

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

BANCO ESPIRITO INTERNATIONAL, LTD., ESB FINANCE, LTD., and BANCO ESPIRITO SANTO S.A.,)	
)	
Plaintiffs,)	Case No. 04-14009CA31
)	
-vs-)	
)	
BDO SEIDMAN, LLP,)	
)	
Defendant.)	
)	
)	

**BRIEF AMICUS CURIAE OF THE AMERICAN
TORT REFORM ASSOCIATION AND THE
FLORIDA JUSTICE REFORM INSTITUTE**

INTEREST OF THE AMICUS CURIAE

The American Tort Reform Association (“ATRA”) is a non-profit, non-partisan organization formed in 1986 that is dedicated exclusively to reforming the civil justice system throughout the United States. ATRA represents more than 300 businesses, corporations, municipalities, associations, and professional firms. ATRA is especially concerned with the costs that excessive civil litigation impose on society. In addressing that issue, ATRA has been actively involved in the implementation of appeal bond legislation in dozens of states, including Florida.

The Florida Justice Reform Institute (“FJRI”) is an organization of concerned citizens, small business owners, business leaders, doctors and lawyers, all working toward the common goal of restoring predictability and personal responsibility to civil justice in Florida.

FJRI works to restore faith in the Florida judicial system and protect Floridians from the social and economic toll that results from rampant litigation. It is the first independent organization focused solely on civil justice in Florida.

ATRA and FJRI both have a particular interest in this case because plaintiffs' constitutional challenge to one of Florida's appeal bond statutes -- Fla. Stat. § 45.045 -- directly implicates their individual missions to help improve the fairness, predictability, and efficiency of America's civil justice system. ATRA and FJRI believe plaintiff's constitutional challenge to Florida's appeal bond statute presents important issues that no court in this country has yet been called upon to address and that are best suited for consideration by Florida's appellate courts.

ARGUMENT

This Court should take this opportunity to uphold the Florida Constitution, which separates powers between the branches of government. Art. II., § 3, Fla. Const. Upholding this appeal bond statute would affirm the Legislature's right to make substantive law. *See Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000) ("Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law."). Often, laws contain elements of both procedure and substance. *See e.g., Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000) (finding a statute created substantive rights and that any procedural provisions were "intimately related to the definition of those substantive rights"). In such a case, if the substantive and procedural aspects are "intertwined," a constitutional challenge should be rejected. *See id.* ("We have consistently rejected constitutional challenges where the procedural provisions were intertwined with substantive rights.").

I. AS ANTICIPATED BY FLORIDA RULE OF APPELLATE PROCEDURE 9.310(a), THE FLORIDA LEGISLATURE HAS ENACTED THREE SUBSTANTIVE STATUTES LIMITING SUPERSEDEAS BONDS.

The language adopted by the Florida Supreme Court in Rule 9.310 of the Florida Rules of Appellate Procedure acknowledges that the Legislature constitutionally may enact statutes addressing stays pending review. Rule 9.310(a), which controls the application of the rule, is prefaced by the language “Except as provided by general law” Recognizing that stays pending appeal are tied to the substantive constitutional right to appeal, the Supreme Court anticipated the Legislature’s need to address this issue. The Legislature’s enactments in this area fit squarely within its constitutional authority as recognized by the Supreme Court.

The Legislature has acted under this authority on three separate occasions. In 2000, the Legislature adopted Fla. Stat. § 768.733, creating a \$100 million limit on supersedeas bonds in certified class actions. In 2003, the Legislature adopted Fla. Stat. § 569.23, creating a \$100 million limit on supersedeas bonds in actions involving signatories to the tobacco settlement agreement. In 2006, the Legislature adopted Fla. Stat. § 45.045, the specific statute at issue here. These enactments are anticipated, and indeed authorized, by the language of Rule 9.310.

