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## **Howard M. Engle, M.D. v. Liggett Group, Inc.**

CHIEF JUSTICE: THE NEXT CASE ON THE MORNING'S CALENDAR IS I THINK HE WILL IS EN GLE VERSUS LIGGETT GROUP. JUSTICE CANTERO IS RECUSED FROM THE CASE. WE HAVE EXPANDED THE TIME FOR ORAL ARGUMENT FROM 20 MINUTES TO 30 MINUTES , UNDERSTANDING THE MA NY ISSUES INVOLVED. THE COURT APPRECIATES THE TREMENDOUS RECORD IN THIS CASE, BUT WHAT WE WOULD APPRECIATE IS THAT THERE BE FOCUS PRIM ARILY ON THE ISSUE OF CL ASS DECERTIFICATION AND PUNITIVE D A MAGES , THE NOTION OF PUN ITIVE DAMAGES WITHIN A C LASS AC TION, AND THEN YOU ARE CERTAINLY FREE TO TOUCH ON ANY OF THE OTHER ISS UES , BUT THIS IS TWO OF THE MA JOR ISSUES, AS FAR AS OUR CONCERNS.

THANK YOU , YOUR HONOR . STANLEY AND SUSAN ROSENBLATT ON BE HALF OF THE ENGLE CLASS . SEVEN AND-A-HALF YE ARS AFTER THE THIRD DIST RICT COURT OF APPEAL CERTIFIED THIS CASE , THEY DECERTIFIED IT. WHEN ONE LOOKS AT THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL , THAT OPINION TO TALLY IGNORES A HALF CE NTURY OF FRAUD , FRAUD AND DECEIT ON BEHALF OF THE TOBACCO INDUSTRY. FRAUD AND DECEIT A S REGARDS A SE ASONED TRIAL JUDGE WHO SAT THERE FOR TWO AND- A-HALF YEARS AND LIST ENED TO WITNESSES AND LOOKED AT THOUSANDS OF DOCUMENTS.

THE CLASS CERTIFICATION IN 1996 AS IT CAME THR OUGH , SINCE THAT TIME AND THE OPPOSITION PRESENTS TO YOU A L ONG LA UNDRY LIS T OF CASES, INDICATING THAT THEIR POSITION THAT U NDER THE CIRCUMSTANCES THAT A CLASS APPROACH WOULD BE INAPPROPRIATE , WOULD YOU DISCUSS THE CONCEPT OF LAW OF THE CASE , DECERTIFICATION WITHIN THAT CONCEPT , AND WHAT BIN DING E FFECT DID THAT INITIAL DECISION HAVE WITH REGARD TO THE INTERLOCUTORY DETERMINATION MA DE?

THEY HAVE NOT EVEN APPEALED THE IN ITIAL CERTIFICATION. WE ARE HERE ON THE FAILURE OF THE TRIAL COURT TO DECERTIFY .

THAT IS WHAT I MEAN , AND THE IMPACT OF THE THIRD DISTRICT AFFI RMING CERTIFICATION INITIALLY.

ALL THE OTHER CASES THAT DEAL WITH CLASS CERTIFICATION IN A TOB ACCO INDUSTRY CASE , NONE OF THOSE CASES ARE REMOTELY SIMILAR TO THIS CASE IN AN Y WAY .

IS THAT BECAUSE THERE WAS ALREADY A TRIA L? IS THAT , I MEAN, THEY ARE ALL ABOUT THE TOBA CCO INDUSTRY.

YES. YES. YES. THAT IS CERTAINLY PART OF IT. THERE HAS NEVER BEEN A CASE WHERE THERE HAS BEEN A TWO-YEAR TRIAL , A FINAL JUDGMENT , NOTICE THAT WENT O UT, AND YOU T E LL THE PEOPLE OF FLO RIDA WHO WA ITED PATIENTLY FOR , IT IS TEN AND-A-HALF YEARS SINCE THIS LAWSUIT WAS FILED , TEN AND-A-HALF YEARS, MAY OF 1994.

LET ME , WHAT STRIKES ME , THOUGH, AND MAYBE IT IS BECAUSE OF THE STRUCTURE OF OUR COURT SYSTEM , THAT WE HAVE GOT A RULE IN THIS COURT THAT , ONCE WE TAKE JURISDICTION IN A CASE , WE EXAMINE ANY ERROR IN THERECORD, AND SO WE ARE NOT REALLY DEALING WITH A LAW OF THE CASE ARG UMENT IN MY PERSPECTIVE. WE ARE DEALING WITH AND CAN AND SHOULD EXAMINE THE MATTER O F CERTIFICATION , TAN D OES LOOK LIKE TO ME, THAT THE FED

ERAL CIRCUIT COURTS , REALLY THE U.S. SUPREME COURT I N THE AIR CAM CASE , HAVE RULED THAT THESE ENORMOUS CLASSES IN MASS TORTS , ARE JUST NOT A N APPROPRIATE PROCEDURAL MECHANISM TO TRY THESE CASES. NOW , WOULD YOU S PEAK TO THE CASTELANO CASE AND THE BARNES CASE OU T OF THE THIRD CIRCUIT AND THE AIR CHEM CASE .

THIS OFFERS NO REMEDY OUTOF THE THIRD CI RCUIT , TO THE PEOPLE OF FLORIDA WHO WAITED PATIENTLY FOR TEN AND-A-HALF YEARS AS THIS CASE WENT THROUGH , AND THERE WERE NUMEROUS APPE LLATE OPPORTUNITIES FOR THE THIRD DISTRICT COURT OF APPEAL TO SEND THIS BAC K.

WELL , THE THIRD DISTRICT , AT THE END OF THEIR OP INION , DO IN FACT , SAY THAT THE MEMBERS OF THE CLASS WHO HAVE NOT HAD THEIR CLAIMS ADJUDICATED, CAN DO SO. AREN'T THERE PEOPLE WHO , IN FACT, PURSUANT TO THE NOTICE , JOINED THE CLASS?

JUSTICE QUINCE , THAT IS A FICTION. A TOTAL FICTION. IN 1 996 , WHEN THE THIRD DISTRICT CERTIFIED THIS CASE , THEY S AID THE DECI SION IN THE BROYNE CASE, THE FLIGHT ATTENDANCE - - ATTENDANT CASE WHICH WAS FILED IN 19 91 , SAID THAT DECISION COMPELS THIS DECISION , COM PELS CERTIFICATION, AND WHAT DID THE BROYNE COURT HOLD ? IT SAID YOU CAN'T GET JUSTICE THERE.IS NO REMEDY WITHOUT A CLASSACTION. THIS IS THE TOBACCO INDUSTRY. THEY BO ASTED IN THEIR BR IEF IN 28 ,000 2 , WE IN 2002 , WE HE AR

NOW WE ARE TALKING ABOUT SORT OF AN EQUITABLE I DEA OF HOW THE RULE W O RKS AND WHAT I AM STRUGGLING WITH FRANKLY, IS, A ND IT IS GOING TO BE A QUESTION TO MR . SCHERKER AND TO THE DEFENDANTS , IS, WHEN YOU HAVE ISSUES THAT ARE COMMON, WHICH THIS CASE DOES. THE SAME COULD HAVE OCCURRED IF YOU HAVE THE FORD , THE P INTO CASE, THE GAS TANK , THAT YOU HAVE TO PROVE A PRODUCT DEFECT AND THAT EVIDENCE IS GOING TO BE SIMILAR, BECAUSE IT IS THE SAME PRODUCT , DOES THAT , BECAUSE YOU HAVE SO M A NY PEOPLE THAT HAVE BEEN INJURED , DOES THAT LEND ITSELF TO A CLASS , OR IS IT BECAUSE THE IDEA THAT SMOKING AND WHAT O CCURS I S SO INDIVIDUALIZED , AS WAS S HOWN IN THE CASES THAT WERE TRIED , THAT YOU , REALLY , ARE NOT , THERE IS NO ECONOMY O F SCALE, SO TO SPEAK , IN A CLASS ACTION, SO THERE IS A PHILOSOPHICAL BATTLE GOING ON , AND JUDGE WEINSTEIN AND HIS ORDER CERTIF YING THECLASS , OTHER THAN ENGLE , SEEMS TO BE HE NEWSPAPERSIATING THAT STRUGGLE, SO COULD YOU ADDRESS THAT PROBLEM.

WELL , THE COURT IN BROY NEAND THE COURT IN ENGLE ONE , SAID COMMON ISSUES OBVIOUSLY PREDOMINATE. EVERYTHING WAS KN OWN BY THETHIRD DISTRICT COURT OF APPEAL IN 1996 , THAT THEY KNEW 7 AND-A-HALF YEARS LATER , WHEN THEY DID A TOTAL FLIP-FLOP. THEY CERTIFIED IT AND THEN THEY DECE RTIFIED IT .

BUT COMMON ISSUES DO NOT PREDOMINATE HERE. YOU HAVE GOT

RESPECTFULLY, YOUR HO NOR, THE TRIAL JUDGE WHO SAT THERE FOR TWO YEARS AND H EARD 1 57 WITNESSES , DISAGREES.

AS POINTED OUT IN THE KASIAN BY JUDGE SMITH IN THE FI FTH CIRCUIT , YOU HAVE GOT STATUTE OF LIMITATIONS ISSUES, CAUSE ATION ISSUES. YOUR BASIS FOR YOUR CLAIM IS FRAUD.YOU HAVE GOT RELI ANCE ISSUES. YOU HAVE GOT C H OICE OF LAWS ISSUES, IF YOU ARE BASING IT UPON FRAUD AND INTENTIONAL INFLECTION OF - - INTENTIONAL INFLECTION OF, SO IT SEEMSTO ME THAT ALL OF THESE OTHER COURTS THAT HAVE GONE IN THIS OTHER DIRECTION, HAVE DEALT WITH IT ON THEBASIS THAT YOU DON'T HAVE COMMON ISSUES.

YOUR HONOR, YOU KNOW , I HAVE TO SAY THAT , EVERY NOW AND THEN , IN THE COURSE OF AMERICAN LAW THAT , ST EPS HAVE TO BE TAKEN FOR IN JUSTICE. L OOK AT COURT VERSUS LOOK AT BRO WN VERSUS BOARD OF EDUCATION. IT SAID CERTAIN SI TUATIONS ARE DO NE TO CO RRECT A 06-YEAR-OLD DECISION. IT IS FLAGRANT RY WRONG. THERE IS NO REMEDY ON THE

## ISSUE

YOU ARE YIM THYME IS RUNNING , AND I DON'T KNOW WHETHER ISSUES ABOUT RACIAL EQUALITY HAVE ANY PLACE IN THE ARGUMENT THAT WE ARE FACED WITH TODAY . I AM NOT SURE YOU HAVE ANSWERED THE QUESTION ABOUT OR MAYBE YOU ARE , WHICH IS SAYING THAT SOMEHOW THIS COURT SHOULD INVOKE ITS EQUITABLE POWERS AND , REALLY , NOT LOOK AT HOW THE RULE , THE CLASS ACTION RULE SHOULD TAKE PLACE, AND BECAUSE THE TOBACCO INDUSTRY'S CONDUCT IS SO OUTRAGEOUS AND AFFECTED SO MANY PEOPLE , THAT YOU HAVE GOT TO GO AHEAD AND DO IT IN A CLASS ACTION?

YOUR HONOR, THIS IS A COURT WHICH , IN OPINION AFTER OPINION, TALKS ABOUT DEFERENCE TO THE TRIAL JUDGE. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL TOTALLY IGNORES THE 7 - - TOTALLY IGNORES THE 67 PAGE OPINION , WHICH BY THE WAY THE TRIAL JUDGE WROTE HIMSELF , AS OPPOSED TO THE THIRD DISTRICT COURT OF APPEAL WHICH ESSENTIALLY ADOPTED THE PHILIP MORRIS BRIEF .

