No. A-

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

ELAINE JORDAN,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA FIRST DISTRICT COURT OF APPEAL

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to this Court's Rule 13.5, Philip Morris USA Inc. ("PM USA") respectfully requests a 25-day extension of time, to and including September 21, 2018, within which to file a petition for a writ of certiorari to the Florida First District Court of Appeal.*

The First District Court of Appeal issued its opinion on April 3, 2018. *Philip Morris USA Inc. v. Jordan*, No. 1D15-5871, 243 So. 3d 929 (Fla. Dist. Ct. App. 2018) (per curiam). It denied PM USA's motion for rehearing on May 29, 2018. The First

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* Pursuant to this Court's Rule 29.6, undersigned counsel state that PM USA is a wholly owned subsidiary of Altria Group, Inc. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

District's opinion is not reviewable in the Florida Supreme Court because it does not contain analysis or a citation to any other decision. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). Accordingly, this Court has jurisdiction to review the First District's decision under 28 U.S.C. § 1257(a) because the First District was "the highest court of a State in which a decision could be had." *See, e.g., KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam). Unless extended, the time within which to file a petition for a writ of certiorari will expire on August 27, 2018.

A copy of the First District's decision is attached hereto as Exhibit A; a copy of its order denying rehearing is attached as Exhibit B.

1. This case is one of approximately 8,000 individual personal-injury claims filed in the wake of the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), which prospectively decertified a sprawling class action against the major domestic cigarette manufacturers filed on behalf of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* at 1256 (internal quotation marks omitted). When it decertified the class, however, the Florida Supreme Court preserved several highly generalized jury findings from the first phase of the *Engle* class-action proceedings—for example, that each defendant "placed cigarettes on the market that were defective and unreasonably dangerous" in some unspecified manner and at some unspecified time over a 50-year period. *Id.* at 1257 n.4. The Florida Supreme Court stated that those findings

would have "res judicata effect" in subsequent cases filed by individual class members. *Id.* at 1269.

In each of the thousands of follow-on "*Engle* progeny" cases filed in state and federal courts across Florida, the plaintiffs have asserted that the generalized *Engle* findings relieve them of the burden of proving the tortious conduct elements of their individual claims against the defendants—for example, on a claim for strict liability, that the particular cigarettes smoked by the class member contained a defect that was the legal cause of the class member's injury. Relying exclusively on *claim* preclusion principles, the Florida Supreme Court has held that affording such broad preclusive effect to the generalized *Engle* findings is consistent with federal due process. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 436 (Fla.) ("That certain elements of the prima facie case are established by the Phase I findings does not violate the *Engle* defendants' due process rights . . . ."), *cert. denied*, 134 S. Ct. 332 (2013).

Pursuant to the procedures established in the Florida Supreme Court's *Engle* decision, Plaintiff Elaine Jordan brought this personal-injury action against PM USA to recover damages for her chronic obstructive pulmonary disease, which she alleged was caused by smoking. Plaintiff asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. The trial court ruled that, upon proving that she was a member of the *Engle* class, Plaintiff would be permitted to rely on the "res judicata effect" of the *Engle* findings to establish the conduct elements of her claims and would not be required to prove those elements at trial.

The jury found that Plaintiff was an *Engle* class member, found in her favor on all of her claims, and awarded her $7.8 million in compensatory damages and $3.2 million in punitive damages.

On appeal to the First District Court of Appeal, PM USA raised several challenges to the judgment under state law. In addition, PM USA expressly preserved its position that the trial court violated federal due process by permitting Plaintiff to rely on the *Engle* findings to establish the tortious conduct elements of her claims.[1] The First District Court of Appeal affirmed in a *per curiam* opinion without citation or analysis.

2. This Court's review would be sought on the ground that the First District Court of Appeal's decision—which rejected PM USA's due-process challenge to the broad preclusive effect afforded to the *Engle* Phase I findings—conflicts with this Court's due-process precedent by depriving PM USA of its property without any assurance that any jury actually found that PM USA committed tortious conduct that was the legal cause of Plaintiff's injuries. For example, on the strict-liability and negligence claims, Plaintiff was permitted to invoke the *Engle* jury's generalized findings that PM USA sold unspecified cigarettes at unspecified times that contained an unspecified defect to establish conclusively that the particular cigarettes she smoked were defective. The First District

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[1] *See* PM USA Initial Br. 49 ("PM USA preserves its position that it violates due process to allow Plaintiff to use the *Engle* findings to establish the conduct elements of her claims because it is impossible to determine whether the *Engle* jury resolved anything relevant to Plaintiff's claims.") (citing *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904)). PM USA acknowledged that "the Florida Supreme Court has rejected this argument, *Douglas*, 110 So. 3d at 430-36," but noted its intention to "preserve it for review by the U.S. Supreme Court." PM USA Initial Br. 49.

