>> NEXT CASE R.J. REYNOLDS V--
[INAUDIBLE]
[BACKGROUND SOUNDS]
>> WHEN YOU'RE READY.
>> THANK YOU, YOUR HONOR.
I'M NOT QUITE AS TALL AS THE
PRIOR ATTORNEYS.
CHIEF JUSTICE LABARGA, MAY IT
PLEASE THE COURT, NOEL FRANCISCO
FOR R. J. REYNOLDS TOBACCO
COMPANY, AND I'D LIKE TO RESERVE
FIVE MINUTES FOR REBUTTAL AS
WELL.
YOUR HONORS, IN THE ENGEL CASE
THIS COURT RECOGNIZED THAT THE
ENGEL CLASS CONSISTED OF
INDIVIDUALS WHO MANIFESTED
SMOKING-RELATED DISEASE PRIOR TO
THE CLASS CUTOFF DATE.
AND THEY DID SO FOR TWO REASONS.
FIRST, TO INSURE THAT PLAINTIFFS
HAD MEANINGFUL NOTICE OF THEIR
RIGHT TO OPT OUT AND, SECOND AND
RELATEDLY, TO SHIELD DEFENDANTS
FROM THE POSSIBILITY OF ONE-WAY
INTERVENTION.
>> NOW, JUST-- FROM THE
PROCEDURAL POSTURE YOUR POINT
ABOUT, YOU KNOW, PLAINTIFFS NEED
TO HAVE AN OPPORTUNITY TO BE
ABLE TO OPT OUT.
AT SOME POINT IN THE ENGEL
LITIGATION THERE WERE, AGAIN,
ESTIMATED TO BE 700,000
PLAINTIFFS.
WAS THERE, BUT IN THIS CASE THE
OPT-OUT REALLY OCCURRED AFTER
THE ENGEL DECISION BY GIVING
WHOEVER WOULD BE WITHIN THE
CLASS A YEAR TO FILE SO IF I'M,
AND I'M UNDERSTANDING THAT
ONLY 10,000 OF A POTENTIAL
700,000 ACTUALLY FILED CLAIM.
SO I GUESS THE QUESTION BECAUSE
THIS IS, I GUESS I CAN SEE YOUR
POINT AS TO THE FACT THAT A
PLAINTIFF SHOULD BE ABLE TO KNOW
TO OPT IN OR OUT, BUT THE
POSTURE OF THIS CASE REALLY
ALLOWED THE OPT-OUT OR OPT-IN TO

OCCUR AFTER WE INCLUDED THE
ENGEL CASE WHERE WE SPECIFIC
CREATE SAID THE CLASS REJECTED
THERE HAD TO BE AN IDEA OF
DIAGNOSIS AND USED THE
DEFINITION THAT WAS HAVING
SYMPTOMS.
SO--
>> YEAH.
>>-- GIVE ME THAT, THAT THIS IS
DIFFERENT THAN THE SITUATION
WHERE THE OPT OUT IS DURING THE
THE COURSE OF A CLASS
LITIGATION.
>> YES, YOUR HONOR, AND--
>> YOU UNDERSTAND--
>> YOU PUT YOUR FINGER ON IT.
PLAINTIFFS HAD TO EXERCISE THEIR
OPT OUT RIGHT IN 1996, 1997.
FAST FORWARD TO 2006 WHERE THIS
COURT ISSUED THE ENGEL DECISION.
THOSE WHO DID NOT OPT OUT, SO
WHO ARE AUTOMATICALLY SWEPT INTO
AND BOUND BY THE CLASS
JUDGMENTS, NOW HAVE ANOTHER YEAR
TO REFILE THEIR LAWSUIT.
BUT THEY NONETHELESS ARE
PLAINTIFFS WHO ARE BOUND BY THE
CLASS JUDGMENT REGARDLESS OF
WHETHER THEY DECIDE TO--
>> THIS WOULD HAVE BEEN AN
INTERESTING CIRCUMSTANCE IF
THERE HAD BEEN A VERDICT FOR
R.J., FOR THE TOBACCO COMPANIES
AND THEN SOMEBODY WHO STILL
HADN'T, WHERE THEIR CLAIM HADN'T
BEEN PERFECTED, THEY HAD BEEN
BOUND BY IT.
SO YOU WOULD HAVE HAD THE
REVERSE SITUATION.
IN OTHER WORDS, THE CLAIM HADN'T
BEEN PERFECTED BECAUSE THEY
DIDN'T HAVE NOTICE.
>> SURE.
>> SO THEY WOULDN'T HAVE KNOWN
TO OPT OUT.
>> TAKE, FOR EXAMPLE,
MR. CICCONE HIMSELF.
LET'S SUPPOSE THAT HE DIDN'T
HAVE NOTICE OF HIS RIGHT TO OPT

OUT WAY BACK IN '97, AND THEN
THE ENGEL JURY SUBSEQUENTLY WERE
TO ISSUE RULES ON WHICH DISEASES
WERE CAUSALLY LINKED TO
CIGARETTE SMOKING.
NOW REMEMBER, THE ENGEL JURY
FOUND THAT MOST DISEASES WERE
CAUSALLY-LINKED.
WHAT HE HAD WAS NOT
CAUSALLY-LINKED.
THAT MEANS THAT HIS FAILURE TO
OPT OUT BACK THEN WOULD HAVE
BOUND HIM TO THE ENGEL JUDGMENT.
SO FAST FORWARD TO TODAY, HIS
CLAIM WOULD BE BARRED EVEN
THOUGH HE HAD NO MEANINGFUL
NOTICE OF HIS RIGHT TO OPT OUT
IN THE FIRST PLACE.
AND THAT'S THE PIVOTAL ISSUE
HERE.
WHEN THIS COURT BACK IN 2006
RECOGNIZED THAT THE ENGEL CLASS
WAS LIMITED TO INDIVIDUALS WHO
MANIFESTED SMOKING-RELATED
DISEASE.
IT DID SO BY PUTTING ITSELF IN
THE SHOES OF THE PLAINTIFFS AT
THE TIME THE CLASS WAS DEFINED.
>> BUT, YOU KNOW, I GUESS I'M
STILL GOING BACK TO WHAT WE SAID
IN ENGEL.
WE WERE TRYING, WHETHER THE
TOBACCO COMPANIES THINK WE DID
OR NOT, TO SORT OF TAKE THIS
CASE, ENGEL, AND LOOK TO SEE AT
LEAST BY SETTING ASIDE THE HUGE
PUNITIVE DAMAGE AWARD REQUIRING
PUNITIVE DAMAGED TO BE
PLED AND PROVE SUBSEQUENT CASES.
AS TO THE CLASS, THE ISSUE WAS
WOULD IT BE OPEN ENDED UP UNTIL
THEORETICALLY THE TIME THAT WE
HAD DECIDED THE ENGEL CASE?
SO WAS THERE BRIEFING ON THE
ISSUE OF WHEN THE CLASS SHOULD
END IN ENGEL?
BECAUSE I WAS--
>> YEAH.
>> WHAT WAS THAT, WHAT WERE THE
ARGUMENTS--

