IN THE SUPREME COURT OF FLORIDA

AMANDA JEAN HALL, etc.,

Petitioner,

v.

Case No. SC11-1611
L.T. No. 1D10-2820

R.J. REYNOLDS TOBACCO CO.,

Respondent.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPAL

BRIEF OF *ENGLE* PLAINTIFF AMICI

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INTEREST OF AMICI

This brief is filed on behalf of twenty-five members of the class approved by this Court in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).[1] These class members (collectively, the "*Amici*") are interested in this case because each possesses a judgment in an *Engle* progeny case[2] and thus faces increased risks and costs of collecting their judgments as a result of the unconstitutional protections afforded to four tobacco companies ("Tobacco") by section 569.23(3), Florida Statutes (2010).[3]

Section 569.23 allows Tobacco to obtain a stay of execution on appeal, all the way through the United States Supreme Court, by posting an appellate bond that may be only a fraction of the security bond required by this Court's rule governing the posting of an appellate bond, Florida Rule of Appellate Procedure 9.310. *Amici* join Petitioner in arguing that Section 569.23 is unconstitutional

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[1] Amici are Earline Alexander, Andy Allen, Sr., Leon Barbanell, Patricia Bowman, Connie Buonomo, Franklin D. Campbell, Sr., Finna Clay, Robin Cohen, Carolyn Gray, Jan Grossman, Despina Hatziyannaki, Anna Louis Huish, Thomas G. Jewett, Leroy Edward Kirkland, Peter Mack, Mathilde Martin, Michelle Mrozek, Lucinda Naugle, Margaret E. Piendle, Sharon Putney, Lucille Ruth Soffer, Ellen Tate, Lyantie Townsend, Marry Tullo, and Diane Webb.

[2] *See R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. 1st DCA 2010) (using term "*Engle* progeny case" to refer to an individual lawsuit of a plaintiff asserting *Engle* class membership).

[3] By "Tobacco" we mean the four tobacco companies who participated in the state settlement, R.J. Reynolds Tobacco Company, Philip Morris Inc., Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company. Brown & Williamson has since been acquired by R.J Reynolds.

because it is a special law that provides special protections to four corporations and directly conflicts with this Court's rules of procedure.

Amici file this brief to urge the Court to resolve the certified question before it, even though Tobacco may argue that the *Hall* case is about to become moot. On the merits, *Amici* discuss the sharp contrast between Section 569.23 and Rule 9.310, and the impact this unconstitutional statute has on the thousands of *Engle* plaintiffs who await their day in court.

SUMMARY OF THE ARGUMENT

We will not duplicate the detailed substantive analysis provided by Petitioner, Amanda Jean Hall ("Petitioner"). Instead we demonstrate that, in keeping with the Court's past practices, the Court should answer the certified question, even if the *Hall* case ultimately becomes moot.

Next we address the sharp distinctions between the special law enacted for Tobacco, and the protections normally afforded by this Court's rule requiring an adequate bond. Section 569.23 allows Tobacco to substantially undersecure the larger judgments against it, leaving plaintiffs without the significant protections afforded by a full bond. Moreover, the statute impacts even smaller judgments by eliminating the requirement to post a bond that includes the interest expected to accrue during the appeal and by automatically extending the protection of the bond through proceedings in the United States Supreme Court.

We close by describing the impact Section 569.23 has on the *Engle* progeny litigation. By substantially reducing the costs and consequences of an appeal, the statute reinforces Tobacco's propensity to litigate these cases to the limit, at the expense of the plaintiffs and the court system.

ARGUMENT

Amici fully join in the detailed substantive analysis presented by the Petitioner. We file this amicus brief to urge this Court to answer the certified question even if the Petitioner's case ultimately becomes moot, and to discuss the impact of the unconstitutional special law on the thousands of *Engle* plaintiffs whose cases await trial.

The Court Should Answer the Certified Question Even if the Case Becomes Moot.