NOW THAT WE GET PAST THIS EQUITY ARGUMENT , YOUR POSITION IS THAT BECAUSE THIS TRIAL WAS HELD , BECAUSE THE TRIAL COURT CONDUCTED THE TRIAL IN AN ORDERLY MANNER AND THESE FINDINGS OF FACT ARE NOW BINDING ON THE DEFENDANT THAT, IT WOULD , REALLY , BE AN INEFFICIENCY TO TAKE AWAY THE , AT LEAST PHASE I FINDINGS.

EXACTLY. IT WOULD BE , A HUGE INEFFICIENCY AND A HUGE INJUSTICE.

NOW, WHAT ABOUT , THOUGH , IS THE COURT TO LOOK AT , NOW WE HAVE A NUMBER OF PEOPLE IN THE CLASS , IN OTHER WORDS , WOULD IT BE DIFFERENT IF THERE HAD BEEN 40,000 PEOPLE IN THIS CLASS OR 10,000 OR 5,000 , VERSUS A MILLION? IS THAT , DOES THAT SPEAK IN FAVOR OF CLASS DETERMINATION OR DOES IT SPEAK AGAINST IT? I MEAN IN OTHER WORDS NUMBER OF PEOPLE IS A REQUIREMENT. BUT DOES IT GET SO NUMEROUS THAT THE BURDEN ON THE COURT SYSTEM IS SO GREAT THAT YOU CAN'T, AS A JUDICIAL SYSTEM , HAVE THIS AS AN ONGOING LITIGATION?

ONE PRACTICAL WAY TO PREVENT THIS FROM BEING A BURDEN ON THE COURT SYSTEM IS FOR THIS COURT TO NOT FOLLOW ITS DECISION AT ALL. THE VERDICT ONE, WHICH FINDS FRAUD AND DECEIT AND RELIANCE THAT THE TOBACCO COMPANIES INTENTIONALLY WANTED SMOKERS TO RELY ON THEIR LIES AND MISREPRESENTATION TO SAY THEIR DEBT MEANT , WE DON'T NEED A TRIAL. WE HAVE ALREADY PROVED OUR BREACHES OF DUTY AND THE ONLY THING IS ADMINISTRATION OF DUTY OR QUICK MECHANISM TO ESTABLISH DAMAGES.

THERE IS WHERE I HAVE SOME PROBLEMS , BECAUSE THAT WOULD BE A FICTION , TO SAY THAT THE QUESTION OF CAUSATION , THE QUESTION OF RELIANCE , ALL OF THESE OTHER AFFIRMATIVE DEFENSES, THAT SOMEHOW THE TOBACCO INDUSTRY IS DEPRIVED OF THE ABILITY TO , THERE IS LIABILITY WASN'T ESTABLISHED. WHAT WAS ESTABLISHED WAS EITHER A PRODUCT DEFECTOR NEGLIGENCE, AND THAT IS DIFFERENT THAN LIABILITY. SO I DON'T SEE HOW YOU GET AROUND NOT HAVING TO PROVE FOR EVERY SINGLE SMOKER , CAUSATION AND RELIANCE AND THE OTHER AFFIRMATIVE DEFENSES.

YOU WOULD HAVE TO PROVE SPECIFIC CAUSATION. THERE IS NO QUESTION ABOUT THAT. NOW , ONE CASE WENT TO TRIAL. THE LUCAS CASE WENT TO TRIAL AND THERE WAS A VERDICT , BECAUSE THE TRIAL JUDGE , THAT WENT SEVEN DAYS , SIX , SEVEN DAYS , NOT ONE OF THESE LENGTHY TRIALS TOOK ABOUT SEVEN OR SIX DAYS , AND THAT WAS BECAUSE THE TRIAL JUDGE PERMITTED THEM TO USE VERDICT ONE , WHICH WAS THE MISCONDUCT OF THE INDUSTRY,, WHICH YOUR HONOR, WE TRIED FOR A YEAR.

WAS IT THE SAME JURY OR A DIFFERENT JURY?

THE DEFENSE IN THIS CASE, DURING THE TWO YEARS, INSISTED ON A TOTALLY DIFFERENT JURY.

A SEVENTH AMENDMENT ISSUE, THEN, AS TO THE DEFENDANT? TWO SEPARATE JURIES.

I SPEAK TO REALITY. I MEAN, THIS WAS A JURY IN OUR CASE, IN OUR CLASS ACTION, THAT SAT FOR TWO YEARS, AND WHEN THEY CAME IN WITH A PUNITIVE DAMAGE VERDICT, COUNSEL FOR PHILIP MORRIS SAID WE DON'T WANT THE JURY EXCUSED. WE WANT THEM TO BE HERE FOR THESE INDIVIDUAL TRIALS, AND THE TRIAL JUDGE BASICALLY, TWO YEARS ISN'T ENOUGH? THIS IS A LIFE TIME SENTENCE FOR THE JURY?

MR. ROSENBLATT I AM NOT A JURY. I AM ASKING YOU A QUESTION AS A JUSTICE, A QUESTION OF LAW. SPEAK TO THE SEVENTH AMENDMENT ISSUE OF THIS DEFENDANT, IF YOU CAN. IF NOT, SHE IS GOING TO SPEAK TO IT LATER THAT, IS FINE.

NO. SHE WILL SPEAK TO IT NOW.

NO. I CAN RESPOND TO. I THINK, YOUR HONOR, I AM SUSAN ROSENBLATT. THE SEVENTH AMENDMENT REALLY DOESN'T HAVE ANY APPLICATION HERE IN THESE FURTHER PROCEEDINGS, BECAUSE THERE WERE SPECIFIC FINDINGS OF A CONTINUING FRAUD OVER DECADES, AND THAT IS WHAT EACH CLASS MEMBER IN A PHASE II TRIAL WOULD USE, IN ORDER TO RECOVER DAMAGES, SO I DON'T THINK THE COURT WOULD BE ASKING, AND JUDGE KAY DEALT WITH THAT IN HIS OPINION.

SO HOW LONG HAVE YOU HAD A SO HOW ABOUT IF YOU HAD A PLAINTIFF WHO DIDN'T RELY ON THOSE MISREPRESENTATIONS OR FRAUD? HOW DOES THAT, HOW DO THOSE FINDINGS IMPACT THAT NEW JURY?

WELL, WHAT WE ESTABLISHED IS COMMENCING WITH THE FRANK STATEMENT IN 1954 AND THERE HAS BEEN A CONTINUING 40, 50 YEAR PATTERN OF FRAUD, AND JUDGE KAY HAD ADDRESSED THAT IN HIS LENGTHY 67-PAGE ORDER AS WELL.

DON'T YOU AGREE, THOUGH, THAT THE RELIANCE OF THE INDIVIDUAL ON IT WOULD HAVE TO BE ESTABLISHED IN A SUBSEQUENT TRIAL? YOU HAVE ESTABLISHED FRAUD, BUT THAT THERE HAS TO BE RELIANCE.

YEAH. BUT RELIANCE IN THE CONTEXT OF FRAUD ON THE PUBLIC, MANIFESTED THROUGH THOUSANDS OF WAYS WHICH WE SHOW, JUST GOING ON AND ON THROUGH JUST MEDIA AND UNDERMINING EVERYTHING, AND, ALSO, WHEN YOU ARE DEALING WITH RELIANCE, YOUR HONORS, THIS IS VERY UNIQUE HERE, BECAUSE WE ARE NOT JUST DEALING WITH READING AND MISREPRESENTATION. YOU ARE DEALING WITH THE DESTRUCTION OF EVIDENCE. YOU ARE DEALING WITH INTENTIONAL MANIPULATION, LEVELS OF NICK CONTINUE TO GET CHILDREN ADDICTED AND TO CONTINUE THAT ADDICTION. HOW DOES SOMEONE RELY ON NICK CONTINUE THAT HAS BEEN ADDICTED. HOW DOES SOMEONE RELY ON SOMETHING THAT IS FRAUD AND DISTORTED. THIS IS SIMPLY RELYING BY THE PUBLIC, AND THAT

BECAUSE ARE JUST SAYING IS NOT FRAUD FOR EACH ONE OF CLASS MEMBERS THAT OCCURRED IN FLORIDA, CORRECT?

NO, YOUR HONOR THIS IS DECEPTION OF THE PUBLIC.

BUT THE CLASS IS ALL WHO HAVE SUFFERED, PRESENTLY SUFFERED, WHO HAVE DIED FROM DISEASE AND MEDICAL CONDITIONS, BY ADDICTION TO CIGARETTES, WHO ARE FLORIDA RESIDENTS OR CITIZENS.

UM- HUM.

NOW, THEY MAY HAVE BEEN LIVING IN THE STATE OF WASHINGTON UP UNTIL A DAY BEFORE THEY WERE DIAGNOSED. ISN'T THAT CORRECT? I MEAN, ALL OF THE RELIANCE, OR ALL OF THE FRAUD THAT THEY WERE COMMITTED ON THEM, WOULD HAVE TO DO WITH THE LAWFUL THE STATE OF WASHINGTON, WOULD IT NOT?

WELL, I THINK THE WAY THE ORDER IS AND THE CHOICE LAW ORDER, THEY WOULDN'T BE PART OF THE CLASS, IF EVERYTHING HAPPENED AND THEY WEREN'T LIVING IN RESIDENCE AND CITIZENS OF FLORIDA, BUT IT IS THE SAME FRAUD THROUGHOUT THE UNITED STATES. THE FRAUD WAS THROUGHOUT EVERY STATE, YOU KNOW.

YOU ARE RUNNING OUT OF TIME. COULD YOU SWITCH TO THE STATE FARM VERSUS CAMPBELL SITUATION, AS FAR AS THE TRIAL AND PUNITIVE DAMAGES, WITHOUT AN UNDERLYING EVIDENCE AS TO WHAT THE COMPENSATORY DAMAGES OF THE CLAIMANT IS. IT SEEMS TO ME THAT STATE FARM VERSUS CAMPBELL FAIRLY ESTABLISHED BY THE U.S. SUPREME COURT, THAT IT IS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, THE UNITED STATES CONSTITUTION, NOT TO HAVE A RATIO BETWEEN COMPENSATORY DAMAGES AND PUNITIVE DAMAGES.

OKAY. THE RATIO THAT I REFERRED TO IN STATE FARM, WHICH ALSO RELIED IN BMW AND GORE AND COOPER INDUSTRIES AND TMW INDUSTRIES, ALL OF THAT TALKS ABOUT THE RATIO, WHICH I BELIEVE JUSTICE ANSTEAD IS DISCUSSING IN THE BALLARE CASE, WHICH IN THE BALLARD CASE, WHICH TALKS ABOUT THE POTENTIAL HARM DONE TO THE PUBLIC, SO IT IS MUCH, MUCH BROADER THAN A COMPENSATORY DAMAGE AWARD. STATE FARM WAS DEALING ONLY WITH AN INDIVIDUAL IN A BAD FAITH CASE, AND UNDER THOSE CIRCUMSTANCES, THEN THEY TALKED ABOUT THE RATIO BETWEEN COMPENSATORY DAMAGES, WHICH IN THAT CASE WAS THE WAY THE HARM WAS MANIFESTED AND HOW IT WAS ESTABLISHED, AND THE PUNITIVE DAMAGE AWARD, BUT WE ARE TALKING ABOUT MUCH BROADER CONCEPTS. NONE OF THE CASES THAT ARE ADDRESSED BY THE UNITED STATES SUPREME COURT IN ANY WAY, SHAPE OR FORM, WOULD PRECLUDE A PUNITIVE DAMAGE AWARD AND HAVING THAT, THEN, COMPARED, THE DAMAGE TO THE CLASS, WITH THE PUNITIVE AWARD, AND IF ANYTHING, IT WOULDN'T BE A WINDFALL TO ONE OR TWO PEOPLE, BECAUSE PUNITIVE DAMAGES ARE TO BASICALLY PUNISH.