>> RIGHT.
>>-- ON BOTH SIDES AS TO WHEN
THE CLASS WOULD HAVE BEEN
TERMINATED, BEEN CLOSED?
>> SO IN THE ORIGINAL LANGUAGE
WE ADVANCED TWO ARGUMENTS ON
THIS CASE.
FIRST, WE ARGUED THE CLASS
CUTOFF DATE SHOULD BE 199 AS
OPPOSED TO 196.
SECOND, WE ARGUED THE STANDARD
SHOULD BE DIAGNOSIS, THAT IS THE
PLAINTIFF HAD TO BE DIAGNOSED
WITH SMOKING-RELATED DISEASE--
>> RIGHT, AND--
>> IN DOING SO, IT GAVE--
>> SO WHAT WERE THE PLAINTIFFS
ARGUING?
THE APPELLEES?
>> I THINK, I THINK AND I'LL,
OBVIOUSLY, LET THEM ANSWER THIS
AS WELL.
>> [INAUDIBLE]
>> BUT THEY WERE ADVOCATING FOR
1996 AND MANIFESTATION, ALTHOUGH
IT'S POSSIBLE THEY WERE ARGUING
FOR AN OPEN-ENDED CLASS WHICH
WOULD HAVE KIND OF RESOLVE ALL
OF THE ISSUED--
>> SO, AGAIN, SO WE WOULD HAVE
BEEN DEALING WITH SYMPTOMS
VERSUS DIAGNOSIS?
AND I GUESS, YOU KNOW, WE'RE
REALLY LOOKING AT WHAT WE
INTENDED IN ENGEL, WOULD YOU
AGREE WITH THAT?
>> UNDERSTOOD, YOUR HONOR.
AND THE REASON WHY WE THINK
WE'RE RIGHT HERE IS THE REASONS
THIS COURT GAVE FOR ADOPTING A
CLOSED CLASS MAKES SENSE ONLY
UNDER OUR UNDERSTANDING OF
MANIFESTATION.
IF YOU ADOPT THEIR UNDERSTANDING
OF MANIFESTATION, THEN TAKE
MR. CICCONE HERE.
HE HAD NO MEANINGFUL NOTICE OF
HIS DUTY TO OPT OUT.
BECAUSE IN 1996 OR '97, HE HAD
BY ASSUMPTION NO ABILITY TO KNOW

HE WAS POTENTIALLY IN THIS CLASS
IN THE FIRST PLACE.
>> BUT WHAT JUDGE GROSS SAYS
WHICH REALLY SEEMED LOGICAL TO
ME IS THAT WE WERE DECIDING THE
ISSUE OF WHO GOT TO OPT IN OR
OUT IN 2006.
SO, LIKE, IT'S NOT YOUR-- IT IS
SO MUCH NOT YOUR NORMAL
SITUATION THAT WE WERE SAYING,
YES, YOU'RE RIGHT, THE CLASS IS
GOING TO END, PEOPLE THAT HAD
MANIFESTATION AT THE TIME OF
1996, BUT WE'RE GOING TO DEFINE
IT IN A MUCH-- WHAT THE CLASSES
IN A BROADER SENSE OF
MANIFESTATION, NOT DIAGNOSIS.
>> RIGHT, YOUR HONOR.
AND I WOULD ACKNOWLEDGE THIS IS
NOT YOUR ORDINARY CASE.
BUT WHEN THIS COURT ANNOUNCED
ITS RULING IN ENGEL, IT WASN'T
JUST, YOU KNOW, SORT OF MAKING
UP THE RULES, IT WAS APPLYING
THE STANDARD RULES THAT APPLY
WHEN YOU'RE DEFINING A SCOPE OR
A CLASS, AND IN THIS REGARD I'D
ASK THE COURT TO TAKE A LOOK AT
THE SUPREME COURT'S DECISION
WHICH MAKES QUITE CLEAR THAT
WHEN YOU'RE DEFINING THE SCOPE
OF A CLASS, PARTICULARLY A LARGE
CLASS LIKE THIS, YOU NEED TO
DEFINE IT IN A WAY THAT INSURES
WOULD-BE PLAINTIFFS THAT ARE
GOING TO BE SWEPT INTO THE CLASS
HAVE MEANINGFUL NOTICE OF THE
RIGHT TO OPT OUT AND CORPS
RESPONDINGLY THAT--
>> HERE'S THE PROBLEM, WE'RE
DEFINING IT IN 2006, AND YOU'RE
SAYING THE OPT-OUT HAD TO OCCUR
IN 1996.
YOU KNOW, YOU'RE SORT OF ARGUING
FOR FAIRNESS FOR THE PLAINTIFF
WHEN YOU REALLY--
>> NO.
>>-- ARE, I'M NOT GETTING THAT.
I'M NOT GETTING IT IN THIS
PROCEDURAL POSTURE.