Petitioner observed in both her jurisdictional and merits briefs that her challenge to the reduced appellate bond posted in her case by R.J. Reynolds Tobacco Company ("RJR") could potentially become moot, once RJR exhausts its appeals and actually pays the judgment awarded by the jury. The case is not moot yet, however. Although the United States Supreme Court recently denied RJR's petition for certiorari in *Hall* and three other cases, RJR has not indicated whether it will seek rehearing and has not yet paid the judgment. Until RJR writes a check for the full amount of that judgment, Petitioner remains at risk as a result of the reduced bond, and this case is not moot.[4]

[4] As of this writing, Tobacco is challenging the calculation of interest for 2012 and whether attorneys' fees under Florida's offer of judgment statute extend to the fees incurred by the plaintiffs in their defense of Tobacco's certiorari petitions in the United States Supreme Court. Tobacco has not yet revealed whether it is going to pay the ninety-nine percent of the judgment amount that is not subject to dispute and concerning which appellate review is now exhausted.

Moreover, even if RJR ultimately writes that check to Petitioner, this Court should respond to the certified question posed by the First District. As this Court has explained, an important exception to mootness exists when the issue presented is of great public importance or is likely to recur. *See Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). Both elements are present here. As to its importance, the issue has already been certified to this Court as being of great public importance, and this Court ordered briefing on the merits, despite the looming issue of mootness. *See Pino v. Bank of New York*, 76 So. 3d 927, 927-28 (Fla. 2011) (resolving issue of great public importance even after the case had become mooted by a settlement among the parties).

Equally important, the issue has recurred and will recur in scores of cases. Each of the *Amici* is facing the issue in one of their cases right now. Moreover, the *Amici* and the Petitioner are just a few out of the thousands (approximately 8,000) of members of the class approved by this Court in *Engle.* Many of these class members will be forced to go through an appellate process with their judgment undersecured. Indeed, as more judgments are awarded, Section 569.23 continues to reduce Tobacco's collective bonding obligations and prevailing plaintiffs will be even *less* secure. As discussed below, this is the ultimate irony. As Tobacco's defenses are rejected and as judgments are affirmed, the statute makes it easier and easier for Tobacco to appeal without financial consequence -- a result that could

not be more inconsistent with the intent behind this Court's rule requiring the posting of a bond that adequately secures the plaintiff.

Simply put, this Court should exercise its discretion to resolve this issue of great public importance which will recur in scores of *Engle* cases to come.

The Impact of Tobacco's Unconstitutional Special Law

Section 569.23 is a sharp departure from Rule 9.310(b)(1), this Court's rule requiring the posting of a bond that adequately secures plaintiff. It is well-settled that the purpose of an appeal bond is to ensure that, if the trial judgment is affirmed, money will be available at the conclusion of the appellate process. *P.S. Capital, LLC v. Palm Springs Town Homes, LLC*, 9 So. 3d 643, 646 (Fla. 3d DCA 2009); *Fodor v. Geiszler*, 958 So. 2d 446, 449 (Fla. 2d DCA 2007); *Pabian v. Pabian*, 469 So. 2d 189, 191 (Fla. 4th DCA 1985). This is important because of the delays involved in the typical appeal. The bond protects the plaintiff from the defendant's insolvency or from fraudulent transfers at the expense of judgment creditors. Moreover, even when defendants are well-funded, as Tobacco is here, the bond ensures that plaintiffs will be paid in a timely manner. Rather than having to resort to expensive post-judgment collection discovery or time

consuming and expensive writs of execution, the plaintiff may simply collect from the surety.[5]

Recognizing these concerns, this Court adopted a rule of procedure requiring a bond in every appeal of a money judgment. Florida Rule of Appellate Procedure 9.310(b)(1). Equally important, the rule requires a bond that is big enough to fully secure the amount of the judgment, plus interest. Rule 9.310(b)(1) provides that, to obtain a stay of a money judgment pending appeal, a defendant must post a bond in the full amount of the judgment plus two years of interest at the statutory rate. Thus, plaintiffs are secure from insolvency, improper transfers, or stubborn defendants who simply will not pay until forced through expensive execution processes.

These principles are particularly important in *Engle* cases because of the length of time it takes these cases to reach a conclusion. Tobacco is a particularly stubborn defendant -- a defendant that foregoes settlement regardless of the number of adverse trial and appellate rulings it receives, and that insists on litigating virtually every case all the way to the United States Supreme Court. Indeed, outside of the two *Engle* class members whose judgments were affirmed in *Engle*, this process, started in 1994, is not yet complete as to any class member.