COULD WE EXPLORE JUST FOR A MOMENT, THE TIMING OF PUNITIVE. LET'S ASSUME THAT WIF AN APPROPRIATE THAT WE HAVE AN APPROPRIATE CLASS. WE HAVE TWO POSSIBLE TIMES, AS WAS DONE HERE, BEFORE WE HAVE THE INDIVIDUAL CLAIMS PRESENTED. WE HAVE THE THREE. OR AT SOME OTHER TIME, IT, CERTAINLY AT THE BEGINNING, IT IS NOT GOING TO BE KNOWN THE EXACT OR WHAT THE COMPENSTORIES WILL BE.

RIGHT.

AND IT IS VERY DIFFICULT TO DO IT AT THE END, BECAUSE WE DON'T KNOW WHEN THE END IS GOING TO BE.

AND YOU REALLY CAN'T HAVE A CLASS, IF YOU DO IT AT THE END, BECAUSE

SO THIS IS THE PROBLEM, IT SEEMS, AND WE DON'T SEEM TO HAVE A LOT OF CLEAR GUIDANCE IN THE LAW, WITH REGARD TO PUNITIVE DAMAGES AND THE CLASS SETTING SUCH AS WE ARE DEALING WITH HERE. COULD YOU SHED SOME LIGHT ON THAT, AS TO WHY WE SHOULD DO IT OR WHY IT IS APPROPRIATE TO DO IT, WHEN WE CAN'T REALLY GAUGE A RELATIONSHIP TO ANY PARTICULAR INJURY. WE CAN TO A POTENTIAL CLASS OF FLORIDA CITIZENS. COULD YOU ADDRESS THAT AND EXPLORE WHY IT IS BETTER THIS WAY THAN AT SOME OTHER TIME, OR IS THERE AN OPTION, SOME IN-BETWEEN?

I DON'T KNOW IF THERE IS REALLY AN OPTION. I GUESS THE OPPOSITE IS TO HAVE SOME TYPE OF RATIO THAT, AS PEOPLE RECOVER COMPENSATORY DAMAGES, THEY WOULD AUTOMATICALLY GET FROM THE FUND OF DAMAGES, THREETIMES OR FOUR TIMES THEIR COMPENSATORY DAMAGE AWARD IN CONTEXT OF A CLASS ACTION, THE REASON THE CASE WAS CERTIFIED AS A CLASS, WAS TO TRY THE CONDUCT OF THE INDUSTRY. THAT TOOK A YEAR, BETWEEN VOIR DIRE, WHICH WAS ABOUT THREE MONTHS, AND THEN I BELIEVE IT WAS NINE MONTHS, AND THAT WOULD LITERALLY HAVE TO BE REPEATED TENS OF THOUSANDS OF TIMES, AND THAT WAS THE WHOLE PURPOSE OF CERTIFYING THIS CLASS, AND IN THAT CONTEXT, WHAT YOU LOOK AT IS THE FACT OF HARM, AS OPPOSED TO THE QUANTUM. THE QUANTUM WILL TAKE SOME TIME. THAT IS AT THE END OF THE DAY, THE QUANTUM WILL BE ESTABLISHED. WE KNOW IT STATISTICALLY. WE KNOW THAT THERE WAS A CERTAIN AMOUNT OF HARM DONE, PROBABLY KNOW ISSUE HAS BEEN STUDIED MORE THAN TOBACCO AND HEALTH. WE HAVE THE SURGEONS GENERAL'S REPORTS. WE HAD MANY, MANY PUBLIC HEALTH OFFICIALS TALK ABOUT THE HARM THAT WAS DONE TO FLORIDIANS. WE KNOW HOW MANY FLORIDIANS DIED. WE DON'T KNOW HOW MANY OF THOSE HAVE SURVIVORS, SO THE NUMBER OF 700,000 WHICH WAS GIVEN FOR THE TOTAL OF THE CLASS, WHICH INCLUDES PEOPLE WHO PASSED AWAY FROM ILLNESSES

LET GO BACK AGAIN, ABOUT WHETHER THIS STILL COULD HAVE BEEN DONE, SHOULD HAVE BEEN DONE BEFORE COMPENSATORY DAMAGES HAD BEEN ESTABLISHED. AND, A GAIN, I READ WITH SOME INTEREST, JUDGE WEINSTEIN AND HIS PROPOSAL ABOUT THIS LIMITED FUND. WHY ISN'T IT APPROPRIATE TO, FIRST OF ALL, LEAVE ASIDE THE QUESTION OF EXCESSIVENESS, TO HAVE THAT ISSUE WAIT UNTIL THE END OF THE COMPENSATORY DAMAGE CASES OF THE CLASS?

WELL, THE DEFENDANTS ARE INSISTING THE COMPENSATORY DAMAGES BE TRIED INDIVIDUALLY, AND YOU ARE GOING TO TRY 100,000 OR 70,000 COMPENSATORY DAMAGE TRIALS. IT IS ABSOLUTELY NOT DO-ABLE. EVERYTHING THAT THE DEFENDANT

THERE IS A PROBLEM, THOUGH, BECAUSE THAT IS WHERE THE DUE PROCESS ISSUES COME IN. THE DEFENDANTS HAVE A RIGHT TO HAVE, TO QUESTION EACH AND EVERY PLAINTIFF INDIVIDUALLY, ABOUT, BEFORE THEY ARE GOING TO BE RECOVERING INDIVIDUAL DAMAGES.

YES. BUT, YOUR HONOR, I THINK, WHAT WE ARE DEALING WITH IS THE FACT OF INJURY HAS BEEN ESTABLISHED IN PHASE I. WE ESTABLISHED THREE CLASS REPRESENTATIVES WHO CERTAINLY SUFFERED COMPENSATORY DAMAGES. THE DEFENDANTS, THEMSELVES, EXTRAPOLATED AT THE PUNITIVE DAMAGE TRIAL, REPEATEDLY, SAYING DON'T AWARD PUNITIVE DAMAGES, BECAUSE THESE PEOPLE, BASED ON THE AWARDS TO THESE THREE CLASS REPRESENTATIVES, WILL GET TRILLIONS OF DOLLARS, AND IF YOU LOOK AT THAT RATIO, IT IS LESS THAN ONE TO ONE. I MEAN, THROUGH SURGEON GENERALS THAT TESTIFIED, WE ESTABLISHED THE FACT OF THE HARM, THE FACT THAT CITIZENS OF FLORIDA AND RESIDENTS OF FLORIDA WERE HARMED, SO WHAT WE ARE TALKING ABOUT IS, I THINK THAT FULLY COMPARTS WITH THE U.S. SUPREME COURT CASES, BECAUSE WHEN YOU ARE DEALING WITH A CLASS ACTION, WHAT YOU NEED ESTABLISH IS THE FACTS OF THE HARM, AND THEN COMPARE THAT, AND THE REPHENDEABILITY OF THE HARM IS THE NUMBER ONE ISSUE THAT WAS NEVER ADDRESSED, THE REPHENDEABILITY AND AMOUNT OF THE HARM AND THEN YOU GO TO THE PUNITIVE DAMAGES.

CHIEF JUSTICE: I WANT TO REMIND YOU YOU ARE IN YOUR REBUTTAL TIME.

CAN WE EXPAND THE TIME? I DON'T WANT TO SIT DOWN.

I AM CONCERNED ABOUT THE ISSUE AND WHETHER OR NOT THE MASTER SETTLEMENT, THE STATE OF FLORIDA SETTLEMENT WITH THE TOBACCO COMPANY, PRECLUDES EVEN HAVING PUNITIVE DAMAGES IN THIS PARTICULAR CASE.

IT DO ESN'T PRECLUDE IT AT A LL. OUR POSITION IS THAT , MOST RESPECTFULLY THE POSITION OF THE THIRD DISTRICT ON THAT IS LE WD RE DUCE. THE MASTER SETT LEMENT AGREEMENT , THE FLORIDA SETTLEMENT AGREEMENTS , THE MEDICAID RECOUP CASES , HAD ABSOLUTELY NOTHING TO DO WITH THE RI GHTS OF PRIVATE CITIZENS TO REDRESS. THERE HAD BEEN A MOTION TO STAY THAT PARTICULAR FLORIDA STATE ACTION, BA SED ON O URCASE, BECAUSE OUR SMALLGROUP OF MEDICAID RECIPIENTS BASICALLY SUBS UMED THAT WHOLE LITIGATION BE FI LE D F IRST . RES JUDICATA REALLY DOESN'T APPLY. I REAL LY DON'T WANT TO GO INT O ALL O F STAN'S TIME. HE WOULD BE ANGRY WITH ME , BUT, YOUR HONOR, IT HAS NO APPLICATION . THE THIRD DISTRICT JUST DIDN'T GET IT , AS FAR AS WHAT THIS IS ALL ABOUT. THEY ARE TOTALLY , TOTALLY COMPLETELY DI FFERENT CASES.

HOW DO WE SEPARATE IT IN THE RHETORIC? WHILE M R. ROSENBLATT WAS SPEAKING, HE SPOKE ABOUT ATTORNEY GENERALS IN THE STATE OF FLORIDA N THE REALITY OF WHAT WE DEAL WITH , YOU SEEM TO SEPARATE THE INDIVIDUAL CLAIMANTS , AND WHEN HE IS SPEAKING , HE IS TALKING ABOUT THE PEOP L E OF THE STATE OF FLORIDA, AS IF IT IS A REPRESENTATIVE ACTION, NOT ONLY FOR THE INDIVIDUAL CLAIMANTS BUT FORTHE PEOPLE AS A WHOLE , SO

THE CITI ZENS O F THE STATE OF FLORIDA, AND YOU ARE ACTING IN ES SENCE IN A CLASS ACTION, L IKE A PR IVATE ATTORNEY GENERAL, BUT WE ARE N OT SEEKING TO RECOUP MONIES FOR THE TREASURY, WHICH WAS THE MED ICAID EXP ENSE , WHICH IS WHAT THE ST ATE OF FLORIDACASE WAS ALL ABOUT. COMPLETELY DIFFERENT CASE.

NO PUNITIVES WERE SOUGHT IN THAT CASE?

THEY SOUGHT THEM AND THEN THEY WERE THROWN OUT BY THE COURT , AND I KNOW THEY TOOK THE POSITION ON APP EAL , WELL , WE COULD HAVE APPEALED THAT , BUT , Y EAH , THEY SOUGHT PUNITIVE DAMAGES B UT NOT ON BEHALF THE PEOPLE. THE PEOPLE ARE NOT DEFINED. THERE IS NO DUE PROCESS VIOLATION.NO CITIZEN COULD GO IN AND CON TEST IT. I BETTER SIT DOWN.

CHIEF JUSTICE: MR . SCHERKER, AND I UNDERSTAND YOU ARE GOING TO T AKE THE LION'S SHARE OF THE TIME , 26 MINUTES , AND I GUESS THE RED LIGHT WILL GO ON AND THEN THERE WILL BE FOUR M INUTES REMAINING.

ACTUALLY , YOUR HONOR , A TAD MORE THAN THE LION'S SHARE. MR. DAVIS HAS CE DED TWO ADDITIONAL MINU TES TO ME .

MAY IT PLEASE THE COURT. ELLIOTT SCHERKER ON BE HALF THE RESPONDENTS THIS. CASE EX-EMPFIES THE C HAOS THAT CAN KPEFERP FLY A CLASS ACTION.