>> RIGHT.
WE'RE NOT ARGUING, I MEAN,
OBVIOUSLY, WE'RE DEFENDING OUR
OWN INTERESTS, NOT THE
PLAINTIFFS' INTERESTS.
BUT WHAT WE'RE TRYING TO POINT
OUT IS WHEN THIS COURT
RECOGNIZED HOW THE CLASS WAS
DEFINED IN 2006, IT WASN'T
WRITING ON A CLEAN SLATE.
>> WOULDN'T THEN THE OPPORTUNITY
TO OPT IN OR OUT, IF-- IT HAD
TO OCCUR IN 1994 OR 1996.
>> 1997 WAS THE OPT-OUT.
>> 1997, OKAY.
BUT THE ISSUE, AS YOU SAID, IS
NOW NOT OPT OUT, IT'S OPT IN.
>> WELL, THAT'S AFTER THIS
COURT'S 2006 DECISION.
YOU EFFECTIVELY HAD TO OPT IN
HAVING-- IF YOU FAILED TO OPT
OUT THE FIRST TIME, YOU NOW HAD
A YEAR TO FILE A LAWSUIT.
I WAS USING IT MORE BY ANALOGY.
>> WHY ISN'T OUR, THE ASPECT OF
THE CASE IN ENGEL THAT DEALT
WITH THE ONE CLAIMANT WAS
CHALLENGED WHETHER THAT CLASS
WAS A REPRESENTATIVE BECAUSE HIS
OR HER-- I FORGET WHETHER IT'S
A MAN OR A WOMAN--
>> [INAUDIBLE]
>> RIGHT.
BECAUSE IN THAT CASE THAT
INDIVIDUAL DID NOT HAVE A
DIAGNOSIS, AND THIS COURT
ALLOWED THAT INDIVIDUAL AS PART
OF THE CLASS BASED UPON THE
EXISTENCE OF THE SYMPTOMS OF THE
TOBACCO DISEASES AS OPPOSED TO A
DIAGNOSIS OR IN HER MIND LINKING
IT, THE CREEPING DISEASE KIND OF
APPROACH TO IT.
DIDN'T WE ANSWER THAT?
>> I DON'T THINK SO, YOUR
HONOR--
>> HOW CAN THAT BE?
DIDN'T WE ALLOW THAT PERSON TO
STAY PART OF THE CLASS AND MAKE
A RECOVERY?

>> WELL, TWO RESPONSES.
FIRST, THE DEFENDANTS-- THE
PLAINTIFFS IN THAT CASE NEVER
CHALLENGED THAT MRS .del
VECCHIO MANIFESTED DECIDE PRIOR
TO THE CUTOFF DATE--
>> WELL, SHE WAS NOT PART OF THE
CLASS.
>> SURE, YOUR HONOR.
WE WERE ARGUING THAT THE--
>> NO, THAT WASN'T THE BASIS AT
ALL.
>> IF I COULD FINISH, AND THAT
THE STANDARD WAS DIAGNOSIS
VERSUS MANIFESTATION.
WE NEVER ARGUED THAT IF WE LOST
ON BOTH OF THOSE ISSUES SHE
WASN'T PART OF THE CLASS BECAUSE
SHE FAILED TO MANIFEST DISEASE
PART OF THE CUTOFF DATE.
SO I WOULDN'T THINK THAT WOULD
BE PART OF A RATIONALE THAT WE
WOULD CLAIM WAS CONSISTENT WITH
THE RATIONALE THE COURT DID
ADOPT.
AND I WOULD ACTUALLY DRAW THE
COURT'S ATTENTION TO PAGE A1 OF
THE APPENDIX.
THAT CLASS NOTICE MAKES CRYSTAL
CLEAR, IT TELLS TO THE CLASS
MEMBERS WHO ARE REQUIRED TO OPT
OUT BY 1997, YOU ARE NOT A
MEMBER OF THE CLASS, AND THERE
IS NO NEED TO EXCLUDE YOURSELF.
YOU HAVE NOT MANIFESTED DISEASE
CAUSED BY YOUR ADDICTION TO
CIGARETTES THAT CONTAIN
NICOTINE.
NOW, IN 1997 WHEN MR. CICCONE OR
ANY OTHER CLASS MEMBER RECEIVED
THIS, IT WOULD HAVE BEEN
MEANINGLESS UNLESS THIS
PRESUPPOSES AN ABILITY TO KNOW
YOU'RE IN THE CLASS IN THE FIRST
PLACE.
IF YOU DON'T HAVE AN ABILITY TO
KNOW YOU SUFFER SMOKING-RELATED
DISEASE, YOU DON'T HAVE AN
ABILITY TO KNOW YOU EVEN HAVE AN
OPT-OUT RIGHT.

AND THAT'S WHAT WE WOULD SUBMIT AS A CRITICAL PART OF THE ENGEL DECISION.
>> I GUESS THE ISSUE IS IF SOMEBODY IS A SMOKER AND THEY'VE GONE TO A DOCTOR, NOBODY HAS DIAGNOSED THEM AND THEY'RE HAVING SYMPTOMS, HOW THE HECK ARE THEY GOING TO KNOW IF THE DOCTOR DOESN'T KNOW THAT THEY'VE GOT SMOKING-RELATED SYMPTOMS? SO, AGAIN, I GUESS I GO BACK TO THAT WE REJECTED TOBACCO'S ARGUMENT THAT THEY WERE, IT WAS DIAGNOSIS.
NOW YOU'RE SAYING, NO, WELL, IT WAS IF THE DEFENDANT SAID, YOU KNOW, I THINK I'M A SMOKER, I'M HAVING BACK PAIN, YOU KNOW, I WONDER IF THAT'S RELATED, IT DOESN'T REALLY SEEM LIKE THAT, THAT THE CHOICE OF DIAGNOSIS VERSUS MANIFESTATION IS ONE OF ONE IS THEIR SYMPTOMS AND THE OTHER IS YOU WERE DIAGNOSED BECAUSE OF THOSE SYMPTOMS.
>> WELL, YOUR HONOR, IT'S PRECISELY THE SAME STANDARD THAT THE COURT APPLIES ON A DAILY BASIS.
YOU DON'T NEED TO BE DIAGNOSED WITH A SMOKING-RELATED DISEASE, YOU SIMPLY NEED TO HAVE ENOUGH FACTS NECESSARY TO HAVE A LAWSUIT.
IT REALLY GOES TO THE DISTINCTION BETWEEN A SMOKER WITHOUT SYMPTOMS WHO ALL HERE WOULD AGREE IS NOT A MEMBER OF THE CLASS AND A SMOKER LIKE MR. CICCONE WHO HAS SOME SYMPTOMS THAT HE HAS NO REASON TO BELIEVE ARE CAUSED BY SMOKING.
IN BOTH INSTANCES THAT PERSON, WE WOULD SUBMIT, IS IN THE SAME POSITION WITH RESPECT TO WHETHER HE HAS NOTICE OF HIS ABILITY TO OPT OUT.
OF HERE THE CLASS IS DEFINED AS