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[5] As this Court is well aware, the expense and time of collecting a substantial judgment from a stubborn defendant can often dwarf the time and expense required to litigate the case to conclusion in the first place.

Although the first four cases appear to have almost reached the end of their extended litigation journey, many more cases are following behind which face years of appellate review. If any plaintiffs should be fully secure, it should be *Engle* plaintiffs.

Section 569.23(3), however, achieves precisely the opposite result contemplated by Rule 9.310(b)(1). Applying to only the four specific tobacco companies that settled the Medicaid lawsuit brought by the State of Florida more than fifteen years ago, section 569.23(3) purports to impose an automatic stay upon the posting of a much reduced bond. For these Tobacco defendants only, the appellate bond is limited to the lesser of the amount of the judgment (without interest) and a complicated formula that begins with a tier of amounts depending on the number of judgments "on appeal in the courts of this state." §569.23(3)(a).

Under the tiered schedule, when there are less than 41 *Engle* judgments on appeal, the law purports to cap the appellate bond in each case at $5 million. *Id.* Once the number of judgments appealed exceeds 40, but remains less than 80, the amount of the appellate bond drops to $2.5 million, regardless of the amount of the judgment. *Id.* The cap keeps getting lower as more and more *Engle* verdicts are appealed until it reaches a cap of just $66,667 if and when more than 2,001 *Engle* judgments are on appeal. *Id.* These appellate bond caps are designed to ensure that the maximum amount of all bonds posted does not exceed $200 million. *Id.*

In cases like this one, the result is that a plaintiff receives a small fraction of the security required by rule 9.310. The Petitioner's judgment in this case totaled $15,750,000.00. The bond posted was $12,600,000 under the amount that would be required in any other Florida non-tobacco case. The same is true for many of the *Amici*. For example, the judgment in *Putney v. R.J. Reynolds Tobacco Company*, Case No. 2007-CV-36668 (17th Cir. Broward County) totaled $14,776,447.59; the judgment in *Mrozek v. Lorillard Tobacco Company*, Case No. 16-2007-CA-011952-XXXX-MA (4th Cir. Duval County) totaled $15,200,588.25; and the judgment in *Naugle v. Philip Morris USA, Inc.*, Case No. 07-036736CA (17th Cir. Broward County) totaled $36,760,500. The appeal bond in each case was capped at $5,000,000.[6] Thus, in these four cases alone, judgments are undersecured in the range of $70 million under what would be required by this Court's rule.

Section 569.23 also unconstitutionally impacts cases with smaller judgments by denying *Engle* progeny class members the additional protection of two years' interest. Thus, a judgment of less than the current cap imposed by Section 569.23 is still undersecured because Tobacco is able to appeal without providing the protection of two years' interest afforded by Rule 9.310. This shortfall impacts many plaintiffs because there have been more small judgments than the large

[6] *See* http://www.floridasupremecourt.org/clerk/tobaccoBonds/TAB_Appeals-Bonds%20Posted033012.pdf (last visited April 13, 2012).

judgments upon which Tobacco focuses.

In fact, the majority of the plaintiff's judgments on appeal are less than $5,000,000. Yet, these judgments are still denied full security because the plaintiffs are not afforded the additional amount to cover interest over the anticipated life of the appeal.[7]

There is yet another benefit to Tobacco. Section 569.23(b) extends the right to avoid execution through review by the United States Supreme Court without Tobacco having to seek a stay of the mandate from the Florida Courts or the United States Supreme Court. Thus, no matter how often its arguments are rejected, and no matter how slim the possibility of discretionary review, Tobacco can delay payment for an extra year or more in every case, *automatically*.

