. The whole represented by a class action is more than the sum of its parts. If injured plaintiffs were each required to bring their own lawsuits, not only would efficiency be lost, but also substantive rights would be lost – rights that are recognizable only through the population perspective provided by class actions.

²¹ Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* 421-2 (4th ed.).

Again, Professor Shapiro illuminates the distinctive value of class actions by stating: "...[the] significance [of deterrence] should not be downplayed in torts involving substantial harm to individuals. (Indeed, in the view of some, deterrence remains the primary justification for a civil tort system....) And surely, a more acceptable level of deterrence is achieved by assessing the costs of injury avoidance in the light of the reasonably foreseeable harm to the entire class of victims rather than on the basis of the disparate recoveries (and failures to recover) that may be anticipated in lawsuits brought by a self-selected fraction of those injured."²²

One of the most important benefits conferred by class actions is often described as the "negative value" class action in which the amount of the claim of any one plaintiff is considered too small to support individual litigation. This benefit ought not be misunderstood, however, as being confined to claims measured in small dollar amounts, as has mistakenly been done by the Third District Court of Appeal in its decertification of the *Engle* class. Instead, the class action benefits plaintiffs whose assets are disproportionately small compared to those of the defendants, as is the case with tobacco litigation. An individual plaintiff who claims damage caused by the actions of a cigarette manufacturer may have a legitimate claim measured in millions of dollars, but that amount is still

²² David L. Shapiro, *Class Actions: The Class as Party and Client*. 73 Notre Dame L. Rev. 913, 931, note 44, 1998.

miniscule when measured against the assets of the defendant. The defendant thereby has the ability to thwart effective litigation, as has been the case for decades with individuals' tobacco lawsuits, resulting in injustice.²³ The injustice is dispelled by the use of a class action which permits the aggregation of assets of many represented plaintiffs against the assets of corporate giants such as the tobacco defendants.

Without the class action, then, the tobacco companies are granted what amounts to immunity from responsibility. The financial strength of the tobacco industry is great enough to dissuade litigants and their lawyers from seeking redress for even life-threatening damage caused by smoking.²⁴ In Phase 1 of the *Engle* trial, it took one year to litigate issues dealing exclusively with the defendants' conduct and the general health effects of smoking. The assets needed to support that level of effort are unavailable to most individual plaintiffs and their lawyers, and therefore legitimate claims will go unpursued, to the detriment of the public's health. The disparity in resources between the damaged plaintiff and the corporate defendant can be solved by the aggregation of plaintiffs into a class.

This was recognized by the Third District Court of Appeal in its *Broin* decision of March 15, 1994 (641 So. 2d 888, Fla.). In *Broin* the Third District certified a

²³ *Thayer v. Liggett & Myers Tobacco Co.*, No. 5314, 1970 U.S. Dist. LEXIS 12796 (W.D. Mich. Feb. 19, 1970).

²⁴ *Smith v. R.J. Reynolds Tobacco Company*, 630 A. 2d 820 (N.J. Super. Ct. App. Div. 1993); *Haines v. Liggett Group*, 814 F. Supp. 414 (D. N.J. 1993).

national class of non-smoking flight attendants who had been damaged by their exposure to second hand smoke. The Third District stated in its *Engle* decision of January 31, 1996 that their *Broin* decision compelled them to affirm class certification in *Engle*.

In addition, the *Engle* appellate court suggests that hundreds of thousands of Florida smokers should seek redress in individual trials. Other arguments aside, such a suggestion is simply unrealistic. The resulting backlog of cases would surely lead to “justice denied” for the majority of plaintiffs. Also, such an approach is particularly unnecessary where, as here, the members of the *Engle* class of Florida smokers share highly significant similarities among themselves, such as their biological and physiological responses to cigarette smoke.

The jury in the *Engle* trial found the conduct of the tobacco companies reprehensible enough to award \$145 billion in punitive damages, which the Court of Appeal found excessive. But the Court of Appeal also found that “The amount [of punitive damages] awarded should be large enough to provide retribution and deterrence....” The Court of Appeal noted that the tobacco defendants paid and continue to pay damages to states under the Master Settlement Agreement (MSA), and the Court felt that such payment should preclude the imposition of additional punitive damages.

But the MSA imposition of damages has failed to deter the tobacco defendants, who continue to produce and market cigarettes with the entirely foreseeable result of additional hundreds of thousands of tobacco-related deaths each year in the United States. When other disease or injury producing products caused the imposition of substantial damages against the products' manufacturers, those products were either redesigned (e.g., the Ford Pinto) or their production was ceased (e.g., three-wheeled all terrain vehicles). With cigarettes, however, the defendants have demonstrated by their continued production of this lethal product – without substantially altering its health effects or addictive qualities -- that previous penalties levied against them are inadequate for behavioral change. Clearly, additional measures, including this litigation, are necessary and appropriate.

According to the U.S. Department of Agriculture, after the Master Settlement Agreement was signed in November 1998, the tobacco industry produced about 595 billion cigarettes for use in 2000.²⁵ The major domestic cigarette manufacturers are required to submit a statement of their tobacco purchase intentions to the Secretary of Agriculture. These cigarette makers indicate that they intend to purchase hundreds of millions of pounds of tobacco

²⁵ Thomas Capehart, U.S. Dep't of Agriculture, TBS-250-01, *Trends in the Cigarette Industry After the Master Settlement Agreement* (2001).

from the 2004 crop.²⁶ Thus business goes on as usual, with hundreds of billions of health hazards entering the stream of commerce, due to the conduct of the defendants.