INDIVIDUALS WHO MANIFEST DISEASE
THAT ARE, THAT IS CAUSED BY
SMOKING.
IN BOTH OF THOSE EXAMPLES, THE
PERP KNOWS HE'S BEEN EXPOSED TO
CIGARETTES IN BOTH OF THOSE
EXAMPLES THE PERSON HAS NO BASIS
TO KNOW THAT HE'S MANIFESTED OR
IS SUFFERING DISEASE CAUSED BY
EXPOSURE TO CIGARETTES.
THEREFORE, NEITHER HAS ANY
ABILITY TO KNOW HE'S IN THE SAME
CLASS WHICH IS NOT EXPOSURE TO
CIGARETTES BUT, RATHER, DISEASE
CAUSED BY SESSION RELATES.
IT REALLY GOES BACK TO THE--
>> NOW, IN THIS PARTICULAR CASE
THE TOBACCO COMPANY LITIGATED
EXTENSIVELY THAT THEY EVEN
DISFUELED WHETHER THE SYMPTOMS
HE WAS DISPLAYING WERE, IN FACT,
MANIFESTATION OF TOBACCO
RELATED.
TOBACCO HAD THE CHANCE TO
ACTUALLY SAY YOU'RE NOT EVEN
PART OF THE ENGEL CLASS.
IS THAT CORRECT?
>> I'M NOT SURE I QUITE FOLLOW
YOU, YOUR HONOR.
>> I THOUGHT THAT THE ISSUE--
THIS IS A FOURTH DISTRICT CASE
THAT'S UP HERE?
>> YEAH.
>> OKAY.
THAT THEY ARGUED TO THE JURY
THAT WHAT HE WAS EXHIBITING UP
UNTIL 1996, '97, WHENEVER IT IS,
WERE NOT SYMPTOMS THAT WERE
RELATED TO HIS--
[INAUDIBLE]
>> RIGHT.
WE ARGUE THAT IT WAS CAUGHT--
>> THEY WERE ARGUING HE WAS NOT
A PART OF THE ENGEL QUEST.
>> WE WERE ARGUING, CORRECT,
THAT HE HAD NOT MANIFESTED PVD
BY THE CUTOFF DATE.
>> EVEN UNDER THE MORE EXPANSIVE
DEFINITION OF MANIFESTATION.
>> CORRECT, YOUR HONOR.

>> OKAY.
>> BUT THE POINT IS, THOUGH, MR. CICCONE HAD TO HAVE AN ABILITY TO OPT OUT OF THE CLASS IF HE WANTED TO, AND UNDER THE POSITION ADOPTED BY PLAINTIFFS IN THIS CASE MR. CICCONE IN 1997 COULD NOT HAVE OPTED OUT OF THIS CLASS EVEN IF HE WANTED TO.
YOUR HONOR, WE WOULD SUBMIT, AND IF YOU LOOK AT THIS CLASS, AT THIS CLASS NOTICE I THINK IT IS CRITICAL,
THE TRIAL COURT HAS FROM THE BEGINNING UNDERSTOOD THIS CLASS WAS LIMITED TO INDIVIDUALS WITH ASCERTAINABLE CAUSES OF ACTION AT THE TIME THEY WERE REQUIRED TO OPT OUT.
OTHERWISE THE CLASS NOTICE IS REALLY MEANINGLESS TO INDIVIDUALS WHO RECEIVE BUT HAVE NO REASON TO KNOW THEY SUFFER FROM SMOKING-RELATED DISEASE.
WHEN SOMEONE LIKE MR .CICCONE RECEIVED THIS NOTICE IN 1997, HE HAD NO ABILITY TO OPT OUT OF THE CLASS BY DEFINITION HE HAD NO REASON TO KNOW HE WAS SUFFERING ANYTHING CAUSED BY TOBACCO.
THAT IS THE TYPE OF ILL-DEFINED CLASS SWEEPING IN INDIVIDUAL WITHOUT ANY ABILITY TO KNOW THEY'RE POTENTIALLY IN THE CLASS IN THE FIRST PLACE THAT JUSTICE GINSBURG SUGGESTED WOULD BE UNCONSTITUTIONAL IN THE AMCHEM CASE.
WE WOULD SUBMIT THIS COURT WHEN IT ADOPTED THE STANDARD IT DID IN THE ENGLE DECISION WAS PRECISELY ATTEMPTING TO AVOID THAT SITUATION BY DEFINING THE CLASS IN A WAY THAT INSURED THAT WOULD-BE PLAINTIFFS HAD MEANINGFUL NOTICE OF RIGHT TO OPT OUT BEFORE BEING SWEPT INTO THE CLASS.
ONLY OUR POSITION FURTHER IS THAT PLAINTIFFS HAVE YET TO

