IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1856

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

Petitioner,

vs.

LIGGETT GROUP, etc.

Respondents.

AMICUS BRIEF OF TOBACCO TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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Interest of Tobacco Trial Lawyers Association (TTLA)

The TTLA is composed of private attorneys who represent individual claimants against the tobacco industry, both in Florida and throughout the country. Attorney members of the TTLA represent an overwhelming majority of individual claimants against the tobacco industry, both within and without Florida. These individual claimants have a direct interest in the outcome of this appeal and in the matters of law raised.

SUMMARY OF ARGUMENT

The *Engle* class action provides the only viable remedy for many thousands of Floridians to seek redress against the tobacco industry for their cigarette related injuries. Decertification of the *Engle* class effectively leaves those Floridians without a viable remedy. In decertifying the *Engle* class, the lower court failed to give adequate weight to the superiority of the class action over individual actions.

Additionally, the lower court's adoption of implied preemption directly conflicts with this Court's interpretation of preemption as it relates to cigarette labeling acts, as this court has previously ruled those acts involve express preemption rather than implied preemption.

ARGUMENT

I. The *Engle* class action provides the only realistic remedy for Floridians suffering from cigarette related diseases who wish to seek redress against the tobacco industry

As a practical matter, decertification of the *Engle* class means that virtually all Florida residents with cigarette related injuries will never have an opportunity to seek compensation through the courts. Given the cigarette industry's "scorched earth" defense tactics[1], the scarcity of attorneys available in Florida who are willing and able to represent claimants against the cigarette industry, and the relatively advanced age and poor health of most Floridians suffering from cigarette injuries, redress on an individual basis is unrealistic and indeed illusory. To date, despite the fact that several hundred individual cases have been brought in Florida against the cigarette industry since 1995, only two individuals have received any compensation from individual actions: Grady Carter, a Jacksonville resident whose case was filed in 1996 and affirmed by this Court in 2000[2] and Floyd Kenyon, a Sarasota County resident whose modest compensatory judgment was paid in 2003, long after he had passed away.[3]

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[1]See, e.g. *Haines v. Liggett Group, Inc., et al*., 814 F.Supp. 414, 421-424 (U.S.D.C. NJ, 1993).

[2]*Carter v. Brown & Williamson Tobacco Corp.*, 779 So.2d 932, 942 (Fla. 2000).

[3]*Kenyon v. RJ Reynolds Tobacco Company*, Case No. 00-05401 Div. D, In the Circuit Court for the Thirteenth Judicial Circuit , Hillsborough County, Florida

The undersigned's firm, a member of TTLA, presently represents more than 1800 individuals who suffer from cigarette related injuries and who have retained his firm to represent their interests ***only as class members*** in the *Engle* class action – they have specifically been advised and have agreed that our firm cannot represent them in pursuing individual suits against the tobacco industry due to the time, expense, and difficulty such representation would require. Our clients suffer from lung cancer, emphysema, heart disease, laryngeal cancer, vascular disease, strokes, and other diseases caused by smoking. Many of our clients have passed away while awaiting their day in court. Given the sheer number of our cigarette injured clients, their age and infirmities, the *Engle* class action provided the only real hope our clients had of obtaining any compensation for their injuries.

The undersigned's law firm is the only one within a radius of 150 miles which has been willing to represent injured smokers in individual suits brought against the cigarette companies. In fact, the undersigned is aware of only three other lawyers in the entire state of Florida who have tried such cases to verdict. In our experience, we have learned that prosecution of individual claims involves approximately 18 months of intensive discovery conducted by the defense, with interlocutory appeals being taken at every opportunity. Following what is usually a lengthy trial, the appeal of any successful plaintiff's verdict typically consumes another 24 months. Given the amount of time involved in successfully prosecuting these kinds of cases, and in further light of the fact that there are virtually no other lawyers within Florida who will prosecute

these kinds of claims, virtually none of the thousands of Floridians who suffer from cigarette related injuries will ever have an opportunity to present their claims to a jury. It is for these reasons that we have consistently recommended to our clients that their best hope of recovering any compensation would be to participate as a member of the *Engle* class action.

Accordingly, the *Engle* class action clearly represents a superior remedy for the many thousands of Florida residents suffering from cigarette related injuries. In reality, it is the only viable remedy available. In decertifying the class, the lower court failed to recognize the superiority of the remedy afforded by the class action compared to separate individual actions.

II. The tobacco industry's conduct rightfully triggers liability for compensatory and punitive damages.

The conduct of the tobacco industry rightfully triggers liability for punitive and compensatory damages according to Florida and federal law. Said industry violated the most basic legal and ethical standards by concealing and falsifying scientific information on cigarette hazards, by manipulating addiction through nicotine chemistry, and in many other particulars.

For example, as this Court commented in *Carter v. Brown & Williamson Tobacco Corp.*, 779, So.2d 932, 942 (Fla. 2000):

> The evidence in question consisted of documentary and testimonial evidence showing research conducted by Brown & Williamson, the British American Tobacco Company and the Battelle Institute in the 1950s through the 1970s. The story behind how this evidence came to light is most peculiar, but fortunately the tale is one that we need not tell nor address. *See* Stanton A. Glantz et al., *The Cigarette Papers* (1996); Lisa Bero, et al., *Lawyer Control of the Tobacco Industry's External Research Program: The Brown & Williamson Documents,* 274 JAMA 241 (1995). The evidence allegedly revealed that Brown & Williamson and its affiliates had conducted research on the dangers of smoking and learned as early as 1963 that nicotine was addictive.