LE T'S TA LK ABOUT THE MAGIC TORT TYPE OFSITUATION. LET'S TAKE AN ASSUMPTION THAT SOMEONE HAS POISONED THE WATER AND IT HAS KILLED OUR CHILDREN, AND THESE THINGS COME OUT , AND CERTAINLY WOULD YOU NOT AGREE THAT CA USATION IN EVERY CASE WOULD BE AN ISSUE , CAUSATION TO PARTICULAR INJURY FOR EVERY INDIVIDUAL , W OULD YOU AGREE WITH THAT?

IN THE FO X I CAN WASTE CASE. IN THE TO XIC WASTE CASE?

YES, A TOWARD KIND O F ACTION.

OF COURSE.

AND IN ALL OF THOSE YOU COULD HAVE MASSIVE NUMBERS OF INDIVIDUALS, AND IT SEEMSTO ME THAT THAT WOULD BE THE ONLY WA Y, ONLY CONCEIVABLE WAY TO PUT TOGET HER A CLASS TO PROCEED IN CON NECTION WITH THAT , AND YOU SEEM TO BE IN THE DEFENSE POSITION IN

THIS , THAT YOU COULD NEVER HAVE A CLASS ACTION, I F YOU HAD THIS LARGE NUMBER OF PEOPLE , ALL IMPACTED TERRIBLY, BUT DIFFERENTLY, AND TO DIFFERENT EX TENT , ANDWOULD NEVER, IT WOULD JUST , IT SEEMS TO ME IT WOULD TAKE THE HE ART OUT O F IT AND JUST REASON FOR THE CLASS ACTION R ULE. COULD YOU ADDRESS THAT ON WHY, IF WE AC CEPT YOUR POSITION OF THE RULE , IT WOULD ERA SE THE CLASS ACTION LITIGATION.

NOT AT ALL. WE POINTED OUT IN OUR BRIEFS AND WE CONSISTENTLY MAINTAINED THAT THE OIL REFINERY FIRE , THE DUMPINGOF WATER INTO THE LAKE IN A RESIDENTIAL AREA, THOSE ARE THE CLASSIC IN STANCES IN WHICH CLASS CERTIFICATION I S APPROPRIATE AND IN WHICH THECOURTS HAVE UPHELD CLASS CERTIFICATION . I THI NK IT I S A CLASSIC EXAMPLE.

ALL OF T HOSE INSTANCES OF CAU SATION O F INDIVIDUAL HARM TO INDIVIDUAL CLASSES .

YOU CAN' T HAVE THAT IN THE TOXIC TORT.

THAT IS DAMAGES.

CAUSATION, TOO , SO CAUSATION MAY AFFECT IT DIFFERENTLY.

WHAT YOU DO IN THOSECASES AND WHAT DO YOU IN A TRUE CLASS ACTION AS OP POSED TO WHAT YOU DID HERE , I S YOU HAVE CLASS REPRESENTATIVES WHO ARE DETERMINED BY THECOURT TO STAND I N FOR THE INJURED FOLKS , AND YOU HAVE TO HAVE APPROPRIATE CLASS REPRESENTATIVES WHO CAN STAND IN FOR THE VARIOUS INJURIES OR THE DIFFERENT TYPES OF CAUSATION THAT YOU MIGHT HAVE, AND THEY STAN D AT THE PEE K OF THE PYRAMID, AND WHEN THEIR CASES ARE TRIED, YOU DETERMINE LIABILITY OF THE DEFENDANTFOR THE OIL SPILL, FOR THE REF INERY FIRE.

YOU SEEM TO BE ARGUING THAT YOU MUST B E CARBON COPIES BEFO RE YOU CAN HAVE C LASS ACTION LI TIGATION. IF THAT IS YOUR POSITION

NO. YOU MUST HAVE A TRIAL OF CLASS REPRESEN TATIVES WHO STAND IN FOR THE CLASS, THAN IS WHAT YOU DID NOT HAVE

FOR E X AMPLE HYPERTENSION , YOU COULD ONLY HAVE THOSE WHO HAVE LUNG DIS EASE , OR YOU COULD ONLY HAVE THOSE WHO HAVE CARDIOPULMONARY ISSUES. IS THAT WAUR SAYING, IS THAT YOU MUST IS THAT WHAT YOU ARE SA YING , IS THAT YOU MUST HAVE ONE INDIVIDUAL FOR EACH TYPE OF MEDICAL CONDITION?

NO.I AM TALKING ABOUT A S INGLE EXPLOSION , AN OIL RE FINERY , THAT TYPE OF CLASS ACTION. BUT WHAT YOU DIDN'T HAVEHERE IS A PLAINTIFF . A PLAINT IFF PHASE I IN WHICH IN 50 YE ARS OF MISCONDUCT , WHERE IT WAS TRIED AND SHOWN THAT ANYONE WAS AF FECT ED BY IT , AND PRODUCT DEFECT , WHERE AN YONE U SED THE PRODUCT OVER 51 YEARS.

IF THE JURY HAD COME BACK AND IN A MANY-PAGE FIN DING IN THE FIRST PHASE , AND FOUND THAT CIGARETTES DID NOT CONTAIN N ICK CONT INUE ADDICTIVE DID NOT CONTAIN NICOTINE ADDICTIVE O R FOUND THAT ONE OR MORE DEFENDANT TOBACCO COMPANIES PLACED THE CIGARETTES ON THE MA RKET ANDKNEW THEY WERE DEFECTIVE AND SAID THEY WEREN'T, W OULDN'T THAT HAVE BOUND THE ENTIRE CLASS OF SMOKERS IN FLORIDA?

THEY ASKED FOR IT. THAT WAS THE WAY , THAT WASWHAT THE JURY DETERMINED.THE JURY DETERMINED THAT CIGARETTES WERE NOT ADDICTIVE YOU WOULD HAVE BEEN, IN THE TERMS OF THESTATE OF FLORIDA, HOME FREE FROM ANY OTHER LAWSUITS.

I SU PPOSE S O , YOUR HONO R.

SO WHAT I AM TROUBLED ABOUT HERE, IS THAT PHASE I AND DIFFERENT FINDINGS OF PRODUCT LIABILITY, SO I AM HAVING TROUBLE UNDERSTANDING, LIKE THE THIRD DISTRICT SAID THAT IT WASN'T A PROPER CLASS ACTION, BECAUSE IT MIGHT HAVE BOUND ABSENT CLASS MEMBERS TO A NEGATIVE DECISION, WHERE THEY HAD OTHER INDIVIDUAL ISSUES. WELL, THAT, IF THAT HAD HAPPENED, THEN MR. ROSENBLATT WOULDN'T BE HERE, BEING ABLE TO ARGUE, SO I GUESS IT IS THE, WHY CAN'T THE FINDINGS, IN PHASE I, ACT AS THE PREDICATE FOR ANY FURTHER TRIALS? I MIGHT NOT AGREE WITH MR. ROSENBLATT THAT THERE DOESN'T HAVE TO BE RELIANCE, BUT WHAT IS WRONG WITH THOSE PREDICATE FINDINGS THAT WOULD BE COMMON TO EVERY SINGLE SMOKER, YOU KNOW, AS TO WHETHER IT IS, NICOTINE IS ADDICTIVE AND WHETHER THE PRODUCT IS DEFECTIVE?

LESS THE I NOT GET TO THE POINT THAT I NOT GET TO THE ISSUE THAT YOUR HONOR REFERRED TO DURING MR. ROSENBLATT'S ARGUMENT, PHASE I CANNOT BE SAID AND BECAUSE IT WAS POISONED BY MR. ROSENBLATT'S CONDUCT, AND THAT VERDICT IS NOT GOING TO BE ABLE TO STAND IN ANY CASE.

AS TO THE CLOSING.

YES AND IT IS THEORETICAL AS TO WHAT YOU COULD DO WITH THE PHASE I VERDICT, BUT ARE CIGARETTES ADDICTIVE, THE ANSWER WAS YES, AND THE QUESTION ABOUT PRODUCT LIABILITY, AND I HEARD YOU ASK MR. ROSENBLATT ABOUT THIS, IS VERY IMPORTANT IT SAYS DID THE DEFENDANT PLACE CIGARETTES ON THE MARKET WHICH WERE DEFECTIVE AND CONSIDERED DANGEROUS? IT DIDN'T ASK IF ANY PLAINTIFF USED THEM AT ANY PARTICULAR TIME. IT QUESTIONS WHETHER A PLAINTIFF MADE A FALSE STATEMENT TO THE MATERIAL FACT. I BELIEVE MS. ROSENBLATT REFERRED TO THE LUCAS TRIAL THAT WENT TO TRIAL DURING THE PENDING ANSWER OF THE AX. BUT THE PENDING OF THE ACTION, BUT FACED WITH NO CONDUCT OF THE DEFENDANTS OVER 50 YEARS OR NOT, THE JUDGE THREW HER HANDS UP AND SAID EVERYTHING IN THAT CASE WAS FALSE.

I AM A LITTLE TROUBLED BY YOUR ANSWER, ABOUT WHO I AM A LITTLE TROUBLED BY YOUR ANSWER, ABOUT WHO WOULD BE BOUND BY THIS THING, AND I GO BACK TO WHAT THE SUPREME COURT SAID IN THE AIR CHEM CASE, WHERE THEY SAID THAT THEY WOULD AGREE WITH THE THIRD CIRCUIT THAT A CLASS REQUESTING INDIVIDUAL DAMAGES FOR A GLOBAL CLASS OF ASBESTOS CLAIMANTS, WOULD NOT SATISFY THE REQUIREMENTS OF RULE 23, BECAUSE THERE WERE TOO MANY OF THEM. MY QUESTION HERE IS, THIS NOTICE, IT WAS DONE, IT WENT OUT, BY PUBLICATION TO 38 NEWSPAPERS IN THE STATE. NOW, WHAT DO WE DO, IF THIS WAS HELD TO BE, IF WE AFFIRM THE THIRD DISTRICT AND HELD THAT THE CLASS CERTIFICATION WAS ERRONEOUS? ABOUT THE PEOPLE THAT WERE OUT THERE THAT READ THIS THING OR WHAT ABOUT STATUTE OF LIMITATIONS, AS FAR AS THESE PEOPLE THAT ARE OUT THERE? WHAT DO WE DO ABOUT THAT?

JUSTICE WELLS, FIRST LET ME BE CLEAR AS TO WHAT OF THIS I WAS ANSWERING WITH JUSTICE PARIENTE'S QUESTION. I UNDERSTOOD THE QUESTION TO BE IF THIS VERDICT HAD COME BACK FOR THE DEFENDANTS, WOULD HAVE BEEN FOR THE DEFENDANT. THEY ASKED FOR THE CLASS ACTION. THEY GOT IT. I WAS ABSOLUTELY NOT SPEAKING WHAT HAPPENS AFTER DECERTIFICATION. THE THIRD DISTRICT SAID EACH OF THE PLAINTIFFS IS FREE TO TRY AN INDIVIDUAL CASE.

THEY DON'T, DO THEY?

NO AND THE REASON THEY DON'T IS IT WASN'T THE THIRD DISTRICT. THE STATUTE OF LIMITATIONS

IT DEALT WITH THE FACT THAT THERE SHOULD BE SOME PERIOD OF TIME BY WHICH PEOPLE WHO WOULD BE IN THE PUNITIVE CLASS, COULD FILE A CLAIM.

WE CITE LANCE VERSUS LIGGETT IN OUR BRIEF AND RECOGNIZE LANCE VERSUS WADE IN OUR BRIEF AND RECOGNIZE THAT THE COURT IS FREE TO DO THAT IN LANCE VERSUS WADE AND FREE TO DO THAT HERE. IT IS NO DIFFERENT. WE CITE IT. WE RECOGNIZE THE COURT'S AUTHORITY TO DO THAT.