EXPLAIN HOW THEIR POSITION WOULD
ALLOW PLAINTIFFS TO HAVE ANY
MEANINGFUL ABILITY TO OPT OUT OF
THE CLASS IF THEY WANTED TO.
YOUR HONOR, I THINK I AM INTO MY
REBUTTAL TIME, AM I CORRECT?
IN WHICH CASE I WILL RESERVE THE
BALANCE OF MY TIME FOR REBUTTAL.
THANK YOU.
>> GOOD MORNING.
BART ROCENBACH ON BEHALF THE
CICCONES.
THIS CASE IS UNIQUE.
MOSTLY BECAUSE OF THE HISTORY
WHAT WENT ON IN THE SITUATION.
R.J. REYNOLDS COMES TO THIS
COURT AND SAYS THAT MR. CICCONE
HAD TO HAVE KNOWLEDGE OF WHAT
WAS BOTHERING HIM.
THERE WAS A COUPLE OF PROBLEMS
WITH THAT.
THERE WAS DECADES OF DECADES OF
CONSPIRACY THERE ARE NO DISEASES
CAUSED BY SMOKING AND THERE IS
NO THING SUCH AS ADDICTION.
TODAY R.J. REYNOLDS COMES AND
SAYS MR. CICCONE HAD TO KNOW HE
WAS SUFFERING FROM ADDICTION
RELATED DISEASE, NOT JUST
SMOKING-RELATED DISEASE BUT
ADDICTION-RELATED DISEASE WHICH
R.J. REYNOLDS DENIED EXISTED
UNTIL 2000.
THE IDEA THAT THE POTENTIAL
CLASS MEMBERS HAD TO HAVE THE
KNOWLEDGE IS SOMEWHAT DIFFICULT
TO APPLY HERE.
>> WE DO SAY IN ENGLE POTENTIAL
PLAINTIFFS ALLOWED TO INTERVENE
AFTER JUDGMENT IN FAVOR OF THE
CLASS OR ALTERNATIVELY THEY'RE
NOT BOUND BY AN ADVERSE
JUDGMENT.
NOW THERE IS NO QUESTION THAT
YOUR CLIENT WOULD NOT, WHEN THIS
CLASS NOTICE WAS SENT, WOULD NOT
HAVE HAD THE ABILITY TO OPT OUT.
SO WHY IS THAT, WHY IS THAT
CRITICAL CONCERN ABOUT OPT OUT
VERSUS IN THE LATER OPTING BACK

IN?
-- ENGLE.
AND SO THAT, YOU IT HAS TO BE
THEY HAVE TO KNOW SOMETHING TO
OPT OUT.
>> WHAT WOULD HAPPEN IF THIS
SITUATION HAD BEEN THE OPPOSITE?
WHAT IF THE TOBACCO
MANUFACTURERS HAD WON?
I THINK THAT DISCUSSION BROUGHT
OUT THE IDEA OPT IN, OPT OUT
HERE IS A LITTLE DIFFERENT,
OPTING OUT IS DIFFERENT IN THIS
CASE THAN IT IS IN OTHER CLASS
ACTIONS.
>> BUT YOUR CLIENT WOULD HAVE
ARGUED, AND PROBABLY PRETTY
PERSUASIVELY, THAT HE, WELL HIS
WIDOW.
>> HIS WIDOW, YES.
>> IF IT WAS AN ADVERSE JUDGMENT
TO THE PLAINTIFFS AND I THINK
EVERYBODY WAS OPERATING ON, THIS
WAS EITHER GOING TO BE, THIS WAS
GOING TO BE THE CASE, ENGLE.
THAT THE TOBACCO COMPANIES WOULD
HAVE SAID, YOU'RE BOUND BY THIS
ADVERSE JUDGMENT AND THE CICCONE
FAMILY WOULD HAVE SAID, HOW
COULD I BE BOUND WHEN I HAD NO
IDEA AS OF 1997 THAT I WAS PART
OF THIS CLASS?
>> IF I WAS--
>> IF WE'RE GOING TO TAKE IT
BOTH WAYS, YOU KNOW, THE BITTER
AND THE SWEET AS WE'VE BEEN
SAYING ON THE PUNITIVE, SOMEONE
SAID ON PUNITIVE DAMAGES.
>> IF I WAS HANDED THAT CASE I
WOULD BE SAYING THE EXACT SAME
THING I AM TODAY WHICH IS, THE
DEFENDANTS WERE IN THE
CONSPIRACY, CAN NOT BENEFIT FROM
THAT CONSPIRACY.
IF MR. CICCONE DIDN'T KNOW THAT
HE HAD A SMOKING-RELATED DISEASE
BECAUSE HE DIDN'T KNOW WHAT A
SMOKING-RELATED DISEASE WAS, HE
DIDN'T KNOW THERE WAS SUCH A
THING, AND THERE IS TESTIMONY IN

THIS RECORD THAT MR. CICCONE
BELIEVED WHEN HE HEARD THE
VARIOUS EXECUTIVES, SPECIFICALLY
THE ONE ON "NIGHTLINE," I HAVE
FORGOTTEN THE NAME, THAT HE
BELIEVED, WHEN THAT PERSON SAID
THAT SMOKING DOESN'T CAUSE
DISEASE, HE BELIEVED IT.
SO I WOULD BE HERE SAYING THE
SAME THING IS THAT THE
DEFENDANTS WHO WERE TOBACCOS
GUILTY OF A CONSPIRACY, WHO TOLD
ME THERE WERE NO SUCH THINGS AS
SMOKING-RELATED DISEASE CAN NOT
BENEFIT FROM THAT CONSPIRACY.
>> GO AHEAD.
>> NOT AS IF THE CAUSE OF ACTION
IS SOMEHOW DISTINGUISHED IF THEY
DIDN'T KNOW AND CAUSATION COMES
TO LIGHT LATER, THE CAUSE OF
ACTION WOULD THEN ACCRUE.
THE DIFFERENCE WHETHER OR NOT
THEY GET THE BENEFIT OF BEING
INCLUDED IN THE ENGLE CLASS ON
THE FRONT END OTHER THE CAUSE OF
ACTION ACCRUES LATER.
THAT IS THE DISTINCTION.
>> I'M SORRY, I DIDN'T FOLLOW
THE QUESTION.
>> WELL, NEVER MIND.
>> OKAY.
>> THE, YOU KNOW, LET'S SAY THAT
THIS HAD BEEN, WELL, BACK IT UP.
WHAT WAS A SMOKING-RELATED
DISEASE?
THE DEFENDANT'S POSITION IS THAT
WE ALL HAVE TO KNOW THAT SMOKERS
HAD TO KNOW THAT AHEAD A
SMOKING-RELATED DISEASE.
THAT IS NOT ENTIRELY TRUE.
THE CLASS NOTICE SAYS YOU HAVE
TO HAVE NOTICE OF AN
ADDICTION-RELATED DISEASE.
WHAT ARE THE ADDICTION-RELATED
DISEASES?
IT WASN'T UNTIL 2000 WHEN THE
ENGLE JURY MADE THE DECISION,
HERE'S A LIST.
THAT'S WHEN PEOPLE FOR THE FIRST
TIME KNEW WHAT A SMOKING-RELATED