The consequences of such conduct were the largest preventable health disaster in history. The 2001 Surgeon General report summarizes the epidemic of lung cancer among women that has been going on for over 30 years:

> Today the nation is in the midst of a full-blown epidemic. Lung cancer, once rare among women, has surpassed breast cancer as the leading cause of female cancer death in the United States, now accounting for 25 percent of all cancer deaths among women. Surveys have indicated that many women do not know this fact. And lung cancer is only one of myriad serious disease risks faced by women who smoke. [2001 Surgeon General Report, Women and Smoking (U.S. Department of Health and Human Services, Office of the Surgeon General), Executive Summary at 1]

The report links the epidemic to a single cause: cigarette smoke; states that 90% of lung cancers are due to cigarette smoke; states that the risk of premature death is twice as high in smokers; and warns that an average of 14 years' of life is lost per premature death:

> 1. Cigarette smoking plays a major role in the mortality of U.S. women.

2. The excess risk for death from all causes among current smokers compared with persons who have never smoked increases with both the number of years of smoking and the number of cigarettes smoked per day.

3. Among women who smoke, the percentage of deaths attributable to smoking has increased over the past several decades, largely because of increases in the quantity of cigarettes smoked and the duration of smoking.

4. Cohort studies with follow-up data analyzed in the 1980s show that the annual risk for death from all causes is 80 to 90 percent greater among women who smoke cigarettes than among women who never smoked. A woman's annual risk for death more than doubles among continuing smokers compared with persons who have never smoked in every age group from 45 through 74 years.

5. In 1997, approximately 165,000 U.S. women died prematurely from a smoking-related disease. Since 1980, approximately three million U.S. women have died prematurely from a smoking-related disease.

6. [F]or every smoking attributable death, an average of 14 years of life was lost.

8. Cigarette smoking is the major cause of lung cancer among women. About 90 percent of all lung cancer deaths among U.S. women smokers are attributable to smoking.

9. The risk for lung cancer increases with quantity, duration, and intensity of smoking. The risk for dying of lung cancer is 20 times higher among women who smoke two or more packs of cigarettes per day than among women who do not smoke.

10. Lung cancer mortality rates among U.S. women have increased about 600 percent since 1950. In 1987, lung cancer surpassed breast cancer to become the leading cause of cancer death among U.S. women. [2001 SGR Executive Summary, pp 4-5]

A similar epidemic has existed for men.

III. **The lower court's decision is in conflict with this Court's decision in *Carter v. Brown & Williamson Tobacco Corporation*, in its interpretation of preemption**

The lower court's opinion conflicts with *Carter v. Brown and Williamson Tobacco Corporation*, *supra*, because it adopts "implied preemption." *See* slip opinion at 45 fn 35: "because the sale of cigarettes is subject to federal regulation, attempts to impose contradictory requirements or prohibitions under state law are subject to at least **implied preemption**."

In adopting implied preemption the lower court deviated from settled authority from this Court and from the United States Supreme Court that, in the case of the Cigarette Labeling Acts, **preemption is express, not implied,** and is limited to the terms of the Acts. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 514, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). In *Carter* this court clearly articulated the scope of federal preemption:

> First, the plurality held that the 1969 Act **expressly** preempts post-1969 failure-to-warn claims that cigarette "advertising or promotions should have included additional, or more clearly stated, warnings." *Id.* at 524, 112 S.Ct. 2608. The plurality added that the "[1969] Act does not, however, pre-empt petitioner's claims that rely solely on respondent's testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 524-25, 112 S.Ct. 2608. Next, the plurality concluded that express warranty claims were not preempted by the 1969 Act because liability for express warranty is not imposed under state law but rather by the warrantor's express actions. *See id.* at 525-27, 112 S.Ct. 2608. The plurality also concluded that the 1969 Act does not preempt fraudulent misrepresentation claims because fraudulent misrepresentation claims are based on a state law duty not to deceive rather than a state law duty "based on smoking and health." *Id.* at 528-29, 112 S.Ct. 2608. Finally, the plurality concluded that the 1969 Act does not preempt conspiracy to defraud claims because such

> claims are based on a duty not to conspire to commit fraud rather than a duty "based on smoking and health."

Id. at 530, 112 S.Ct. 2608. 778 So.2d at 940.

The differences between implied preemption and express preemption are considerable. Under implied preemption as advocated by the lower court, there can be no risk-benefit argument for cigarettes. That is, the argument that the benefits of cigarettes are outweighed by their risks cannot be made, because, so the reasoning goes, their sale has been "permitted" by federal law and such a claim would "interfere with Congress's policy in favor of keeping cigarettes on the market." Opinion at 45 n 35.

This Court's holding in *Carter* cannot be harmonized with an implied preemption analysis. In *Carter* the preemption found was express and limited to *post-1969 claims for lack of warning in advertising and promotion*. Thus, the lower court erred in adopting implied preemption concerning the cigarette labeling acts.

CONCLUSION

For the foregoing reasons, the Third District Court of Appeal's ruling decertifying the class should be quashed. Likewise, its holding concerning implied preemption should also be quashed.

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CERTIFICATE OF SERVICE

WE CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached service list.

_____
Norwood S. Wilner

CERTIFICATE OF COMPLIANCE

This Brief uses 14 point Times New Roman type font that is proportionately spaced.

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Attorney

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