Court of Appeal upheld that result even though Plaintiff made no attempt to show that the *Engle* jury actually decided this issue in her favor. Nor could Plaintiff conceivably have made such a showing: In the *Engle* proceedings, the class presented many alternative theories of defect, several of which applied only to particular designs or brands of cigarettes, rather than to every design and brand, and it is impossible to determine from the *Engle* findings or the *Engle* record which of those theories the *Engle* jury actually accepted. It is possible, for example, that the defect found by the *Engle* jury was a flaw in the filters of a brand of PM USA's cigarettes that she never smoked, or the use of certain additives in that brand—and that the jury found that the cigarettes that she did smoke were *not* defective.

Likewise, to support the class's conspiracy to commit fraudulent concealment claim, the *Engle* jury was presented with numerous distinct categories of allegedly fraudulent statements by PM USA, other tobacco companies, and various industry organizations; the jury returned only a generalized finding that PM USA agreed to "conceal or omit information regarding the health effects of cigarettes or their addictive nature." *Engle*, 945 So. 2d at 1277. The *Engle* jury's verdict does not indicate which tobacco-industry statements were the basis for its finding, or whether that finding rested on the concealment of information about the health effects of smoking, the addictive nature of smoking, or both.

In these circumstances, allowing Plaintiff to invoke the *Engle* findings to establish conclusively that the particular cigarettes she smoked were defective, and that any tobacco-industry statements she may have seen and read were fraudulent, violates due process. *See, e.g.*, *Fayerweather v. Ritch*, 195 U.S. 276, 299, 307 (1904) (holding, as a matter of federal due process, that where preclusion is sought based on a jury verdict that may rest

on any of two or more alternative grounds, and it cannot be determined with certainty which alternative was actually the basis for the jury's finding, "the plea of res judicata must fail"); *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) ("We have long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." (internal quotation marks omitted)); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[A State's] abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."). That manifest due-process violation is being repeated in the thousands of pending *Engle* progeny cases in Florida.

3. PM USA is currently evaluating whether to file a petition for a writ of certiorari raising these due-process issues in *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166 (Fla. Dist. Ct. 2017), an *Engle* progeny case that culminated in a verdict of more than $30 million in favor of the plaintiff. The petition in *Boatright* is due on September 20, 2018. *Boatright* is a better vehicle for plenary review than this case because, unlike the *per curiam* affirmance issued by the First District Court of Appeal in this case, the Second District Court of Appeal issued a written opinion in *Boatright* affirming the judgment. If PM USA files a petition for a writ of certiorari in *Boatright*, it plans to file a petition in this case asking the Court to hold this case pending the Court's disposition of the petition in *Boatright*. An extension of time until September 21, 2018, the day after the *Boatright* petition is due, is warranted to permit this Court to consider the petition in this case in conjunction with the petition in *Boatright*.

CONCLUSION

Accordingly, PM USA respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari by 25 days, to and including September 21, 2018.

Respectfully submitted.

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Counsel for Petitioner
Philip Morris USA Inc.

August 17, 2018

Exhibit A

243 So.3d 929 (Table)
Unpublished Disposition
(This unpublished disposition is
referenced in the Southern Reporter.)
District Court of Appeal of Florida, First District.

PHILIP MORRIS USA INC., Appellant,
v.
Elaine JORDAN, Appellee.

No. 1D15-5871
|
April 3, 2018
|
Rehearing Denied May 29, 2018

On appeal from the Circuit Court for Duval County. Virginia Norton, Judge.

Attorneys and Law Firms

Geoffrey J. Michael and Daphne O'Connor of Arnold & Porter Kaye Scholer LLP, Washington, D.C., and Bonnie C. Daboll of Shook, Hardy & Bacon LLP, Tampa, for Appellant.

John S. Mills and Courtney Brewer of The Mills Firm, P.A., Tallahassee, and John S. Kalil of Law Offices of John S. Kalil, P.A., Jacksonville, for Appellee.

Opinion

Per Curiam.

*1 AFFIRMED.

Lewis, Roberts, and Winsor, JJ., concur.

All Citations

243 So.3d 929 (Table), 2018 WL 1613351

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Exhibit B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

May 29, 2018

CASE NO.: 1D15-5871
L.T. No.: 16-2013-CA-8903-XXXX-MA

Philip Morris USA Inc. v. Elaine Jordan

Appellant / Petitioner(s), Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed April 25, 2018, for rehearing is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

John S. Mills
Courtney Brewer
Geoffrey J. Michael
Bonnie C. Daboll
Daphne O'Connor
John S. Kalil
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KRISTINA SAMUELS, CLERK