DISEASE, WHAT AN
ADDICTION-RELATED DISEASE WAS.
SO THAT IS WHY THE CONCEPT OF
OPTING OUT IN THIS CASE IS A
LITTLE BIT FUZZY.
WE HAVE TO DEAL WITH THE
MEDICINE PART OF IT WHERE
DOCTORS DON'T ALWAYS MAKE THE
RIGHT DECISIONS.
MR. CICCONE IS A VICTIM OF THAT.
BECAUSE HE HAD THE, A BACK
PROBLEM CAUSING LEG PAIN, THAT
MASKED HIS SYMPTOMS OF, OF HIS
PVD WHICH WAS ALSO CAUSING HIM
LEG PAIN.
ONCE HE HAD SURGERY, THEN HE
KNEW THAT HIS, YOU HAVE A
QUESTION, JUSTICE PARIENTE.
>> GO AHEAD, FINISH THAT.
>> ONCE HE KNEW, ONCE HE HAD THE
SURGERY HE KNEW HE HAD PVD.
THE DOCTORS COULD SAY OKAY, WE
DIDN'T YOU ARE CURE IT THAT WAY,
WHAT ELSE IS GOING ON HERE?
THEN THEY KNOW.
SMOKERS ARE VICTIMS OF THAT
FIRST.
THEY HAVE TO GET THROUGH THAT
PROGRAM.
THEN WE HAVE THE-- PROBLEM.
THEN IT TOOK WHOLE FOUR YEARS TO
COME TO THE CONCLUSION THAT
THESE ARE THE SMOKING-RELATED
DISEASES.
AT THAT POINT HE SAID ENGLE JURY
CAME OUT, HERE IT IS PVD IS A
SMOKING-RELATED DISEASE.
I NOW KNOW I'M A CLASS MEMBER.
BEFORE THAT PEOPLE COULD GUESS
THEY'RE A CLASS MEMBER OR MAYBE
NOT KNOW AT ALL AND IGNORE THE
NOTICE COMPLETELY.
>> WHAT WERE THE TWO COMPETING
ISSUES IN ENGLE?
SEEMS LIKE, AND I, WE CAN GO
BACK TO THE BRIEF OF COURSE,
EITHER HAD THE, WHEN THE CUTOFF
DATE WAS?
DO YOU KNOW WHAT THE ENGLE CLASS
MEMBERS WERE ARGUING CUTOFF DATE

AND WHAT THE DEFINITION OF THE CLASS SHOULD BE.
>> THE DEFINITION OF THE CLASS WOULD BE PEOPLE WHO WERE, JUST EXACTLY WHAT IT SAYS, PEOPLE WHO WERE SUFFERING FROM THE DISEASES.
>> WAS THERE ANY DISCUSSION SUFFERING MEANT THEY HAD TO KNOW IT WAS RELATED?
>> NO.
>> THAT WAS--
>> THAT WAS DISCUSSED BUT IT WAS ALWAYS ASSUMED THEY DIDN'T HAVE TO KNOW THAT THEY HAD THIS, THAT THEY DIDN'T HAVE TO BE DIAGNOSED.
KNOWING YOU HAVE A SMOKING-RELATED DISEASE, IS ESSENTIALLY EQUIVALENT TO HAVING A DIAGNOSIS.
UNTIL YOU'RE DIAGNOSED YOU DON'T KNOW YOU HAVE A SMOKING-RELATED DISEASE UNTIL A DOCTOR TELLS YOU THAT.
SO R.J. REYNOLDS'S POSITION HERE IS BASICALLY TO REVERSE PART OF ENGLE THAT SAYS WE DON'T NEED TO PROVE DIAGNOSIS.
WE JUST NEED TO PROVE THAT YOU ARE SUFFERING.
>> YOU'RE ARGUING IF WE LOOK AT BRIEFS, IT WILL GIVE THE COURT A CHOICE BETWEEN DIAGNOSIS OR THERE WERE SYMPTOMS?
>> YES.
SUFFERING.
>> WITHOUT IT BEING THAT YOU KNEW AS THE PLAINTIFF THAT IT WAS RELATED?
>> CORRECT.
THAT IS MY UNDERSTANDING.
>> OKAY.
WELL WE'LL HAVE-- THEN THE ISSUE OF WHEN THE CUTOFF DATE WOULD BE, WHAT, DO YOU KNOW WHAT THE--
>> I DON'T KNOW, JUDGE, JUSTICE, I'M SORRY.
>> IF WE'RE TALKING ABOUT, WE'RE