II. THE FLORIDA LEGISLATURE HAS ADOPTED A PUBLIC POLICY OF PROMOTING THE SUBSTANTIVE RIGHT OF APPEAL.

The Florida Constitution guarantees the right to appeal. *T.A. Enterprises v. Olarte*, 931 So. 2d 1016, 1018 (Fla. Dist. Ct. App. 2006) (“Article V, section 4(b)(2) of the Florida Constitution grants a constitutional right to appeal ‘as a matter of right, from final judgments or orders of trial courts.’”) (citation omitted). The Florida legislature, in passing the three statutes described above, has recognized that a massive supersedeas bond requirement can distort the judicial system and unconstitutionally limit the right of appeal.

Defendants who are subject to exorbitant damage awards invariably seek to appeal them, and they often succeed in having the judgments reduced or overturned on appeal. Without a limitation on the required supersedeas bond under Rule 9.310, defendants subject to such huge damage awards may simply be unable to post a bond to protect their assets while they appeal. In order to stop a plaintiff from seizing their assets during an appeal, defendants are faced with two alternatives: first, they may be forced into seeking bankruptcy protection, which carries with it an automatic stay of the debtor's obligations to pay its creditors, but is for many reasons a highly unpalatable choice, particularly for a corporation and its business partners and employees; second, they may be forced into a disadvantageous settlement, the terms of which are dictated by the interference with the substantive right of appeal due to the appeal bond requirement rather than the merits of the case.

The risks posed by high supersedeas bonds are not merely hypothetical. The problems caused by exorbitant supersedeas bonds have been most vividly demonstrated in Florida by the *Engle* case, in which a class of smokers was awarded \$145 billion in punitive damages. *Engle v. Liggett Group*, 945 So. 2d 1246, 1254 (Fla. 2006). If Rule 9.310 applied, the *Engle* defendants would have been forced to post a bond equal to 125 percent of the verdict, or \$181 billion. Since no company or industry could post such a bond, the only way for the defendants to obtain a stay would have been for them to declare bankruptcy. To prevent this unconstitutional abrogation of the right to appeal, the Florida legislature enacted § 768.733, which limited the supersedeas bond to \$100 million. The companies posted a bond under this statute and appealed the verdict. In December 2006, the Florida Supreme Court rejected the \$145 billion punitive damages award, holding that it was "excessive as a matter of law." *Id.* The

Engle case vividly demonstrates the need to allow a full appellate consideration of the issues in cases where large damages, particularly punitive damages, are awarded.

This case presents the same issue. Section 45.045 of the Florida Statutes allowed the defendants here to post a \$50 million dollar bond and appeal. If the statute is held to be unconstitutional, Rule 9.310 would require a bond of approximately \$650 million. If BDO Seidman cannot post a bond of this size, the plaintiffs in this case may immediately begin efforts to seize the defendant's assets. The likely result, were that to happen, is a bankruptcy filing by BDO Seidman, an otherwise healthy business entity, or a settlement that results in the forced abandonment by BDO Seidman of its constitutionally protected right to appeal.

The right result now is to affirm the constitutionality of Fla. Stat. § 45.045 so this important issue can receive a more complete airing in the appellate courts of Florida. Amici note that this issue has already been the subject of one hearing before the Florida Supreme Court. *In re: Amendments to Appellate Rules 9.310*, SC 07-299 (Sept. 20, 2007).

III. THIRTY-FOUR STATES HAVE ENACTED STATUTES LIMITING SUPERSEDEAS BONDS, AND THIS IS THE FIRST TIME ANY HAS BEEN CHALLENGED AS UNCONSTITUTIONAL.