As recognized by the United States Surgeon General and by many decades of scholarly research, the defendants' provision of cigarettes to the public has taken a toll of 440,000 lives per year in the United States, with the expectation that these numbers will continue for years to come, as the defendants continue their business. The defendants have profited and continue to profit by making and selling hundreds of billions of cigarettes a year. The harm they commit by mass marketing a lethal product with no substantial legitimate value is on a more massive scale than any other manufacturer. The defendants should not be permitted to object to their victims grouping together to seek justice.

²⁶ Thomas Capehart, U.S. Dep't of Agriculture, TBS-2003, *Tobacco Situation and Outlook Yearbook* (2003).

Litigation Has Long Been Recognized As A Legitimate Tool for Protecting the Public's Health

It has long been recognized that litigation serves as an effective tool for protecting the public's health.²⁷ Several aspects of lawsuits lend themselves to this purpose. The pre-trial discovery process can yield anecdotal or epidemiologic information that will guide strategies for preventing future injury or disease, such as the realization that some products are involved in a disproportionate number of injuries and therefore need to be modified or their use discontinued.²⁸ Publicity that flows from noteworthy trials can motivate a product manufacturer to solve safety problems associated with that product. For example, after a highly publicized verdict in a trial involving a post-collision fire from a ruptured Ford Pinto gas tank, Ford recalled and modified the Pinto. As reported by John Graham, now the Administrator of the Office of Information and Regulatory Affairs of President Bush's Office of Management and Budget, "In a letter informing the NHTSA's administrator, Joan Claybrook, of the recall, Ford emphasized the

²⁷ Stephen P. Teret, *Litigating for the Public's Health*, 76 American Journal of Public Health 1027 (1986). Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 Epidemiologic Reviews 90 (2003).

²⁸ Stephen P. Teret, *Injury Control and Product Liability*, 2 J. Public Health Policy 49 (1981).

attacks on the safety of the fuel system of the Pinto...had resulted in public concern that Ford wished to put to rest.”²⁹

Thus not only does personal injury litigation serve the purpose of compensating a damaged plaintiff, but it also serves as an incentive for preventing injury and disease. This was recognized by William Prosser who commented that with tort litigation “...there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.”³⁰

The imposition of liability in the instant case, including the imposition of punitive damages, will serve the legitimate purpose of preventing the future occurrence of harm from cigarettes. The tobacco defendants have, for many years, reaped substantial profits from the creation and sale of an addictive, lethal product, and the public has paid for the product not only with money but also with millions of lives lost. The defendants continue to reap profits at the cost of lives. It is a quintessential role of tort law and the judiciary to address this wrong by the imposition of penalties that are severe enough to change the behavior of the wrongdoers and thereby prevent the substantial future harm that will otherwise occur.

²⁹ John D. Graham, Product Liability and Motor Vehicle Safety, in *The Liability Maze* 134, 120-190 (Peter W. Huber & Robert E. Litan eds., 1991).

³⁰ *Prosser and Keeton on the Law of Torts* 25 (W. Page Keeton, ed., 3rd ed. 1984).

CONCLUSION

Over the course of more than half a century, scientific investigation has concluded with increasing certainty that exposure to cigarette smoke causes fatal and disabling diseases, and that smoking cigarettes is an addictive behavior due to the contents of the cigarettes.

The organizations on whose behalf this amici curiae brief is submitted are the leading, largest, and most prestigious professional groups in the fields of public health and medicine. They are convinced of the devastating health effects of tobacco use. The federal government, as represented by the United States Surgeon General and all the health-related agencies, is convinced of the devastating health effects of tobacco use. All states have made claims against the tobacco companies for the health related expenses they bear due to smoking. The states are convinced of the devastating health effects of tobacco use.

But the tobacco companies, the defendants in this lawsuit, continue to produce and sell billions of cigarettes annually, and each year another 440,000 Americans die tobacco-related deaths.

If ever there has been a societal wrong that calls for a judicial response providing both compensation and deterrence, it is the past and present conduct of the tobacco defendants. More Americans die *each year* from cigarettes than all of the Americans who died in World War II, and unless the behavior of the tobacco

defendants is changed, this mortality statistic will not change. The culpability of the tobacco defendants in marketing a product they know to be both addictive and lethal, and in struggling for more than a half century to keep that knowledge from their customers, is shameful.

The fact that a jury spent years listening to evidence regarding the tobacco defendants' conduct and the scientifically proven consequences thereof, and then awarded compensatory and punitive damages ought not to be overturned because an appellate court changes its mind about the appropriateness of a class certification.

The class is the public who share the commonalities of having their health robbed by the deceit and avarice of the tobacco defendants, and the known biological and physiological responses to tobacco smoke. They share illness; they also need to share adequate compensation and the knowledge that future wrongs of the defendants will be effectively deterred.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this amici curiae brief was delivered by federal express to all counsel on the attached Service list.

Stephen Teret

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida rules of Appellate Procedure.

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