BOUND BY OR, THAT ENGLE MAKES A
PRETTY PERSUASIVE CASE FOR WHAT
JUDGE BROUGH SAYS, HAS ADVANCED
SEEMS TO ME WE NEED TO GO BACK
TO LOOK HOW IT WAS ARGUED.
>> PROBABLY.
ANGIE DELL VECK YAW, THAT
PARTICULAR PART OF THE DECISION,
AS JUDGE GROSS POINTED OUT, IS
EXCELLENT INDICATOR THAT
KNOWLEDGE DID NOT MATTER
KNOWLEDGE MATTERED THIS COURT
WOULD HAVE WRITTEN THE OPINION
NOT JUST THAT SHE WAS NOT
DIAGNOSED, SHE SUFFERED FROM THE
DISEASE, THEREFORE SHE IS MEMBER
ABOUT CLASS, IT WOULD HAVE GONE
THROUGH THE NEXT STEP, IF THERE
WAS A NEXT STEP.
BUT THE COURT DID NOT GO THROUGH
THAT NEXT STEP.
IT DID NOT EXIST AT THE TIME.
>> SHE WOULD HAVE BEEN CLEARLY
EXCLUDED IF THAT WERE A
REQUIREMENT.
>> SHE DIDN'T HAVE KNOWLEDGE.
>> RIGHT.
EXCLUDED.
>> SHE WOULD HAVE BEEN EXCLUDED.
ANALYSIS WOULD HAVE ENDED UP
MUCH DIFFERENTLY THAN IT DID.
SO THE, YOU KNOW THE IDEA THAT,
THE OPT-IN IS SO IMPORTANT, OPT
OUT, I KEEP SIGHING OPT IN, I'M
SORRY.
OPT OUT IS SO IMPORTANT, IS THE
DEFENDANT TRYING TO TAKE
ADVANTAGE SEEMINGLY TAKING CARE
OF OTHER PEOPLE AND THAT IS NOT
REALLY IT.
ENGLE WAS AN IMPERFECT CASE.
WE DEAL WITH A LOT OF ISSUES
THAT AREN'T IN OTHER CASES AND
THIS IS ONE OF THEM.
PEOPLE DIDN'T HAVE GOOD
KNOWLEDGE AT THE TIME.
TO IMPOSE AN OBLIGATION
KNOWLEDGE ON THE SMOKER IS TO
BALANCE THAT.
JUDGE GROSS TALKED ABOUT

BALANCING.
HOW THE LAW IS A BALANCE BETWEEN COMPETING INTEREST AND STATUTE OF LIMITATIONS.
IT IS A BALANCE OF A PLAINTIFF'S RIGHT TO BRING AN ACTION AGAINST THE DEFENDANT'S RIGHT TO DEFEND THE ACTION.
HERE IT'S A BALANCE, THIS PERSON'S, KNOWLEDGE THAT THEY HAVE A DISEASE, BALANCED WITH THE DEFENDANT'S, THE DEFENDANT'S RIGHTS BUT WE LOOK AT THE PLAINTIFFS AND THE KNOWLEDGE IS ALWAYS IMPERFECT.
THE PLAINTIFF IS AT THE MERCY OF THE DOCTOR.
AND AT THE MERCY OF WHAT THE DOCTORS KNOW AND AT WHAT THE MERCY OF WHAT THE DEFENDANTS TOLD THE WORLD OF WHAT SMOKING CAUSES.
SINCE THEY DENY THERE WAS ANYTHING CALLED AN ADDICTION TO CIGARETTES AT THE TIME, AND STILL DO, EVEN IN THIS CASE DENIED THAT GEORGE CICCONE WAS ADDICTED, THEY WANT TO SAY HE KNEW DEFINITELY BACK IN 1997, HE HAD TO HAVE KNOWN DEFINITELY HE WAS ADDICTED TO SMOKING AND THAT HE HAD A DISEASE RELATED TO IT WHEN TWO THINGS WERE CLEAR.
NUMBER ONE, HIS DOCTORS DIDN'T KNOW THAT HE HAD A DISEASE AND NUMBER TWO, EVEN IN THE TRIAL R.J. REYNOLDS SAYS HE WASN'T ADDICTED.
SO MR. CICCONE APPARENTLY HAD TO KNOW MORE THAN ANYONE ELSE IN THE WORLD ABOUT BOTH HIS MEDICAL CONDITION AND HIS PHYSIOLOGY.
THAT IS A HUGE BURDEN TO PUT ON PEOPLE, ON SMOKERS.
IF THERE IS NO FURTHER QUESTIONS, THANK YOU.
>> THANK YOU, YOUR HONOR.
FIRST OF ALL I WANT TO CLARIFY THE STANDARD BECAUSE I DON'T THINK MR. ROCKENBACH IS

CHARACTERIZING IT ACCURATELY.
NOT ACTUAL KNOWLEDGE STANDARD.
THEY DON'T HAVE TO PROVE WHAT
MR. CICCONE ACTUALLY KNEW.
IT IS REASONABLENESS STANDARD.
THE SAME ONE THIS COURT APPLIES
ON DAILY BASIS IN THE STATUTE OF
LIMIT TASTE.
>> IT IS HARD TO SAY SHOULD HAVE
KNOWN, SHOULD HAVE KNOWN IF
TOBACCO AGAIN KEEPING THIS FROM
SMOKERS THAT THESE ARE ALL
SMOKING-RELATED DISEASES AND
YOUR OWN DOCTORS DON'T KNOW TO
SAY THAT WE WERE, AGAIN,
MRS. DELLA VECCHIA.
THERE WAS SMOG SAID THAT SHE
KNEW SHE HAD SYMPTOMS RIGHTED TO
SMOKING.
>> UP UNTIL THE CLASS CUTOFF
DATE IN 1997 OR 1996, PARTICULAR
PLAINTIFFS WERE DEFRAUDED BY US
INTO NOT KNOWING CONNECTION
BETWEEN SMOKING AND DISEASE.
THEY HAVE NO EVIDENCE OF THAT.
CERTAINLY NO EVIDENCE
THAT MR. CICCONE WAS DEFRAUDED
BY US UNTIL THAT POINT IN TIME.
IF THERE WERE TRULY PEOPLE IN
THAT SITUATION THE PROPER ANSWER
IS NOT TO DEFINE THE CLASS IN A
WAY ESSENTIALLY DEPRIVES PEOPLE
OF RIGHT TO OPT OUT, APPLYING
DOCTRINES OF EQUITABLE TOLLING
ON CASE-BY-CASE BASIS.
ALLOWS PEOPLE TO CONTINUE TO
BRING THEIR CLAIMS BASED ON WHAT
THEY HAD REASON TO KNOW IN LIGHT
OF OUR ALLEGED FRAUD SO THEY CAN
BRING A CAUSE OF ACTION.
>> SEEMS WE'RE MORE AND MORE
LOOKING AT ENGLE, WE WERE MAKING
THE DECISION BETWEEN DIAGNOSIS
AND JUST HAVING SYMPTOMS AND I,
I WILL GO BACK AND LOOK AT THE
BRIEFS BUT IT SEEMS, WHEN WE
REJECTED DIAGNOSIS BUT STILL PUT
THE CUTOFF DATE AT A REASONABLE
TIME THAT WE WERE AGREEING THAT
THE DEFINITION OF THE MEMBERS OF