WOULD YOU COME BACK TO, YOU START OUT BY SAYING, IF THERE IS A CERTIFICATION HERE, IT IS GOING TO CREATE GREAT CHAOS AND SO ON. WOULD YOU ADDRESS THE ISSUE OF WHETHER OR NOT THE THIRD DISTRICT HASN'T VIOLATED THE RULE OF THE LAW OF THE CASE IN THIS PARTICULAR INSTANCE, BECAUSE HERE WE ARE, NOW, FIRST THEY DECIDED, REALLY, A DIFFERENT CASE, BUT THAT THEY ALLUDED TO IN THEIR EARLIER OPINION, IN WHICH THEY APPROVED CERTIFICATION, ALBEIT LIMITED TO FLORIDA RESIDENTS, AND SO NOW, BASED ON THOSE LEGAL RULINGS, TO WHICH A REVIEW WAS SOUGHT HERE BUT REJECTED, NOW THEY HAVE THE EARLIER CASE THAT THEY DECIDED, WHICH OBVIOUSLY BECAME FINAL, AND THEN THIS CASE THAT THEY DECIDED, AND THE INTERLOCUTORY APPEAL, AND NOW WE ARE, HOWEVER MANY YEARS DOWN THE ROAD, HAVING SENT THE PREDICATE THAT THAT WAS THE CORRECT LAW, THAT WE HAVE HAD ALL OF THESE PROCEEDINGS AND TRIALS AND NOW I AM VERY CONCERNED THAT THEY HAVE NOT ESTABLISHED THE LAW OF THE CASE IN THEIR EARLIER DECISION, AND THAT THERE IS GOING TO BE MORE CHAOS CREATED BY THE FACT THAT THEY SAY OH, NO, YOU KNOW, WE WERE WRONG BEFORE, AND I EVEN QUESTIONED WHETHER THEY HAVE THE AUTHORITY, A THREE-JUDGE PANEL OF THAT COURT, TO SAY THEY WERE WRONG ABOUT THEY WERE WRONG BEFORE, BECAUSE THAT IS IN ESSENCE WHAT THEY ARE SAYING. THEY ARE SAYING THAT NOW WE HAVE THE BENEFIT OF OTHER APPELLATE DECISIONS AROUND THE COUNTRY THAT WENT THE OTHER WAY, YOU KNOW, AND NOW WE ARE REALLY CHANGING OUR MIND, AND IF WE HAD HAD THOSE DECISIONS THEN AND SO ON AND SO ON, SO I AM CONCERNED ABOUT THE FACT THAT EVERYBODY WAS OPERATING ON THE BASIS OF THAT DECISION, AND NOW HERE WE ARE, ALL OF THAT IS BEING THROWN OUT, WHETHER IT IS THE VERDICT OF THE JURY ON SPECIFIC ISSUES OR THAT MAY STILL BE RELEVANT TO EVEN INDIVIDUAL ADJUDICATIONS, SO HELP ME WITH WHY THAT WASN'T THE LAW OF THE CASE HERE, IN FLORIDA, ABOUT THE ORIGINAL APPROVAL OF CERTIFICATION.

THERE ARE SEVERAL ANSWERS TO THAT, JUSTICE ANSTEAD, BUT THE FIRST, AND, I THINK, THE MOST SIGNIFICANT, I THINK YOU HEARD MR. ROSENBLATT TRY TO DRAW DISTINCTION BETWEEN APPEALING CERTIFICATION AND APPEALING DECERTIFICATION, AND THAT WE ARE APPEALING DECERTIFICATION. IF THE COURT GOES TO PAGE 443 AND FOOTNOTE 4 OF THE THIRD DISTRICT'S DECISION, THAT DISTINCTION, IF THAT IS WHAT HE WANTS TO DRAW, ANSWERS THE QUESTION, BECAUSE WHEN WE MOVED FOR DECERTIFICATION BEFORE THE TRIAL COURT, AS THE CASE WENT ON AND AS THE CLASS BEGAN TO GROW FROM 40,000 TO 300,000 TO 500,000 AND THE TRIAL JUDGE DENIED DECERTIFICATION, WE ATTEMPTED AN OTHER INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT, FROM THE ORDER DENYING DECERTIFICATION, AND WHAT THE THIRD DISTRICT DID IS DISMISS FOR LACK OF JURISDICTION, BUT IN FOOTNOTE FOUR OF THE OPINION THAT IS BEFORE THE COURT TODAY, THEY QUOTE THAT ORDER, APPELLANTS' PETITIONERS MAY, HOWEVER, REVIEW THE PROPRIETY OF THE ORDER DENYING DECERTIFICATION BY PLENARY APPEAL FROM ANY ADVERSE FINAL JUDGMENT, AND THAT WAS IN 1998, BEFORE THE CASE WENT TO TRIAL, SO ALL THE ARGUMENT THAT YOU HEAR ABOUT NOTICE AND RELIANCE

CHIEF JUSTICE: WAIT A SECOND. BUT THE DIFFERENCE IS THAT WHAT UPHELD THE CERTIFICATION, THE QUESTION ABOUT WHETHER A CLASS CAN BE DECERTIFIED AFTER IT HAS GONE TO JUDGMENT, THEY RELIED ON RULE 1.220-D-1 THAT SAYS IT MAY BE AMENDED OR ALTERED AT ANY TIME BEFORE JUDGMENT ON THE MERITS. SO THE CONCEPT OF COMING IN AND SAYING, AFTER THE FACT, WE ARE GOING TO DECERTIFY A CLASS, WHEN THAT CASE HAS ALREADY BEEN TRIED, IS SOMETHING, I MEAN, ARE THERE ANY CASES OUT THERE THAT EVEN ADDRESS THIS ISSUE? I GUESS, WHICH IS THAT THE ARGUMENT IS INDIVIDUAL ISSUES PREDOMINATE OVER COMMON ISSUES, YET WE KNOW NOW THERE ARE COMMON ISSUES, SO ONCE THE CASE HAS BEEN

TRIED , DOESN'T THAT ALREADY OBLIATE THE NEED THAT THIS ISSUE OF PREDOMINANCE BE A PRIMARY FACTOR TO CONSIDER, BECAUSE YOU ALREADY HAVE TWO YEARS OF JUDICIAL TIME SPENT IN A JURY DECIDING SOME OF THE CORE ISSUES? MAYBE , I MEAN , I DON'T UNDERSTAND THAT , HOW , BECAUSE DECERTIFICATION IS BEING ASKED FOR AFTER THE FACT, ISN'T THAT JUST , REALLY , REVIEWING THE INITIAL ORDER TO CERTIFY ? I GUESS MAYBE THAT IS THE QUESTION. I MEAN , WHEREAS

YES, YES IT IS , BUT THE ANSWER TO YOUR QUESTION IS LANCE VERSUS WADE. THIS COURT DECERTIFIED AFTER TRIAL. NOW THAT, IS DIFFERENT THAN THE LAW OF THE CASE QUESTION THAT JUSTICE ANSTEAD ASKED ME, BUT IN TERMS OF THE POWER OF THE COURT TO REVERSE A CLASS. LANCE VERSUS WADE IS REVERSED AFTER A TRIAL. THERE ARE FEDERAL CASES THAT HAVE BEEN REVERSED AFTER TRIAL AND FEDERAL CASES IN FLORIDA THAT HAVE ALLOWED REVIEW OF A CLASS CERTIFICATION AFTER INITIAL CERTIFICATION , BECAUSE WHAT EVERYONE RECOGNIZES IS THAT AN INITIAL DECISION OF A CERTIFIED CLASS, BASED ON A HEARING NOT A TRIAL , AND MIND YOU BEFORE THERE WAS A TRIAL PLANNED IN THIS CASE , THE CERTIFICATION WENT OUT FOR REVIEW BEFORE THE THIRD DISTRICT , BEFORE THERE WAS ANY TRIAL PLAN AT ALL OR ANY IDEA HOW THE CASE WAS GOING TO BE TRIED , AND THEY BASED ELEMENTS ON THE RECORD AND MADE DETERMINATION TO DECERTIFY THE CLASS, BUT IN TERMS OF THE LAW OF THE CASE, I SUBMIT THAT THE THIRD DISTRICT'S ORDER TELLING THE PARTIES IN 1998 THAT THE CERTIFICATION WAS GOING TO BE SUBJECT TO REVIEW ON THE PLENARY APPEAL , THAT IS THIS CASE!

LET'S TAKE A LOOK AT OTHER NONFINAL APPEALS IN FLORIDA. WE HAVE A RULE, WOULDN'T YOU AGREE, FOR NONFINAL APPEALS IN CASES. CORRECT?

YES.

AND IN ALL THE CASES YOU MAY HAVE THE RIGHT TO SEEK REVIEW AFTER THE END OF THE DAY , BUT THAT DOES NOT CHANGE THE LAWFUL CASE DOCTRINE, AND FLORIDA HAS APPLIED THAT , IN A LIST OF CASES PROBABLY AS LONG AS YOUR ARM, THE LAW OF THE CASE DOES APPLY , VARIOUS ISSUES, JURISDICTION OVER THE PERSON, KINDS OF ISSUES , AND THE REAL TEST IS , HAS THERE BEEN A CHANGE.

AND THAT IS THE LAST ANSWER TO THE QUESTION.

THE CHANGE , BUT HERE THERE HAS BEEN NO CHANGE, IT SEEMS. TELL US EXACTLY WHAT THE CHANGES.

OF COURSE THERE IS, YOUR HONOR. THERE HAS BEEN A TRIAL IN WHICH WE FOUND THAT INDIVIDUALS , THE PREDOMINANT POSITION WAS THAT ADDICTION WAS NOT AN INDIVIDUAL ISSUE. THAT WAS GOING TO BE CERTIFIED ON A CLASS BASIS.

AS TO WHETHER ADDICTION IS GOING TO BE A PART OF ONE'S CLAIM.

BUT NOW WE KNOW AND THEIR EXPERTS CONCEDE THAT ADDICTION IS AN INDIVIDUALIZED ISSUE. IT WAS BEFORE WE HAD A ONE-YEAR PLAINTIFF LESS TRIAL, IN WHICH NO LIABILITY WAS DECIDED FOR NOBODY.

THAT DOESN'T GO TO CERTIFICATION.

OF COURSE IT DOES, YOUR HONOR IT GOES TO WHETHER THE CASE CAN BE TRIED AS A CLASS ACTION. IT GOES , WHEN, IT WAS BEFORE WE HAD THE PHASE II - A TRIAL , IN WHICH THE TRIAL OF THE THREE INDIVIDUAL PLAINTIFFS TOOK FIVE MONTHS IN WHICH THE JURY FOUND DIFFERING PERCENTAGES OF COMPARATIVE FAULT FOR EACH THE INDIVIDUALS.

SURE. THAT IS ALWAYS THE CASE IN A NEGLIGENCE CASE, IN A STRICT LIABILITY CASE. THAT IS ALWAYS AN ISSUE IN EVERY NEGLIGENCE CASE SINCE WE ADOPTED COMPARATIVE NEGLIGENCE BACK IN THE '80s THAT WAS ALWAYS A PART OF THE LAW. THAT IS NOTHING NEW.