Thirty-four state legislatures have enacted laws limiting the size of appeal bonds.¹

This reflects the deep concern throughout the nation that as damage awards have increased the

¹ Ala. Code § 6-12-4; Ark Code § 16-55-214; Cal. Health & Safety Code § 104558; Colo. Rev. Stat. § 13-16-125; Fla. Stat. § 768.733, § 569.23, § 45.045; Ga. Code Ann. § 5-6-46; Haw. Rev. Stat. Ann. § 328L-7; Idaho Stat. Ann. § 13-202; Ind. Code Ann. § 34-49-5-3; Iowa Code § 625A.9; Kan. Code § 50-6a05; Ky. Rev. Stat. Ann. § 411.187; La. Rev. Stat. Ann. § 98.6; Mich. Comp. Laws. Ann. § 600.2607(1); Minn. Stat. Ann. § 550.36; Mo. Rev. Stat. § 512.085; Neb. Stat. Rev. § 25-1916; Nev. Stat. § 20.035.1; N.J. Stat. Ann. § 52:4D-13; N.M. Stat. § 39-3-22; N.C. Gen. Stat. § 1-289; ND Cent. Code § 28-21-25; Ohio Rev. Code Ann. § 2505.09; Okla. Stat. Ann. tit. 12 § 990.4 B.5; Or. Rev. Stat. § 19.312; 35 Pa.S. § 5701.309; S.C. Code Ann. § 18-9-130; Tenn. Code § 27-1-124; Tex. Civ. P. & Rem. § 52.006(b); Va. Code Ann. § 8.01-676.1 J; (continued...)

appeal bond requirement may function to impair the right of appeal. Most of these states have a separation of powers principle embedded in their constitutions, which obviously are each applied differently by the courts of those states. Yet, to date, none of these statutes has been the subject of a constitutional challenge in any court in this country. Thus, the issue before this Court is one of first impression anywhere, and it will be watched with interest and be the subject of consideration not only by the courts of Florida but of other states as well.

The fact that so many states have passed appeal bond limitation statutes is an indication that legislators feel such laws are critical to the protection of the right to appeal. Florida's legislators arguably have demonstrated this interest and concern more than those in any other state, as they have addressed the issue three times in the last seven years.

The issue of the constitutionality of Fla. Stat. § 45.045 is a vitally important one, and deserves a complete airing by the appellate courts of this state. The only sensible way to achieve that in this case is for this Court to affirm the statute's constitutionality, thereby avoiding a bankruptcy filing by the defendant or a settlement that prevents appellate consideration of this issue.

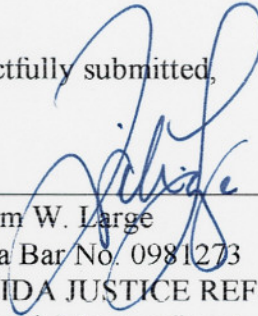
Wash. Rev. Code § 43.340; W. Va. Code § 4-11 A-4; Wis. Stat. Ann § 808.07; Wyo. Stat. § 1-17-201.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion.

DATED this 2nd day of October 2007.

Respectfully submitted,



William W. Large
Florida Bar No. 0981273
FLORIDA JUSTICE REFORM INSTITUTE
210 South Monroe Street
Tallahassee, Florida, 32301-1824

Keith A. Teel
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel: 202-662-5501
Fax: 202-778-5501

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion Of The American Tort Reform Association And The Florida Justice Reform Institute For Leave To File Brief As Amicus Curiae, and a true and correct copy of the foregoing Brief Amicus Curiae Of The American Tort Reform Association And The Florida Justice Reform Institute was served on this 2nd day of October 2007, by facsimile where facsimile numbers are available and where not available by overnight delivery, and by mail to those receiving delivery by facsimile upon the following persons:

Mitchell W. Berger
Rene D. Harrod
BERGER SINGERMAN, PA
350 E. Las Olas Boulevard, Suite 1000
Fort Lauderdale, Florida 33301
Telephone: 954-525-9900
Facsimile: 954-523-2872
Co-Counsel for Plaintiffs

Steven W. Thomas
Emily Alexander
Anthony J. Lewis
SULLIVAN & CROMWELL, LLP
1888 Century Park East
Los Angeles, California 90067
Telephone: 310-712-6627
Facsimile: 310-712-8800
Co-Counsel for Plaintiffs