THE CLASS WOULD BE MORE
OPEN-ENDED THAN YOU'RE ARGUING.
>> AND TWO RESPONSES TO THAT
YOUR HONOR.
FIRST, IN RESPONSE TO THE
QUESTION THAT YOU ASKED BOTH OF
US, MY COLLEAGUE HAS INFORMED ME
THE PRINCIPLE ARGUMENT THAT THE
PLAINTIFFS ADVANCED, AGAIN YOU
CAN CHECK THE RECORD, THAT THE
CLASS SHOULD BE OPEN-ENDED.
THEY DIDN'T ARGUE FOR A CUTOFF
DATE.
I THINK THE MORE IMPORTANT
THOUGH IS--
>> THAT WOULD HAVE BEEN, IF WE
HAD DONE THAT THERE WOULD HAVE
BEEN SOME SERIOUS ISSUES OF
FAIRNESS TO--
>> THAT IS CERTAINLY THE CASE
BUT WE ALSO THINK THAT THERE
WOULD BE SUBSTANTIAL ISSUES OF
FAIRNESS IF MANIFESTATION
DOESN'T MEAN WHAT WE CLAIM IT
MEANS.
>> JUST ON THAT ISSUE, WE HAVE
BEEN HEARING NUMBERS.
IN THE ORIGINAL ESTIMATION WAS
700,000 PLAINTIFFS.
MR. MILLS IN THE PRIOR ORAL
ARGUMENT SAID THERE IS AROUND
10,000 PLAINTIFFS.
DO YOU HAVE THAT KNOWLEDGE?
YOU'RE OBVIOUSLY DEFENDING A
LOST THESE CASE.
>> RIGHT.
>> ARE WE TALKING ABOUT UNDER
20,000 CASES?
>> YES, YOUR HONOR.
I THINK THAT ORDER OF MAGNITUDE
IS APPROXIMATELY RIGHT.
AND I THINK THAT THE POINT THAT
WE'RE TRYING TO EMPHASIZE
THOUGH, THIS COURT DIDN'T PULL
MANIFESTATION OUT OF THIN AIR.
THE TRIAL COURT HAS FROM THE
BEGINNING UNDERSTOOD THIS CLASS
TO ENCOMPASS INDIVIDUALS WITH
ASKER IS STAINABLE CAUSE OF
ACTIONS AT TIME THEY EXERCISED

THE OPT OUT RIGHT.
PRECISELY WHY IN THE CLASS NOTICE IT JUST DOESN'T TALK ABOUT TERMS OF SYMPTOMS BUT SPECIFICALLY TELLS CLASS MEMBERS, THIS IS A-1 OF THE APPENDIX, YOU ARE NOT A MEMBER OF THE CLASS AND YOU SHOULD NOT OPT OUT IF YOU HAVE NOT MANIFESTED SMOKING-RELATED DISEASE.
IF YOU, THIS OBVIOUSLY PRESUPPOSES THAT THE PEOPLE WHO RECEIVED THIS HAD THE ABILITY TO KNOW WHETHER OR NOT THEY WERE IN OR OUT OF THE CLASS.
BECAUSE IF THEY HAD NO ABILITY TO KNOW, THIS CLASS NOTICE WOULD BE BASICALLY MEANINGLESS.
SO THE QUESTION REALLY BECOMES, WHEN THIS COURT ISSUED ITS DECISION IN ENGLE, WAS IT OVERTURNING WHAT THE TRIAL COURT HAD UNDERSTOOD FROM THE BEGINNING?
AND WE WOULD SUBMIT THAT IT PLAINLY WAS NOT, WHEN IT ADOPT AD RATIONALE IN ENGLE, THE LOGIC OF WHICH IS CONSISTENT ONLY WITH OUR UNDERSTANDING OF MANIFESTATION BECAUSE THE PLAINTIFFS HAVE TO THIS DATE NOT EXPLAINED HOW UNDER THEIR POSITION SOMEBODY LIKE MR. CICCONE COULD HAVE POSSIBLY EXERCISED HIS RIGHT TO OPT OUT IN 1997 IF HE HAD WANTED TO.
THE ANSWER IS BECAUSE HE COULD NOT HAVE.
UNDER THEIR POSITION, THAT CATEGORY OF PLAINTIFFS WAS ABSOLUTELY DEPRIVED OF THE RIGHT TO OPT OUT OF THE CLASS, CORRESPONDINGLY THE DEFENDANTS ARE SUBJECTED TO POSSIBILITY OF ONE-WAY INTERVENTION AS TO THAT CATEGORY OF PLAINTIFFS.
>> YOU'RE OUT OF TIME.
>> THANK YOU, YOUR HONOR.
>> THANK YOU FOR YOUR ARGUMENTS.

THE COURT WILL BE IN RECESS FOR
TEN MINUTES.
>> ALL RISE.