BUT THE THIRD DISTRICT LEARNED THAT IT DID NOT KNOW FROM THE TRIAL OF THIS CASE, IS THAT THE TRIAL OF A FEW SO-CALLED COMMON ISSUES THAT DO NOT PREDOMINATE, THAT WILL NOT PREDOMINATE AND THAT WILL BE OF NO HELP IN PHASE III, WHEN THE COURT ASKED MR. ROSENBLATT ESSENTIALLY WHAT IS GOING TO HAPPEN IN PHASE III, I THINK THE COURT HEARD NO ANSWER, AND THE COURT HAS SEEN NO ANSWER IN ANY OF THE PAPERS THAT HAVE BEEN FILED, BECAUSE THE PHASE III TRIALS ARE GOING TO REPLAY EVERY ISSUE THAT WAS TRIED IN PHASE I. EVERY INDIVIDUAL PLAINTIFF IS GOING TO HAVE TO PROVE SPECIFIC CAUSATION.

IT SEEMS TO ME THAT IN PHASE III, INDIVIDUALS WOULD HAVE TO PUT ON EVIDENCE THAT THEY HAVE CERTAIN CONDITIONS THAT, THOSE CONDITIONS ARE RELATED TO THE LIST, THAT YOU HAVE ALREADY DETERMINED IN PHASE I, AND THAT THERE ARE DAMAGES RELATING TO THAT.

NO, SIR. THEY ARE GOING TO

WHAT ELSE DO THEY HAVE TO PROVE?

PROVE PROXIMATE CAUSE.

THAT IS CAUSATION. I SAID CAUSATION, SPECIFIC CAUSATION.

EXCUSE ME, YOUR HONOR, IF I MIGHT. THAT IS SPECIFIC CAUSATION FROM SMOKING. THERE WAS NO TORT THAT IS PROVED BY. THAT THEY ALLEGED FRAUD. THEY ALLEGED PRODUCT DEFECT. THEY ARE GOING TO HAVE TO PROVE THAT THEY RELIED ON A FRAUDULENT STATEMENT.

RESULTING FROM THE USE OF A TOBACCO PRODUCT.

AND FROM THE DEFENDANT'S ALLEGED TORTS. THAT IS THE PROXIMATE CAUSE OF THE ISSUE, FROM THE ALLEGED TORT, PRODUCT DEFECT, ALLEGED NEGLIGENCE, THEY ARE GOING TO HAVE TO PROVE PROXIMATE CAUSE. THEY ARE GOING TO HAVE TO PROVE RELIANCE TO PROVE FRAUD. THEY ARE GOING TO HAVE TO PROVE, BECAUSE REMEMBER THERE IS NO FINDING IN THIS VERDICT THAT IS GOING TO HELP ANY INDIVIDUAL PLAINTIFF PROVE THAT THE PRODUCT THEY USED OVER A PARTICULAR POINT IN TIME OVER 50 YEARS OF MISCONDUCT WAS EVEN DEFECTIVE, WHETHER BEFORE WARNINGS WERE REQUIRED OR AFTER WARNINGS WERE REQUIRED, BASED ON THE STATE OF THE KNOWLEDGE AT THE TIME.

DOES FAILURE TO WARN HAVE ANY THING TO DO

SURE. FAILURE TO WARN.

THAT WAS THE DEFECT?

IT IS ONE OF THE DEFECTS THEY ALLEGED.

WHAT ABOUT THE OTHER DEFECT?

THE PRODUCTS THAT THEY USED AT ANY GIVEN POINT IN TIME. THEY PUT ON A LOT OF TESTIMONY ABOUT CIGARETTES CAUSING SERIOUS INJURY BUT THE PRODUCT LIABILITY IS THAT IT WAS DEFECTIVE AND AT A POINT IN TIME. EVERY INDIVIDUAL CASE IS GOING TO HAVE TO HAVE A STATUTE OF LIMITATIONS ISSUE. AMADEO SHOWS THAT STATUTE OF LIMITATIONS IS TO BE TRIED FOR EACH INDIVIDUAL ISSUE AND THERE IS NOTHING IN PHASE I THAT HELPS

COMPARATIVE FAULT AND DETERMINATIVE DAMAGES. EVERY ISSUE WILL HAVE TO BE REPLAYED IN ALL OF THOSE INDIVIDUAL TRIALS.

WHAT IF IT WAS NOT KNOWN AT THE TIME OF THE INTERLOCUTORY APPEAL WAS TAKEN?

THERE WAS NO TRIAL THEN.

THERE MAY NOT HAVE BEEN SOMETHING LIKE THAT, BUT ALL OF THESE ARE MATTERS THAT, REALLY, WERE KNOWN TO EVERYBODY AT THE TIME, WERE THEY NOT? THESE ARE ALL THINGS THAT EVERYBODY KNEW THAT THESE KINDS OF THINGS WOULD HAVE TO BE RESOLVED AND SOME IN INDIVIDUAL TRIALS AND SOME IN THE OTHER WAY. I AM HAVING DIFFICULTY SEEING ANYTHING THAT ACTUALLY PLAYED OUT WAS NOT KNOWN, AT THE TIME THE INTERLOCUTORY APPEAL WAS TAKEN.

A LOT OF THINGS WERE KNOWN IN THEORY, YOUR HONOR, BUT THE COURT, THE DISTRICT COURT OF APPEAL HAD A TWO-YEAR TRIAL TO LOOK AT, TO SEE HOW THE DAMNED THING WORKED, AND WHEN THEY LOOKED AT IT, THEY DETERMINED THAT IT COULD NOT WORK AND IT CANNOT WORK RESPECT AND BECAUSE ARE GOING TO DO AT THE END OF THE DAY, FORGETTING WHAT HAPPENED IN THE TRIAL, IS YOU ARE GOING TO HAVE SEVEN, ALLEGEDLY 700,000 INDIVIDUAL TRIALS. WHEN MR. ROSEN PLAT WAS ASKING A DEFENSE WITNESS A QUESTION IN PHASE II, HE SAID SUPPOSE IT IS 500,000. IT IS GOING TO TAKE HALF A CENTURY.

LET ME ASK YOU THIS QUESTION, IF WE AGREED WITH YOU THAT THE CLASS SHOULD BE DECERTIFIED, THEN WOULDN'T THE REMEDY BE TO LET ALL 700,000 OF THESE INDIVIDUALS BE ABLE TO HAVE THEIR DAY IN COURT SEPARATELY, THOUGH?

YES, MA'AM.

AND SO HOW IS THAT GOING TO BE A SAVINGS TO THE JUDICIARY OF THE STATE AND TO THE CITIZENS, TO HAVE, NOW, 700,000 DIFFERENT PLAINTIFFS FILING, PROCEEDING AND HAVING TO GO THROUGH THE SAME DISCOVERY, AND I ASSUME, THEN, I MEAN, IF SOMEONE HAS ASTHMATIC BRONCHITIS, THEY ARE OUT, RIGHT? BECAUSE THAT IS ONE OF THE ONES THAT THEY SAID DOESN'T CAUSE, THAT SMOKING DOESN'T CAUSE THAT DISEASE, SO THEY COULDN'T FILE THAT ONE, OR ARE THEY, ALSO, ALLOWED TO RELITIGATE THE, ANY OF THE FINDINGS IN THIS VERDICT FORM?

YOUR HONOR, THAT IS A DIFFICULT QUESTION THAT HASN'T BEEN ADDRESSED BY ANY OF THE PARTIES AT ANY OF THE STAGES, DEPENDING UPON THE NATURE OF THE COURT'S DECISION. THE NEGATIVE FINDINGS AND THE POSITIVE FINDINGS, ARE, BOTH, THE PRODUCT OF THE SAME TRIAL. IF THE COURT WANTS TO GIVE, IF, I AM NOT SURE HOW COLLATERAL ESTOPPEL WOULD APPLY STANDING HERE THIS MORNING, TO FINDINGS IN A VERDICT THAT IS REVERSED, BUT THOSE ARE MINOR QUESTIONS THAT COULD EASILY BE ADDRESSED IN AN INDIVIDUAL TRIAL, SHOULD THAT ISSUE ARISE, BUT THE ANSWER, YES, EVERYONE SHOULD BE FREE TO BRING THEIR CASE, BUT IF I MIGHT ANSWER THE PREMISE OF YOUR QUESTION, IF YOU ARE RIGHT, THAT UNDER THIS SCENARIO WE ARE GOING TO HAVE 700,000 TRIALS ESSENTIALLY FROM SCRATCH, AND, OF COURSE, THAT, OR WE ARE GOING TO HAVE 700,000 TRIALS OF INDIVIDUAL PLAINTIFFS, IF BOTH ARE EQUALLY BAD, IF YOU WILL, THE TEST FOR CLASS ACTION IS SUPERIORITY.

EXCEPT THAT THAT IS ASSUMING THAT EVERY SINGLE ASPECT OF THE VERDICT FORM FOR PHASE I, HAS NO APPLICABILITY, AND I THINK THAT IS WHERE, YOU KNOW, I AM HAVING PROBLEMS BETWEEN YOU KNOW, YOU TALK ABOUT LIABILITY, WHETHER THAT HAS BEEN ESTABLISHED, AND WE KNOW THERE IS, WITH LIABILITY, EVEN WHEN A DEFENDANT ADMITS LIABILITY, THERE IS ALWAYS AN ABILITY TO SAY, AS THEY DID WITH THESE INDIVIDUAL PLAINTIFFS, THAT SMOKING DIDN'T CAUSE YOUR LUNG CANCER. SOMETHING ELSE DID. OR YOU HAD ONE TYPE OF LUNG CANCER THAT DOESN'T COME, SO YOU KNOW, THAT CERTAINLY IS, WOULD

BE AN INDIVIDUALIZED DECISION , BUT I GUESS I AM GOING BACK TO THE THOUGHT THAT , IS IT BECAUSE THERE ARE SO MANY SMOKERS THAT THIS IS NOT APPROPRIATE FOR A CLASS ACTION , OR BECAUSE IT IS JUST THAT , EVEN IF THERE WERE THIRTY SMOKERS ARE 100 SMOKERS , THAT YOU COULD NEVER HAVE A CLASS ACTION FOR THIS TYPE OF CASE?

THERE ARE TWO DIFFERENT QUESTIONS. THE SIZE JUST GOES TO MANAGE ABILITY. THE COURTS HAVE RULED THE COMMENTARY TO RULE 23 RECOGNIZES THAT IF YOU ARE JUST GOING TO TRY A COUPLE OF ISSUES AND THEN SET EVERYBODY FREE TO TRY THEIR OWN CASES THAT, IS NOT A CLASS ACTION, AND REMEMBER IN THIS CLASS ACTION, WE HAVE BEEN ORDERED TO PAY \$145 BILLION IN DAMAGES BEFORE WE HAVE BEEN FOUND LIABLE, TO THREE INDIVIDUAL PLAINTIFFS, AND THEN THERE WILL BE 50 OR 100 YEARS OF INDIVIDUAL TRIALS AND THEN THE PUNITIVE DAMAGES WILL ALONG WITH BE DOLED OUT AND THOSE PUNITIVE DAMAGES ARE BASED ON AN ASSUMPTION THAT THE JURY WAS GIVEN THAT WE RELY AND THE TO EVERY SINGLE MEMBER OF THE CLASS AND MR. ROWS BE B LATT SAID, OKAY IF YOU ARE NOT , THEN WE WILL GO OUR OWN WAY.

LET'S SEPARATE THIS OUT IF WE MAY. LET'S ASSUME A VALID CLASS ACTION. DO THEY EXIST UNDER OUR LAW? IS THERE SUCH A THING? I AM NOT SURE THERE IS UNDER YOUR ANALYSIS , BUT OF COURSE THERE IS. OF COURSE!

IF WE ASSUME THAT A CLASS ACTION EXISTS, ARE YOU SUGGESTING THAT PUNITIVE DAMAGES CANNOT BE AWARDED IN A CLASS ACTION SUIT BECAUSE OF THE DIFFICULTY IN WHERE THEY ARE AWARDED?