If any plaintiffs need the protection afforded by Rule 9.310(b)(1) from

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[7] For example, the judgment in *Weingart v. R.J. Reynolds Tobacco Company*, Case No. 50-2008-CA-038878-XXXX-MB (15th Cir. Palm Beach County) totaled $13,500, but the bond posted did not include the interest amount of $1,282.50. Similarly, the bond in *Kirkland v. R.J. Reynolds Tobacco Company*, Case No. 08-CA-000673 (13th Cir. Hillsborough County) omitted the interest amount of $31,200 for the $260,000 judgment; the bond in *Mack v. R.J. Reynolds Tobacco Company*, Case No. 01-2008-CA-003256 (8th Cir. Alachua County) omitted the interest amount of $61,200 for the $510,000 judgment; the bond in *Reese v. R.J. Reynolds Tobacco Company*, Case No. 07-30296-CA-24 (11th Cir. Miami-Dade County) omitted the interest amount of $127,845.97 for the $1,065,383.10 judgment; the bond in *Piendle v. R.J. Reynolds Tobacco Company*, Case No. 50 2008 CA 038777 XXXX MB AJ (15th Cir. Palm Beach County) omitted the interest amount of $296,400 for the $2,470,000 judgment; and the bond in *Alexander, Earline v. R.J. Reynolds Tobacco Company,* Case No. 01-2008-CA-5067 (8th Cir. Alachua County) omitted the interest amount of $453,000 for the $3,775,000 judgment

undue delay it is the *Engle* plaintiffs, in light of the litigation tactics of Tobacco. As noted above, we are only now coming to the end of the first of the *Engle* progeny cases, 18 years after the *Engle* case was first filed. This is no accident. Every case is appealed to every level. No case of substance is settled. Thus, every case is doomed to years of appellate litigation dramatically increasing the litigation and collection uncertainties to *Engle* plaintiffs.

Just as no case is settled, no legal issue is ever settled either. To give just one obvious example, Tobacco has been arguing since the original *Engle* case itself that giving *res judicata* effect to the *Engle* findings in subsequent progeny litigation violates Tobacco's due process rights. This Court first rejected that claim on rehearing in *Engle*, many years ago. The claim has now been rejected by every District Court of Appeal to consider it and this Court and the United States Supreme Court have denied review. Yet the issue has been argued in hundreds of hearings around the State and Tobacco continues to raise this argument even now.[8]

The point of this history is that Tobacco's strategy has and will continue to add many years to the already substantially protracted litigation that each one of these plaintiffs faces. The goal of Tobacco in the appellate courts is the same as it is in the trial court -- a war of attrition designed to make these cases burdensome

[8] For example, as late as April 13, 2012, RJR and Philip Morris filed a brief in *Philip Morris v. Allen*, 1D11-6061 (Fla. First DCA) arguing once again that *Engle* violates due process.

and expensive for the plaintiffs. In a famous 1988 memorandum, introduced into evidence in many of these cases, an industry official declared, "The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for the plaintiff lawyers, particularly sole practioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his." 1988 John Robinson Memo. (attached as **Exhibit A**).[9]

Thus, if there were ever a special law designed to benefit a special few at the expense of the many, section 569.23 is the quintessential example. If there were ever a statute designed to conflict with the intent and purpose of Rule 9.310(b)(1), section 569.23 is it. For the price of additional revenue to the State, four big tobacco companies have been granted a break received by no other litigant, big or small -- the right to appeal without either submitting to execution or securing the plaintiffs' right to recovery after the appeal. But, as Petitioner has demonstrated, that special privilege comes at the expense of the Constitution and this Court's rules. It also comes at the expense of every one of the *Engle* plaintiffs who obtains

[9] The Robinson memo has been quoted by numerous courts. *See, e.g., Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 237 (E.D.N.Y. 2001), *rev'd sub nom. Empire Healthchoice, Inc. v. Philip Morris USA Inc.*, 393 F.3d 312 (2d Cir. 2004); *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993); *Smith v. R.J. Reynolds Tobacco Co.*, 630 A.2d 820, 826 n.7 (N.J. Super. Ct. App. Div. 1993); *Richardson v. Philip Morris Inc.*, No. 96145050/CE212596, 1996 WL 34388360 (Md. Cir. Ct. 1996).

a judgment and now faces increased risks of costs and collection as a result of the special privilege extended by this special law.

Finally, as Petitioner has demonstrated, Tobacco's arguments about the reasons behind the statute are irrelevant. Even good reasons cannot excuse a special law designed to benefit four well-heeled companies at the expense of every potential litigant in Florida. But, even if it were relevant, there simply is no rational relationship between the bond caps and the State's interest in receiving revenues from its settlement with Tobacco. To begin with, the obligation to post a bond under Rule 9.310 does not add to Tobacco's liabilities. The liability arises out of the underlying judgment. The bond merely secures, not increases, Tobacco's liability.