Geoffrey B. Marks
BILLBROUGH & MARKS, P.A.
Suite 320
100 Almeria Avenue
Miami, Florida 33134
Telephone: 305-442-2701
Facsimile: 305-442-2801
Co-Counsel for Plaintiffs

James C. Cunningham, Jr.
BERGER SINGERMAN, PA
200 S. Biscayne Boulevard, Suite 1000
Miami, Florida 33131
Telephone: 305-755-9500
Facsimile: 305-714-4340
Co-Counsel for Plaintiffs

Gonzalo Dorta
GONZALO DORTA, P.A.
334 Minorca Avenue
Coral Gables, Florida 33134
Telephone: 305-441-2299
Facsimile 305-441-2299
Co-Counsel for Plaintiffs

Mark F. Raymond
Rhett Traband
BROAD AND CASSEL
One Biscayne Tower, 21st Floor
2 South Biscayne Blvd.
Miami, FL 33131
Telephone: 305-373-9425
Facsimile: 305-995-6385
Co-Counsel for BDO International B.V.

Alan G. Greer
Manuel A. Garcia-Linares
Laline Concepcion-Veloso
RICHMAN GREER, ET AL.
Miami Center, 10th Floor
201 South Biscayne Boulevard
Miami, Florida 33131
Telephone: 305-373-4000
Facsimile: 305-373-4099
*Counsel for Victor Balestra, Bernard Mollet,
Joaquin Garnecho and
Pierre Trezzini*

Manuel F. Fente
LAW OFFICES OF
MANUEL F. FENTE, P.A.
1110 Brickell Avenue, 7th Floor
Miami, Florida 33131
Telephone: 305-379-4900
Facsimile: 305-423-3212
Counsel for Otto Ambrosiani

(VIA MAIL ONLY BY REQUEST)
Michel O. Weisz
SEGREDO & WEISZ
9350 South Dixie Highway, Suite 1500
Miami, Florida 33156
Telephone: 305-670-3820
Facsimile: 305-670-8230
Counsel for Ariadna Puerto

Dominick C. Parlapiano
8201 SW 165th Terrace
Palmetto Bay, Florida 33157
Appearing Pro Se

Kevin W. Goering
Lisa Lewis
SHEPPARD, MULLIN, ET AL.
30 Rockefeller Plaza
24th Floor
New York, New York 10112
Telephone: 212-332-3831
Facsimile: 212-332-3888
Co-Counsel for BDO International B.V.

Ira N. Loewy
BIERMAN SHOHAT LOEWY, ET AL.
800 Brickell Avenue, Penthouse 2
Miami, Florida 33131
Telephone: 305-358-7000
Facsimile: 305-358-4010
*Counsel for Eduardo Orlansky and
Hector Orlansky*

Carlos E. Mendez
1122 Sevilla Avenue
Coral Gables, Florida 33134
Appearing Pro Se

Hector J. Lombana
GAMBA & LOMBANA, P.A.
2701 Ponce de Leon Boulevard
Mezzanine
Coral Gables, Florida 33134
Telephone: 305-448-4010
Facsimile 305-448-9891
Co-Counsel for Bernard Mollet and BESIL

Karen Y. Bitar
Adam D. Cole
Caroline J. Heller
GREENBERG TRAUIG, LLP
MetLife Building
200 Park Avenue, 15th Floor
New York, New York 10166
Telephone: 202-801-9200
Facsimile: 202-801-6400
Co-Counsel for BDO Seidman, LLP

Arturo Alvarez
ALVAREZ ARMAS & BORRON
901 Ponce de Leon Boulevard
Suite 304
Coral Gables, Florida 33134
Telephone: 305-461-5100
Facsimile: 305-461-8642
Co-Counsel for BDO Seidman, LLP

Elliot H. Scherker
Elliot B. Kula
Julissa Rodriguez
GREENBERG TRAUIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: 305-579-0500
Facsimile: 305-579-0717
Co-Counsel for BDO Seidman, LLP

Movant