JUST ICE LEWIS , IF YOU GO BACK TO MY PYRAMID EXAMPLE AND YOU TRY A REAL CLASS ACTION , AND YOU TRY WITH CLASS REPRESENTATIVES, THE TRIAL OF WHOSE CASES RESOLVE LIABILITY AND DAMAGES

LET'S ASSUME I DON'T ACCEPT YOUR PYRAMID THAT EVERYBODY IS HARMED EXACTLY SAME WAY.

NOT EVERYBODY.

LET'S ASSUME THAT, IN YOUR PYRAMID THAT PEOPLE WILL BE HARMED IN DIFFERENT WAYS AND YOU DON'T KNOW UNTIL YOU PUT THE EVIDENCE ON FOR EACH ONE. LET'S ASSUME THAT .

YOU HAVE TO DETERMINE ADEQUACY OF A CLASS REPRESENTATIVE. YOU HAVE TO KNOW THAT THEY CAN STAND IN. AT LEAST SIGNIFICANTLY.

YOU ARE SAYING, THEN , EXACTLY, IT MUST BE A CARBON COPY CASE.

OF COURSE NOT.

BECAUSE IF THERE IS ANY DIFFERENCE, IF , WOULD YOU PLEASE ANSWER MY QUESTION.

YES, SIR.

IF WE HAVE A CLASS ACTION CASE.

REPEATTIVE.

WHERE DO THE PUNITIVE DAMAGES IT IS, DO THEY COME BEFORE BEFORE YOU DETERMINE ANY DIFFERENCES OR AFTER YOU MAKE THOSE DETERMINATIONS?

PUNITIVE DAMAGES, AS A MATTER OF FLORIDA AND FEDERAL CONSTITUTIONAL LAW, CANNOT BE

IMPOSED , WITHOUT A VALID AWARD OF COMPENSATORY DAMAGES.

SO THEN B Y THAT YOU ARE SAYING IT SHOULD COME AFTER YOU MA KE THE DETERMINATIONS WITH REGARD TO EACH PERSON.

IT MUST.

IT SEEMS TO ME THAT THE DEFENSE ARGUMENT WAS THAT WE WON'T KNOW WHAT THE LIABILITY IS OR EX POSURE IS AND IT IS BETTER FOR U S TO KNOW WHAT THE LUMP SU M IS , SO YOU ARE SAYI NG THAT IT IS. THAT IS THE LEGLY CORRECT WAY IS TO WAIT THE LEGALLY COR RECT WAY IS TO WAIT UNTIL THE END O R MAKE INDIVIDUAL PLAINTIFF MAKE THEIR CLAIM FOR PUNITIVE DAMAGES.

JUSTICE WE LLS , LET ME MAKE IT VERY PLAI N.WE HAVE A CONSTITUTIONAL R IGH T TO HAVE THE QU ANTUM OF P UNITIVE DAMAGES REVIEWED , UNDER THE C O OPER AND GORE STANDARD, AND STATE F AR M HAS TAKEN IT TO ITS P U REST LEVEL, WHEN THE COURT SAID , A ND I THIN K I HAVE THE WO RDS ALMOST EXACTLY RIGHT, THAT GENERALLY COMPENSATORY DAMAGES ARE PRESUMED TO BE ENOUGH TO MAKE THE PLAINTIFF WHOLE, BUT IF COMPENSATORY DAMAGES ARE NOT , THEN PUNITIVE DAMAGES MAY BE A WARDED , AND THEN T HEY ARE SUBJECTED TO THE TREMENDOUS PARTHEID REVIEW , BUT WE DON'T HAVE FINDING OF LIABILITY TO ANY OF THR EE M UCH LESS DAMAG ES.

IT MUST COME AFTER YOUHAVE THE DETERMINATION OF LIABILITY DAMAGE TO SAY EACH CLAIMANT.

IT IS UNREVIEWABLE. THE TRIAL COURT COULDN'T DO ITS JO B. THE THIRD DISTRICT CAN 'T DO ITS JOB. THIS COURT CAN'T D O ITS CONSTITUTIONAL JOB.

NO W WE ARE FINDING LIABILITY AS TO THE THREECLASS REPRESENTATIVES IN PHASE II .

BUT THERE IS N O RATIO , NO EXTRAPOLATION.

WHAT IS THE STAT US OF THE SIMON TWO LITIGATION. IS THAT BEING APPEALED TO THE SECOND CIRCUIT?

IT WAS ARGUED IN THE SECOND CIRC UIT APPROXIMATELY A YEAR AGO, AND IF I MI GH T TOUCH ON THAT VERY BRIEFLY. WHAT JU DGE WEINSTEIN DID IN THAT CASE WAS TO CREATE ACLASS ON A LIMITED FUND THEORY, AND THIS COURT HAS HAD SOME LIMITED FUND CASES , BUT HIS LIMITED FUND THEORY WAS THAT PUNITIVE DAMAGES ARE LIMITED , CONSTITUTIONALLY LIMITED, SO THE FUND IS LIMITED , ANDCREATED A CLASS THAT WAY, AND, AL SO, CAME UP WITH A BUNCH OF THEO RIES ON SCIENTIFIC STATISTICAL STUDIES , TO TRY TO G ET A SAMPLE TO SHOW CAUSATION AND LIABILITY AND SUCH , NONE OF WHICH WE HAVE HERE , BUT IT IS PENDING BE FORE THE SECOND C IRCUIT , AND A DECISION IS PENDING.

THE IDEA, THOUGH, AND I THOUGHT , AND MAYBE THIS WILL BE ANSWERED BY THE SECOND CIRCUIT, THAT IN ONE WAY, THAT THE , IF YOU HAVE A CLASS ACTION PUNITIVE DAMAGE AWARD , YOU, THEN , KNOW , AND WHETHER THIS ONE IS EXCESSIVE AND WHETHER IT SHOULDN'T HAVE BEEN ASSESSED WHEN IT IS , THAT INSTEAD OF THERE BEING WHAT MIG HT BE REFERRED TO AS JACKPOT JUSTICE, WH ICH IS THAT ONE PLAINTIFF SOME WHERE GETS PUNITIVE DAMAGE AWARD BUT 600,000 OTHERS DON'T , ISN'T THERE , IN , REALLY , FAIRNESS TO ALL PARTIES , THAT T HERE BE A SPECIFIC AM OUNT ESTABLISHED FOR A CLASS , AND YOU KNOW, A GAIN , WHETHER , WHEN IT IS ESTABLISHED IS A DIFFERENT QUESTION, BUT DOESN'T THAT SEEM LIKE A SUPERIOR WAY TO DECIDE THESE PUN THESE PUNITIVE DAMAGES ACTIONS?

LET ME T ALK ABOUT THE J ACKPOT THEORY, BECAUSE THAT IS WHAT THE JUDGE SAID

HAPPENED HERE. IN THE JACKPOT TRIAL PLAN, IF THE CLASS IS MUCH SMALLER, WE MAY HAVE A WINDFALL FOR SOME OF THE PLAINTIFFS, SO THAT IS OKAY, AND THIS CASE IS JACKPOT JUSTICE.

IF WE UPHOLD THAT PART, BUT WITH THE IDEA THAT THERE BE A FUND AND THAT ALL PLAINTIFFS THAT ARE IN THE CLASS PARTICIPATE ON A PRO RATA BASIS.

BUT THAT IS WHAT WE HAVE HERE. THAT IS WHAT THEY TRIED TO CREATE HERE, AND THAT IS WHERE THE JACKPOT JUSTICE COMES IN, IF YOU DETERMINE PUNITIVES BEFORE YOU DETERMINE LIABILITY AND DAMAGES.

IF THE AMOUNT HAD BEEN \$10 MILLION, I DON'T KNOW WHETHER

THE THEORY WOULD BE EXACTLY THE SAME BUT IF I MIGHT ANSWER THE REST OF THAT QUESTION, IF THAT MIGHT HAPPEN AND I DON'T KNOW THAT IT WOULD BECAUSE, OF COURSE, PUNITIVE DAMAGES IN ANY INDIVIDUAL CASE HAVE TO BE RELATED TO THE CONDUCT AS TO THE INDIVIDUAL PLAINTIFF AND THERE HAS TO BE A RELATIONSHIP BETWEEN THE PLAINTIFF'S DAMAGES AND THE PUNITIVE DAMAGES, SO I DON'T KNOW IF YOU NECESSARILY WOULD HAVE THAT.

I GUESS, AGAIN, IN ANSWER TO JUSTICE LEWIS'S QUESTION, THERE CAN'T BE CLASS ACTION PUNITIVE DAMAGES.

BEFORE LIABILITY AND COMPENSATORY DAMAGES BECAUSE THEY ARE UNREVIEWABLE. BECAUSE THEY WILL BE UNREVIEWABLE. BUT IF I MIGHT, EVEN IF AT THE END OF THE DAY AND HOWEVER MANY CASES ARE INDIVIDUALLY TRIED, THERE IS SOMEWHAT YOU MIGHT THINK INEQUITY, AND I DON'T WANT TO USE THAT WORD BECAUSE I DON'T THINK IT WOULD BE, IN AMOUNTS OF PUNITIVE DAMAGES HANDED OUT TO PEOPLE DIFFERENTLY. BEAR IN MIND THE ONE THING THAT PARTIES AGREE ON IS PUNITIVE DAMAGES ARE ASSESSED FOR THE BENEFIT OF THE PEOPLE, OF THE STATE. IF THEY HAPPEN TO GO TO THAT INDIVIDUAL PLAINTIFF, THERE IS NO CAUSE OF ACTION FOR PUNITIVE DAMAGES, THERE IS NO RIGHT TO PUNITIVE DAMAGES, AND IF PUNITIVE DAMAGES WERE ASSESSED DIFFERENTLY AND CULPABLE DEFENDANT IS PUNISHED BY PEOPLE GETTING DIFFERENT AMOUNTS OF MONEY, THAT IS HOW IT IS SUPPOSED TO WORK, SO IF YOU WANT TO LOOK FOR AN INSTANCE OF WHAT YOU CALL JACKPOT JUSTICE, IT IS HERE AS OPPOSED TO TRYING CASES INDIVIDUALLY, WHERE PUNITIVE DAMAGES ARE DETERMINED, IN OTHER WORDS WHERE A CIVIL DEFENDANT, AND I HAVE GOT TO YIELD WHATEVER I HAVE LEFT TO MR. DAVIS, WHERE A CIVIL DEFENDANT IS NOT SUBJECTED TO ALICE IN WONDERLAND JUSTICE, WHERE WE HAVE SENTENCE FIRST AND LIABILITY AFTERWARDS. THANK YOU.

CHIEF JUSTICE: REALLY, WE HAVE A HALF A MINUTE, BUT WE WILL GIVE YOU, WHO IS GOING TO TAKE THAT HALF MINUTE?

ALVIN DAVIS FOR LIGGETT AND BROOK. I WILL HAVE TO TALK AS FAST AS MR. SCHERKER DID THE. I DON'T NORMALLY. I ONLY WANT THE COURT TO FOCUS ON THE OTHER SIDE OF THE EQUATION AND THAT IS THE DEFENDANTS HERE. THIS RECORD DEMONSTRATES THAT NO DEFENDANT HAD ANY CASE PROVEN AGAINST THAT GUEST, REQUIRING ALL OF THE AGAINST THAT DEFENDANT, REQUIRING ALL OF THE ELEMENTS OF THE CASE BE PROVEN AGAINST THAT DEFENDANT. LIGGETT AND BROOKS ARE EXAMPLES. BROOK NEVER MANUFACTURED ANYTHING, NEVER SOLD ANYTHING. IT IS A CASE WHERE THE DEFENDANT MANUFACTURED SOMETHING. LIGGETT NEVER SOLD A PRODUCT TO ANY OF THE PLAINTIFFS. THEY ARE STILL IN THE CASE. THE MOST TELLING STATEMENT WAS WE WERE TRYING THE TOBACCO INDUSTRY. THE TOBACCO INDUSTRY IS NOT AN ENTITY. THE TOBACCO INDUSTRY IS ALL OF THE COMPANIES THAT MAKE TOBACCO PRODUCTS. EACH OF THOSE HAS DUE PROCESS RIGHTS TO HAVE ITS CLAIM TRIED AGAINST IT.