Nor do the caps have any realistic relationship to their goal of preserving the State's revenue stream. Section 569.23 is designed to limit the collective obligation of the big four tobacco companies to $200 million, no matter how much injury they inflict and damage they cause, and no matter how many cases they lose. This $200 million constitutes *less than one percent* of the net worth of the four defendants and is a fraction of their many billions in annual revenues and net profits. Simply put, the bond cap is set at a level far below any material impact on the financial health of these companies.

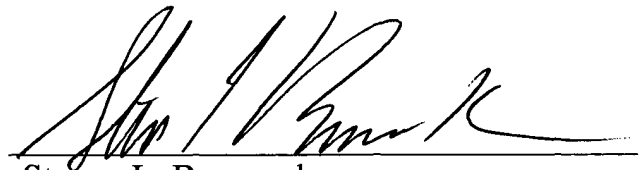
Perhaps the ultimate irony of Section 569.23 is that as more and more juries

and appellate courts determine that Tobacco has engaged in reprehensible misconduct, and as more and more of Tobacco's defenses are rejected in their unsuccessful appeals, Tobacco's obligation to secure each plaintiff's award continues to be reduced. In other words, the less likely Tobacco is to ultimately succeed on appeal, the less its obligation to post a bond. The statute could not be in more direct conflict with this Court's rule.

This Court should end this special privilege and vindicate the purposes behind Rule 9.310 by declaring section 569.23 unconstitutional.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Court should declare section 569.23(3) unconstitutional and reverse the First District's decision approving the trial court's bond order.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email[10] to John Mills (jmills@mills-appeals.com); Courtney Brewer (cbrewer@mills-appeals.com); Rod Smith (rodsmith@avera.com); Mark Avera (mavera@avera.com); Dawn Vallejos-Nichols (dvallejos-nichols@avera.com); Robert B. Parrish (rbp@mppkj.com); David C. Reeves (dcreeves@mppkj.com); Jeffrey A. Yarbrough (jyarbrough@mppkj.com); Karen Fitzpatrick (kfitzpatrick@mppkj.com); Lynn Scott (ldscott@mppkj.com); Elliot H. Scherker (scherkere@gtlaw.com); Julissa Rodriguez (rodriguezju@gtlaw.com); Gregory G. Katsas (ggkatsas@jonesday.com); Charles R.A. Morse (cramorse@jonesday.com);

[10] The parties have agreed to accept service by email at the email addresses listed above in lieu of U.S. Mail and have further agreed that electronic service will be deemed service by mail for purposes of Fla. R. App. 9.420(e).

and Louis F. Hubener (lou.hubener@myfloridalegal.com) this 16th day of April 2012.

STEVEN L. BRANNOCK
Florida Bar No. 319651

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

STEVEN L. BRANNOCK
Florida Bar No. 319651

ATTORNEY WORK PRODUCT
CONFIDENTIAL/PRIVILEGED

MEMORANDUM

TO: S&H ATTORNEYS

FROM: MIKE JORDAN

DATE: APRIL 29, 1998

SUBJ: JOHN ROBINSON'S CALIFORNIA CASES

Although it is not confirmed in writing at this point, during the week of April 25 John Robinson agreed to dismiss his cases against the tobacco industry. Presently I am unsure as to the mechanics of the dismissal, but I suspect that we will receive orders of dismissal in cases filed by John solely, whether served or unserved. I do not know whether this agreement extends to cases filed jointly by John Robinson and George Kilbourne: Brown and Sutton.

Thus Fleming I and II, Honthei, Quandt, Shaum, Whitner, Chidester, Daffron, Dever and Gillespie should be officially ending soon.

This agreement seems to be the result of two factors. First, the California Supreme Court recently ruled that Proposition 51, the proposition that affected joint and several liability, was not retroactive. This meant that asbestos plaintiffs' lawyers could satisfy their entire judgment from any solvent asbestos company, thus eliminating the need to have tobacco as a party to bear a pro rata share. Secondly, the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

JMJ:jp

cc: Control Central

"S & H" = Smoking & Health

J. Michael Jordan = Mike Jordan
(RJReynolds outside lawyer in charge of Calif. cases)

95517167

Exhibit A