THE JURY ACTUALLY FOUND , SOME POSITIVE FINDINGS AS TO YOUR CLIENT.

WELL , THE JURY DID AND THE JUDGE DID AWAY WITH IT. THE JURY FOUND, SINCE NONE OF THEM SMOKED ANY OF OUR PRODUCT , ZERO LIABILITY FOR THEM.

SO YOU WOULD BE HAPPY, IF WE ENDED UP FINDING THAT THOSE FINDINGS REALLY EXEMPTED YOU FROM ANY FURTHER PARTICIPATION IN ANY OF THESE CASES.

I WOULD . AND I WOULD ACCEPT THAT , BUT MY POINT IS THAT THE SAME APPLIES TO EVERY OTHER DEFENDANT IN THE CASE.

YOU ARE THE ONES , I MEAN , YOU ARE THE ONE THAT, IF THIS STOOD AND THEIR FINDING OF NO LIABILITY, THAT WOULDN'T HAVE TO BE TRIED IN ANY OTHER CASE IN THE STATE OF FLORIDA, AT LEAST.

WELL , WE WOULD BE HAPPY WITH THAT, YOUR HONOR. THANK YOU.

CHIEF JUSTICE PARIENTE , I THINK AT THE VERY BEGINNING OF MR . SCHERKER'S ARGUMENT , YOU TOUCHED UPON SOMETHING THAT I DIFFERENTLY WANT TO COMMENT ON, AND THAT HAD TO DO WITH THE BASIC UNFAIRNESS OF ALL OF THIS, IN TERMS OF THE FLIP SIDE . HAD THE JURY RULED IN FAVOR OF THE DEFENSE , AND THIS CAME UP. THIS CAME UP IN PHASE I , BECAUSE WE WERE UNHAPPY WITH THE ENTITLEMENT IS SUE, AND MUCH OF THIS WAS THE DEFENSE 'S PROPOSED VERDICT. THEY COMPLAINED ABOUT THE VERDICT FORM , BUT THEY AGREED TO IT AS A MIDDLE GROUND. THEY DIDN'T WANT THE FACTUAL FINDINGS WHERE WE WOULD SET FORTH FROM OUR AMENDED COMPLAINT , RATATATAT, DID WE DO THIS , DO WE PROVE THIS?

YOU HAD ASKED THAT IN A SPECIAL INTERROGATORY .

THEY HAD SUGGESTED A COMPLETE LINE , IN OTHER WORDS FOR THE THOUSANDS OF MISREPRESENTATION ANSWER ALL OF THE THINGS THAT WE SHOWED THROUGH 157 WITNESSES , WHERE , WHEN , WHY, HOW, FILL IN A BLANK THAT A Ph.D. COULDN'T POSSIBLY DO. IT IS UNREASONABLE. THESE PEOPLE ARE SITTING FOR A YEAR. AT LEAST SET FORTH IN A NEUTRAL WAY THE ALLEGATIONS. THEY REFUSED TO PRESENT THAT. THEY SAID WE AGREE TO THIS AS A MIDDLE GROUND AND THEN WE HAD A DEBATE. WE DIDN'T LIKE

ARE THE ALTERNATIVE VERDICT FORMS SUBMITTED IN THE RECORD?

YES , YES , THEY ARE IN THE RECORD, YOUR HONOR, AND ALSO JUDGE KAY'S COMMENTS , AND AS MUCH AS WE COULD, A LOT OF THIS IS IN MY BRIEF BEFORE THE THIRD DISTRICT, WHICH WAS, LIKE, OVER 200 PAGES, EVEN THOUGH 50 PAGE SASS LOT, FOR THIS CASE IT REALLY WAS NOT PAGES IS A LOT , FOR THIS CASE IT WAS REALLY NOT. FOR THE ENTITLEMENT QUESTION , WE HAD ARGUED AND I DIDN'T LIKE , IT PUNITIVE TITLE TO PUNITIVE DAMAGES SEEMED IF YOU , AND THE DEFENSE , I AM QUOTING A LINE , THEY SAID ABSOLUTELY NOT HAD, THAT IS NOT A MEANINGLESS QUESTION, IF THE ANSWER IS NO , NOT A SINGLE IN JURED FLORIDA SMOKER IN THIS CLASS CAN EVER RECOVER PUNITIVE DAMAGES FROM ANY DEFENDANT IN THIS COURTROOM, SO THERE IS NO QUESTION. IF THEY SAID NO TO ADDICTION. IF THEY SAID NO TO THAT, WE ARE OUT OF HERE , BUT NOW THAT THEY SAID YES, IT IS BEING

BUT THE NOTICE ORDER HAS NEVER BEEN TESTED , CORRECT?

THE NOTICE TO THE CLASS, YOUR HONOR?

IF SOMEONE CAME IN AND SAID I DIDN'T READ A NEWSPAPER IN FLORIDA , AND I DIDN'T KNOW ANYTHING ABOUT THIS CLASS ACTION , AND SO I FILED SUIT, THAT ISSUE HAS NOT BEEN TESTED .

WELL , I THINK THE POSITION THE TOBACCO COMPANIES ALWAYS TO OK, IF SOMEONE FILED SUIT IN 1998 OR IN THE YEAR 2000 AND SAID THEY DEVELOPED LUNG CANCER IN 1978 , THE TOBACCO IN 1998 , THE TOBACCO INDUSTRY IMMEDIATELY WOULD MOVE TO DISMISS OR REBATE THE CASE. WHETHER IT MATTERED OR DIDN'T MATTER , IT WAS CONSIDERED APPROPRIATE PUBLICATION , AND THAT , YOUR HONOR , GETS MENTIONED IN SOMETHING ABOUT NOTICE TO THE CLASS, AND IT DID GO OUT THROUGHOUT FLORIDA, AND IT WAS PUBLISHED IN 1997, AND IT WAS PURSUANT TO THE REQUEST OF THE DEFENSE, WHO AT THE TIME , AND THEY SAID IN HEARING AFTER HEARING, IF THE DEFENDANTS WIN , WE WANT AS MANY PEOPLE AS POSSIBLY , BOUND. THIS WAS MR . HEIM , CHIEF COUNSEL FOR PHILIP MORRIS . WE EXPECT TO WIN THE CASE AND WHEN WE WANT TO WIN AND WHEN WE WIN THE CASE , I WANT TO BE ABLE TO SAY THAT. SO WHAT HAPPENS IS NOTICE GOES OUT THROUGHOUT FLORIDA AND ALL OF THE FLORIDIANS RELY AND NOW IN ANGLE TWO , SUDDENLY AFTER THE FLORIDIANE GOOD DEAL TWO , SUDDENLY AFTER THE FLORIDIANS ARE ADDED IN 1994 , THE CLASS IS CLOSED, SO LITERALLY THESE PEOPLE

IS THERE A RECORD HERE OF HOW MANY FLORIDIANS RELY?

THE ONLY RECORD WE HAVE OF HOW MANY IS THE TESTIMONY THAT STATISTICALLY THERE WOULD BE BETWEEN 200,000 AND 700,000 PEOPLE THAT DIED DURING 1990-TO-1999.

MY QUESTION IS , IS THERE ANY RECORD OF HOW MANY PEOPLE RELIED ON THIS NOTICE THAT WAS PUBLISHED IN 38 NEWSPAPERS?

NOT A DEFINITIVE NUMBER. WE HAVE A DATABASE THAT I BELIEVE IS IN THE RECORD, OF ABOUT 25,000 PEOPLE THAT CONTACTED OUR FIRM. MANY PEOPLE DON'T. MANY PEOPLE TRIED TO FILE LAWSUIT, AND THE LAWSUITS WERE DISMISSED, BECAUSE THERE WAS A CLASS ACTION PENDING , SO THERE IS A LOT OF SITUATIONS THAT ARE UNKNOWABLE BECAUSE OF THE CHAOS THAT WAS CREATED BY THE OPINION. AND JUSTICE ANSTEAD , YOU TALKED ABOUT LAW OF THE CASE. WE FEEL LAW OF THE CASE IS VERY IMPORTANT HERE, AND THIS IS BECAUSE THE REASON WE HAVE AN INTERLOCUTORY APPELLATE RULE FOR CLASS ACTIONS IS, I THINK , TO JUST AVOID THIS KIND OF SCENARIO. YOU HAVE GOT AN INTERLOCUTORY APPEAL. EVERYTHING IS OUT ON THE TABLE. EVERYTHING THAT WAS ARGUED IN ANE GOOD DEAL TWO, WHICH I REFER IN ANGLE TWO , WHICH I REFER TO IN THIS MOST RECENT OPINION IS ANGLE ONE, THERE IS NO DOUBT THAT THERE WAS GOING TO BE SPECIFIC CAUSATION, MANY, MANY ISSUES. THEY ALSO ARGUED IN ANE GOOD DEAL ONE THAT THERE WOULD IN ANGLE ONE THAT THERE WOULD BE MILLIONS AND MILLIONS OF PEOPLE IN THE CLASS.

WAS THAT ARGUED TO THE TRIAL COURT AT THE TIME , PHASE I , TWO AND THREE?

NO. BECAUSE WHEN THEY MOVED TO DECERTIFY THE CLASS IN NOVEMBER 1997.

THAT WAS BEFORE THE TRIAL STARTED?

THEY DID IT BEFORE THEY HAD A TRIAL PLAN. THE TRIAL PLAN WAS NOT IMPORTANT , BECAUSE I THINK IT WAS OBVIOUS WITH A CASE LIKE THIS, THE ONLY WAY TO TRY IT IS TO TRY THE CONDUCT OF THE INDUSTRY, AND THAT IS WHAT THE BROYNE CASE WAS ALL ABOUT , WHICH AT THE TIME WAS CERTAINLY BINDING PRECEDENT ON THE THIRD DISTRICT COURT OF APPEAL AND YOUR HONOR, I AGREE WITH JUSTICE ANSTEAD. THIS WAS NOT AN IN BANK HEARING. THIS WAS A - - THREE-JUDGE PANEL AND THAT WAS ANOTHER THING THAT WAS CONTRARY TO THE FLORIDA LAW .

YOUR TIME HAS EXPIRED, IF YOU WOULD LIKE TO MAKE YOUR CONCLUDING REMARKS.

I HAVE GOT A LOT MORE TO SAY. OKAY. YOUR HONORS , WE ASK THAT THIS COURT REINSTATE

THE CLASS , AND IF THE COURT FEELS THE VERDICT IS TOO HIGH, IF IT IS EXCESSIVE UNDER STATE FARM V CAMPBELL AND CO OPER INDUSTRIES, THIS COURT CAN AND SHOULD REDUCE THE VERDICT . PEOPLE DESERVE TO HAVE A REMEDY, AND WITHOUT THIS, THERE REALLY IS NO REMEDY. THANK YOU.

CHIEF JUSTICE: THANK YOU. THANKS TO ALL COUNSEL , FOR THEIR HELPFUL ORAL ARGUMENT. WE HAVE , FROM BOTH SIDES , WE HAVE YOUR BRIEFS. WE HAVE GOT THE RECORD HERE, SO WE WILL GIVE IT OUR THOUGHTFUL CONSIDERATION, AND WITH THAT, THE COURT IS IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.